and the decision of the learned Subordinate Judge was right.

The appeal is dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

RAMLAL MALIRAND

v.

DEODHARI RAI.*

1923.

June, 4.

Civil Procedure Code, 1908 (*Act V of* 1908), *section* 11—Res judicata—*question of law, decision on, in previous execution case, effect of, in subsequent execution case.*

A decision on a question of law in an execution case operates as *res judicata* in a subsequent application for execution of the same decree even though the view of the law on which the decision of the prior execution case was based has been subsequently disapproved of by a higher judicial authority.

Gowri Koer v. *Audh Koer*(1) followed.

Alimunnissa Chowdhurani v. *Shama Charan Roy*(2), explained.

In considering a question as to the applicability of the rule of *res judicata* what has to be looked at is not whether the cause of action in the subsequent suit is the same as in a previous suit but whether the matter directly and substantially in issue in the subsequent suit has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim.

Ayhore Nath Mukharji v. *Srimati Kamini Debi*(3), followed.

* Appeal from Appellate Order No. 215 of 1922, from an order of Babu Lala Damodar Prasad, Officiating District Judge of Saran, dated the 8th August, 1922, reversing an order of Babu Jotindra Chandra Basu, Subordinate Judge of Saran, dated the 29th April, 1922.

(1) (1884) I. L. R. 10 Cal. 1087. (2) (1905) I. L. R. 32 Cal. 749.
(3) (1910) 11 Cal L. J. 461.

1923.

RAMLAL MALIKAND v. DEODHARI RAI.

Appeal by the decree-holders.

The facts of the case material to this report are stated in the judgment of Das, J.

Baikuntha Nath Mitter, for the appellants.

Harihar Prasad Sinha, for the respondent.

DAS, J.—The decree-holders, who are the landlord-appellants before us, obtained a money decree against the tenant-respondent and in execution of the money decree attached the occupancy holding of the respondent in execution case No. 70 of 1921. The respondent objected to the execution and insisted that his occupancy holding, not being transferable by custom, was not liable to be sold. The learned Subordinate Judge following the line of decisions which was binding upon him gave effect to the respondent's objection and dismissed the execution case.

The cases upon which the learned Subordinate Judge held that the occupancy holding of a tenant could not be sold in execution of a money decree obtained by the landlord have now been overruled by the Full Bench of this Court; and it is now the settled law of this province that a landlord who has sued his tenant and obtained against him a money decree can, in execution thereof, sell the non-transferable occupancy holding of his tenant without the latter's consent. In view of the decision of the Full Bench, the appellants again applied for the sale of the occupancy holding of the judgment-debtor; and the question which we have now to decide is whether the decision of the learned Subordinate Judge in the previous execution case operates as *res judicata* so as to prevent the Court from giving the appropriate relief to the decree-holders.

In my opinion the question must be decided on the terms of section 11 of the Code of Civil Procedure. That section imposes a bar upon the Court from trying any suit or issue in which the matter directly and

substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue had been subsequently raised, and has been heard and finally decided by such Court. An execution case is not a suit; but it is firmly established that the principle of law underlying section 11 applies to proceedings in execution of decrees. The section draws no distinction whatever between an issue of fact and an issue of law; and, in my opinion, an issue of law operates as *res judicata* in the same way as an issue of fact.

The substantial question is: Was the question directly and substantially in issue in a former proceeding between the same parties or between parties under whom they or any of them claim? In my opinion it was; and it is impossible now for the Court to try the issue again between the parties. In the case of *Gowri Koer* v. *Audh Koer* (1) it was held by the Calcutta High Court that where a Division Bench of the High Court decided, as a point of law, that a property had not passed under a certain deed of sale, and, subsequently, the decision on that point of law was in another case disapproved by a Full Bench; the decision of the Division Bench (where the same plaintiff has again sued to recover the same property relying on the same deed of sale), is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved. Sir Richard Garth in delivering the judgment of the Court said: "But although those learned Judges may have made a mistake in point of law, in the decision at which they arrived in 1873, their decision upon the point at issue is nevertheless a *res judicata* as between the parties, and it is no less a *res judicata*, because it may have been founded on an erroneous view of the

(1) (1884) I. L. R. 10 Cal. 1087.

1923.

RAMLAL MALIKAND v. DEODHARI RAI.

DAS, J.

law, or a view of the law which this Court has subsequently disapproved." In the case of *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (1) the facts were these: In a previous suit for rent against a permanent tenure-holder in a permanently-settled area it was held, following the decision of the High Court, that the plaintiff could recover interest on the arrears only at the rate of 12 *per cent. per annum*, as section 67 of the Bengal Tenancy Act controlled section 179 of the Act and was a bar to his recovering at a higher rate mentioned in the *kabuliat*. The decision upon which the previous suit was decided was subsequently overruled by the Full Bench of the Calcutta High Court. In a subsequent suit between the same parties on the same *kabuliat* for rent for a subsequent period it was argued that the previous decision between the parties operated as *res judicata*. The Calcutta High Court held that the case must be decided upon the law as it stood when judgment was pronounced, and that the plaintiff could recover the larger sum for interest; and that the decision in the previous suit would not be *res judicata*. The learned Chief Justice in delivering the judgment of the Court said: "But in the case before us the suit is brought upon a fresh cause of action, no question as to the construction of the *kabuliat* arises, the terms are clear enough and the only question is whether section 67 of the Bengal Tenancy Act is a bar to the present claim for interest. The law, as it now stands, says it is not, and I think we are bound to give effect to that law; when the previous case was decided the law was then regarded as different," and then the learned Chief Justice proceeded to say as follows: "To hold otherwise would be to hold that there is one law for the parties in the Full Bench case, and another law for the parties in the present case. That does not seem to me to be right. If the defendant's contention be sound, the Court must, for all time, perpetuate an injustice, by saying the section

