

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GANESH RAI (DEFENDANT) v. KALKA PRASAD (PLAINTIFF).*

1883
May 12.

Res-judicata—Civil Procedure Code, s. 13, *Explanation III* and s. 373—
Dismissal of suit "in present form."

K, the purchaser of certain immoveable property in execution of a decree, sued for possession of the same. The suit was dismissed "in the form in which it was brought" because the plaintiff had not filed with the plaint the sale-certificate. *K* subsequently brought a fresh suit.

Held that the dismissal of the former suit "in the form it was brought" did not amount to permission to sue again contemplated by s. 373 of the Civil Procedure Code, and such dismissal must be regarded as a "decision" thereof in the sense of s. 13, *Explanation III*, and therefore as a bar to the fresh suit.

THE plaintiff in this suit, Kalka Prasad, sued the defendant, Ganesh Rai, for possession of certain immoveable property which he had purchased at an execution-sale. The Court (Munsif) before whom this suit was brought dismissed it on the 23rd May 1881, "in the form in which it was brought" (*ba hatsiyat maujuda*), on the ground that the plaintiff had not filed his certificate of sale with the plaint. Kalka Prasad thereupon brought a fresh suit against Ganesh Rai and obtained a decree. The defendant appealed to the District Judge, *inter alia*, on the ground (i) that the plaintiff could not bring a fresh suit without leave obtained from the Court under Chapter XXII of the Civil Procedure Code; and (ii) that the decree of the 23rd May 1881 in the former suit operated as *res-judicata* in this suit. The lower appellate Court dismissed the appeal. The defendant thereupon appealed to the High Court.

Munshi *Kashi Prasad* for the appellant.

Babu *Jogindro Nath Chaudhri* for the respondent.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

TYRRELL, J.—We must give effect to this appeal, and hold that the decree of the Munsif of Sháhjahánpur, dated the 23rd May 1881, dismissing the respondent's suit on account of legal defects in respect to the evidence tendered by the respondent, is a bar to

* Second Appeal, No. 1297 of 1882, from an order of Maulvi Muhammad Nasrulla Khan, Subordinate Judge of Sháhjahánpur, dated the 13th July 1882, reversing an order of Muhammad Amir-ullah, Munsif of Sháhjahánpur dated the 1st May 1882.

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the present suit between the same parties raising the same issues on the same or similar evidence. The mere use by the Munsif in the decision of the words "*ba haisiyat maujuda*" cannot have any effect on the case: for they do not amount to the permission to sue again contemplated by Chapter XXII of the Civil Procedure Code: and indeed it is not pretended that any of the procedure of that chapter was adopted by the respondent or used by the Court.

We must regard the dismissal of the respondent's former suit as a "decision" thereof in the sense of s. 13 and its *Explanation III*, Act XIV of 1882. And that decision became final by reason of the respondent's omission to challenge it in appeal, as he might have done. We decree this appeal with costs in all Courts.

Appeal allowed.

1883
 May 18.

Before Mr. Justice Straight and Mr. Justice Oldfield.

SHAM KARAN AND ANOTHER (DECREE-HOLDERS) v. PIARI AND ANOTHER (JUDGMENT-DEBTORS).*

Execution of decree—Civil Procedure Code, s. 257 A.—Act XV of 1887 (Limitation Act), sch. ii, Nos. 178, 179.

On the 27th August 1878, the holder of a decree for money and the judgment-debtor agreed that the amount of the decree should be payable by instalments, and that, if default were made in payment of any one instalment, the whole decree should be executed. The Court executing the decree sanctioned this agreement. On the 28th November 1881, default having been made, the decree-holder applied for recovery of the whole amount of the decree. *Held* that the application was not one to which No. 179, sch. ii of the Limitation Act, 1877, was applicable, but No. 178, and the period of limitation began to run from the date of default. The principle recognized in *Raghubans Gir v. Sheosaram Gir* (1) and *Kalyanbhai Dipchand v. Ghanashamlal Jadunathji* (2) applied.

THE decree of which execution was sought in this case was one for money, bearing date the 9th August 1877. On the 4th May 1878, the decree-holders applied for the arrest of the judgment-debtor and the attachment of certain property belonging to him in execution of the decree. The judgment-debtor was arrested and sent to jail, and the property was attached and advertized for sale. On the 27th August 1878, an application was made on behalf of the judgment-debtor to the Court executing

*Second Appeal, No. 16 of 1883, from an order of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 13th October 1882, affirming an order of Kazi Wajih-lah Khan, Subordinate Judge of Banda, dated the 25th February 1882.

(1) I. L. R., 5 All., 243.

(2) I. L. R., 5 Bom., 29.