

1883
April 13.

CIVIL REVISIONAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

WILAITI BEGAM (PLAINTIFF) v. NUR KHAN (DEFENDANT).*

Civil Procedure Code, s. 13—Res judicata.

N sued *W* for a moiety of a brick-kiln, claiming by right of inheritance, and alleging in respect of the other moiety that it was his own property. *W* in her defence to the suit denied that *N* had any right in the kiln and that a moiety of the kiln belonged to him. An issue was framed on the point whether a moiety of the kiln belonged to *W* which the Court of first instance decided in *N*'s favour. *N* eventually obtained a decree for a moiety of the kiln which he claimed by right of inheritance. *W* appealed, contending, *inter alia*, that it was not proved that a moiety of the kiln belonged to *N*. The appeal was decreed, and the decree of the Court of first instance in *N*'s favour was set aside. *W* subsequently sued *N* for the value of bricks which he had wrongfully taken from the kiln. *N* set up as a defence to the suit that a moiety of the kiln belonged to him. Held that the issue whether a moiety of the kiln belonged to *N* was *res judicata*, under s. 13, *Explanation 1*, of the Civil Procedure Code.

In February, 1878, Nur Khan, half brother of one Muhammad Yar Khan, deceased, sued Wilaiti Begam, the daughter of the deceased, to recover one-half of certain zamindari estates, and one-half of a certain "kothi" (house), of a certain garden, and of a certain brick-kiln. He claimed these properties as an heir to Muhammad Yar Khan. He stated in respect of the other half of the kothi, garden, and kiln that such half was "owned by him from before." With regard to the claim in respect of the zamindari properties, Wilaiti Begam set up as a defence that Nur Khan had surrendered to her his right of inheritance in her father's estate, and was therefore not competent to sue to enforce such right. With regard to the kothi, garden and kiln, she set up as a defence that they were the exclusive property of Muhammad Yar Khan, and Nur Khan was wrong in stating that he was entitled in his own right to a half thereof. The Court trying this suit framed as one of the issues for trial the issue "whether the kothi, garden, and kiln, are joint property, or are they situate on land exclusively belonging to Muhammad Yar Khan." After deciding Nur Khan's claim in respect of the zamindari estates in his favour, the Court came to the following decision upon the issue set out above:—

* Application No. 4 of 1882, for revision under s. 622 of the Civil Procedure Code of an order of Munsif Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 1st February, 1882.

“Now the only point to be determined is whether the garden and other small properties jointly belonged to the plaintiff and the defendant’s father or exclusively to the latter. The evidence of both parties is in favour of the plaintiff, and proves that the property belonged jointly to the plaintiff and the defendant’s father. For the reasons given above, the defendant’s witnesses are not reliable, while those of the plaintiff are found to be trustworthy. The land occupied by the garden and *kothi* belonged jointly to the plaintiff and the defendant’s father, and this fact is satisfactorily proved by the evidence of the plaintiff’s witnesses. Good and strong evidence was required to prove that one of the sharers had erected the building on the joint land, but no such evidence is forthcoming ; therefore the entire claim should be decreed.” The Court accordingly gave Nur Khan a decree as claimed. Wilaiti Begam appealed to the High Court. Of the grounds of appeal, six in number, five related to the claim in respect of the zamindari estates, and the sixth to the claim in respect of the *kothi*, garden, and kiln. This ground was as follows :—“That the plaintiff’s claim a) a share in the garden, the *kothi*, and the brick-kiln, upon the ground of joint interest therein, is not supported by sufficient evidence.” The High Court, by a judgment dated the 27th August, 1879, decided that Nur Khan had surrendered the half share of Muhammad Yar Khan’s property to which he was entitled by inheritance to Wilaiti Begam, and therefore that his claim failed. On the 24th April, 1881, in the course of execution of the High Court’s decree, Nur Khan and Wilaiti Begam entered into a compromise, whereby the former agreed to waive all claim to the “properties decreed by the High Court in the latter’s favour,” and the latter agreed to waive her right to recover the costs of the previous litigation between the parties. In June, 1881, Wilaiti Begam brought the present suit against Nur Khan for Rs. 100, the value of bricks which she alleged the latter had wrongfully taken from the brick-kiln in question, which, it had been decided in the former suit, belonged to her. The defendant pleaded that the kiln with its bricks belonged to him and the plaintiff’s father (Muhammad Yar Khan) in equal shares; and that in the former suit he had not sought any relief in respect of his own share. The Court of first instance framed the following issue, among others, for trial;