(1) (1905) I. L. R. 35 Cal. 749.

is a bar, when the law says it is not a bar. I do not desire to be understood as saying that a point of law can never constitute *res judicata*."

So far as the actual decision is concerned, I have no difficulty in coming to the conclusion that the previous decision between the parties did not operate as *res judicata*. The learned Chief Justice put it upon the ground that the cause of action was different; but it seems to me that section 11 of the Code of Civil Procedure takes no note of the fact whether the cause of action is the same or is different. The only matter for investigation is whether the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim; and it is upon this investigation that the question of *res judicata* must, in each case, be decided. But in the case which I am considering the matter directly and substantially in issue in the subsequent suit was different from the matter which was directly and substantially in issue in the previous suit. In the previous suit the issue was whether the plaintiffs could recover interest at a higher rate mentioned in the *kabuliat* upon the rent that had accrued due to the landlord for a particular period. The issue in the subsequent suit was whether he could recover interest at the rate mentioned in the *kabuliat* for a subsequent period. The issues, in my opinion, were different, although it may be that the question of law to be decided by the Court to give the appropriate relief to the plaintiff was the same. There is, therefore, in my opinion, no conflict between the two decisions to which I have referred.

The question was discussed at great length by Mukharji, J., in *Aghore Nath Mukharji* v. *Srimati Kamini Debi* (1). The learned Judge pointed out that the effect of the decision in *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (2) was to substitute in the

(1) (1910) 11 Cal. L. J. 461. (2) (1905) I. L. R. 32 Cal. 749.

1923.

RAMLAL MALIKAND v. DEODHARI RAI.

DAS, J.

Code the phrase "cause of action" for "the matter in issue" in so far as it lays down that where the matter directly and substantially in issue is a matter of law, the decision may not be *res judicata* if the cause of action in the subsequent suit is different from that in the former suit; and the learned Judge thought that it was a matter of controversy whether that view could be reconciled with the language of the Code. The conclusion at which the learned Judge arrived may be stated in his own words: "The true limits of the rule may be difficult to formulate accurately, but it may be stated generally that we have to distinguish between the application of the rule mainly to two well marked classes of cases. In one class parties may seek to litigate again the same cause of action as had been decided between them in a prior suit; in another class, the dispute may relate to matters which have been already in controversy and formed the subject of consideration in the previous suit, although the causes of action in the two suits may be distinct. In the former class of cases, the application of the rule of *res judicata* is obviously justifiable on principle; in the latter class of cases, the estoppel ought to be limited to matters distinctly put in issue and determined in the prior action, and it should further be restricted to questions of fact or mixed questions of fact and law, for if it was extended to pure questions of law, a Court might find itself in the position that in so far as certain parties are concerned, it is irrevocably bound to adhere to a proposition of law erroneously laid down in a previous suit." If the question is to be determined on the terms of section 11 of the Code of Civil Procedure it is, as the learned Judge himself said, a matter for controversy whether it is permissible to substitute in the Code the phrase "cause of action" for "the matter in issue"; but it is quite clear that so far as the present case is concerned it falls within the rule laid down in *Gowri Koer* v. *Audh Kuer* (1).

(1) (1884) I. L. R. 10 Cal. 1087.

1923.

RAMLAL MALIKAND v. DEODHARI RAI.

DAS, J.

The decree-holder took out execution of his decree and attached, in execution of the decree, the occupancy holding of his tenant. The Court held that the occupancy holding of the tenant could not be seized in execution of a money-decree obtained by the landlord against the tenant. It is true that that view has now been overruled by the Full Bench of this Court; but an issue was raised between the parties in the former execution case whether the occupancy holding of the tenant could be seized in execution of a money decree obtained by the landlord against the tenant. That issue was decided in favour of the tenant and against the landlord. The landlord has now taken another execution of the same decree and his contention is that the view upon which the former execution proceeding was dismissed having been found to be erroneous he ought to be entitled now to maintain execution as against the tenant. It cannot for a moment be urged that the cause of action in the present proceeding is different from that in the former proceeding. If that be so, the decision of the former proceeding operates as *res judicata* between the parties.

The decision of the learned Subordinate Judge is right and must be upheld. This appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

RAGHUNATH SUKUL

v.

RAMRUP RAUT.*

1923.

June, 4.

Civil Procedure Code, 1908 (*Act V of* 1908), *Second Schedule, paragraphs* 10 *and* 12(*a*)—*Arbitration—separate causes of action against several defendants—Suit against all*

* Civil Revision No. 10 of 1923, from an order of Babu B. K. Ghosh, Subordinate Judge of Muzaffarpur, dated the 15th November, 1922.