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—“Whether the kiln is a joint property or it belongs exclusively to the plaintiff; and is s. 13 of the Civil Procedure Code applicable to the defence raised by the defendant.” The Court held that such defence was barred by that law. The appellate Court held that such defence was not so barred. It observed :—“S. 13 does not bar the claim. The decree of the first Court and the final decision of the High Court in the former case are filed with the record. A perusal of them shows that Nur Khan, the present defendant, was plaintiff in the former case. He stated that he and Muhammad Yar Khan, the father of Wilaiti Begam, the defendant in that case, were sharers of half-and-half in the kiln. That case was for the legal share of Nur Khan in half the kiln, the share of Muhammad Yar Khan, and the plaintiff had clearly excluded his own half share in the kiln. The defendant in that case (Wilaiti Begam) contended that the entire kiln belonged to Muhammad Yar Khan, but the lower Court held it to be joint. The High Court awarded the entire property left by Muhammad Yar Khan to Wilaiti Begam, and dismissed the plaintiff's claim, which was for a portion of the property left by Muhammad Yar Khan. The High Court did not make a finding as to whether the whole or only half the kiln had been left by Muhammad Yar Khan, and in fact there was no necessity to make a finding to that effect. The moiety alleged by the then plaintiff Nur Khan was not in dispute in that case, therefore it was quite unnecessary to make a finding on it. Secondly, the cause of action in the present suit, which is for the value of bricks appropriated by Nur Khan, accrued on the 18th March, 1881, as stated in the plaint, and the former case was decided by the High Court on the 27th August, 1879, before that date: s. 13 is quite irrelevant.”

The plaintiff applied to the High Court for revision of the appellate Court's order, under s. 622 of the Civil Procedure Code, contending that the question of the title of the parties respectively to the brick-kiln had been finally decided in the former suit and was therefore *res judicata*.

Mr. Conlan and Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the plaintiff.

Mr. Ross, for the defendant.

The Court (STUART, C. J., and TYRRELL, J.) delivered the following judgments:—

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STUART, C. J.—I am of opinion that this application for revision should be allowed. I have frequently taken occasion to express from this Bench the very strong objections I entertain to the procedure enacted by s. 13 of the Code, because, as I have pointed out, this plea in the District Courts of these Provinces is almost invariably used without any of the conditions and safeguards which make it intelligible and reasonable in England and Scotland; and I have suggested that such a plea should never be allowed to a party in the District Court as a matter of right, but only with the express sanction of the Court, that is, the particular District Court in which it may be desired to plead it. In the present case, however, this plea of *res judicata* comes before us under other and very different circumstances. It appears to me that it has been properly taken as an objection, and that it must be given effect to. For here the judgment on which it is based is not the judgment of a District Kutcherry, but a judgment of this Court which, as clearly as language can, excludes such a suit as the present. In fact, it is very plain to me that the defendant, Nur Khan, has deliberately put difficulties in his way which it was hopeless for him to attempt to avoid. For even if there had been no ground for the plea of *res judicata* in the present suit, he might have been conclusively barred by a plea in estoppel in respect of the compromise under which he conceded the whole of the property left by Muhammad Yar Khan, including, of course, the brick-kiln and the bricks made in it, to the applicant Wilaiti Begam. We have, however, not only that compromise before us, but a judgment by a Division Bench of this Court finding that the defendant had deliberately given up to the applicant the whole of this property as sole proprietress. A more distinct *res judicata* therefore could not possibly have been shown, and we cannot hesitate to accept it as a plea absolutely conclusive against the defendant. The present application for revision must therefore be granted.

TYRRELL, J.—I am of the same opinion. It is true that Nur Khan in his plaint filed in the former suit on the 27th November, 1878, did not include the moiety of the brick-kiln now claimed by him. On the contrary, he reserved it in the 3rd paragraph of the

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plaint, saying "one-half of the kiln is owned^d by the plaintiff from before." But it is no less true that in her written answer to that plaint Wilaiti Begam pleaded in express terms that the "entire brick kiln solely belonged to Muhammad Yar Khan, her father; that the plaintiff had no *right in it*; and he is entirely wrong in saying that half of the said property belonged to him exclusively," *i.e.*, in saying then what he now again alleges in the suit before us in revision. And the issue thus raised formed the first issue proposed for determination in the suit of 1878. It was "whether the kiln was joint property (of Muhammad Yar Khan) or was situate on separate land exclusively belonging to Muhammad Yar Khan?" This issue was decided by the Court of first instance in favour of Nur Khan. The defendant Wilaiti Begam appealed to this Court, and her 6th plea was that Nur Khan's "claim to a share in the kiln upon the ground of joint interest therein is not supported by sufficient evidence." This appeal was decreed, and the decree of the Subordinate Judge negating Wilaiti Begam's exclusive pretensions to the entire brick-kiln was set aside. I cannot but hold that s. 13 of the Civil Procedure Code is applicable to the case. Nur Khan's allegation of a joint interest with Muhammad Yar Khan in the kiln was expressly made by him and denied by Wilaiti Begam in the suit of 1878 (Exp. I, s. 13). The decree which expressly decided that question in Nur Khan's favour has been cancelled altogether. And I therefore think with the Hon'ble and learned Chief Justice that the bar of *res judicata* applies to this issue as much as it indubitably would to the other issue more directly arising out of the "claim of the plaintiff" in his suit. I therefore concur in the order allowing this application with costs.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SHIBBA (DEFENDANT) v. HULASI (PLAINTIFF).*

Small Cause Court suit—Suit by landholder against purchaser of produce of tenant's land for rent—Damages.

B, who held a decree for money against G, a cultivator, brought to sale in execution of his decree the produce of certain land occupied by G, and such

* Second Appeal No. 1391 of 1882, from a decree of J. L. Denniston, Esq., Judge of Ferozshahabad, dated the 10th October, 1882, reversing a decree of Munshi Mammohan Lal, Munsif of Kanauj, dated the 11th July, 1882.