LETTERS PATENT APPEAL.

Before Terrell C.J. and Chatterji, J.

1929.

July, 29.

SANICHAR MAHTON

v.

RAJA DHAKESHWAR PRASAD NARAIN SINGH.*

Res judicata—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 11—*decision in a former suit that the issue between the parties was barred by res judicata, whether operates as res judicata—suit for cess in respect of rent-paying land—decision on the question of general liability—whether operates as res judicata.*

A decision in a former suit that the issue between the parties was barred by the plea of res judicata is in itself a decision which operates as res judicata in a subsequent suit.

Mahendra Nath Biswas v. *Shamsuneessa Khatun*(1) and *Sm. Ayetonnessa Bibi* v. *Amjad Ali*(2), followed.

A decision in a former suit with regard to the general liability to pay cess in respect of rent-paying land operates as res judicata between the parties in a subsequent suit for cess for different years.

Hara Chandra Bairagi v. *Bepin Bihari Das*(3) and *Sheo Prasad Mandar* v. *Bateswar Mahto*(4), referred to.

Pitamber Chaudhury v. *Shaikh Rahmat Ali*(5), distinguished.

Per *Chatterji, J.*—An erroneous decision on a point of law will constitute res judicata as much as a correct decision on a question either of law or fact.

*Letters Patent Appeal no. 80 of 1928, from a decision of the Hon'ble Mr. Justice Ross, dated the 6th August, 1928, reversing a decision of Ashutosh Chatterji, Esq., District Judge of Patna, dated the 21st August, 1925, which in its turn modified a decision of M. Shah Muhammad Khalilur Rahman, Munsif of Barh, dated the 26th September, 1924.

(1) (1914) 19 Cal. W. N. 1280.
(2) (1928) 32 Cal. W. N. 828.
(3) (1910) 13 Cal. L. J. 38.
(4) (1919) 51 Ind. Cas. 56.
(5) (1921) I. L. R. 1 Pat. 218.

T. B. Ramchandra Rao v. *A. N. S. Ramchandra Rao*(1), referred to.

Appeal by the defendants.

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

P. Dayal and *S. N. Bose*, for the appellants.

S. M. Mullick, *S. N. Rai* and *J. P. Sinha*, for the respondents.

COURTNEY TERRELL, C.J.—This is a Letters Patent appeal from the decision of Mr. Justice Ross sitting singly allowing an appeal from a decision of the District Judge of Patna.

The main question which is raised by this appeal is whether a decision in a former suit that the issue between the parties is barred by the plea of res judicata is in itself a decision which operates as res judicata in a subsequent suit.

The facts which gave rise to the suit are as follows. The plaintiff is the 16-annas proprietor of a mauza. His predecessors had leased it many years ago in mukarrari to three separate tenants, one-third of the area to a person whom I call *A*, one-third to *B* and one-third to *C*, and the defendants-appellants are purchasers from *B*. In 1915 the plaintiff brought three separate suits claiming rent and cess for the Fasli years 1319 to 1322 against *A*, against the appellants, and against *C* respectively.

The defence of all three defendants was that they were not liable to pay the cess to the landlord.

An issue was raised as to whether the defendants were so liable for cess and the first Court decided it in favour of the defendants holding that there was no such liability. This decision was affirmed on appeal by the District Judge and there was no appeal from his decision.

(1) (1922) 49 I. A. 129.

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The precise construction of the Subordinate Judge's judgment in the suit of 1915 is a matter of some little difficulty. I will assume, however, for the purposes of this judgment and in favour of the plaintiff that he did not decide that the defendants were not liable to pay the cess.

In 1919 the plaintiff again brought three suits in respect of the Fasli years 1323 to 1326 and the defendants again pleaded that they were not liable and they also pleaded res judicata by reason of the decision in the former suits. An issue was framed before the Munsif upon which he delivered judgment in favour of the plaintiff holding that there was a liability; and an issue was also framed as to whether the question of liability was barred as res judicata and the Munsif held that it was not so barred. Now, two of the defendants, one of them being the present appellants, appealed to the District Judge who transferred the case to the Subordinate Judge who heard the appeals and gave judgment for the defendants. From these decisions the plaintiff appealed to the High Court. As to one of the appeals, that is to say the appeal in which the present appellants were respondents, it was summarily dismissed under Order XLI, rule 11 of the Code of Civil Procedure; but the other appeal came before a Bench and was admitted and when heard it was allowed by Mr. Justice Foster [*Raja Dhakeshwar Prasad Narayan Singh* v. *Ramdarnarayan Singh*(1)], and he decided that the defence of res judicata failed and further that the defendants were liable to pay the cess. The result of this was that there were in existence two decisions in conflict. First, there was the decision in the present appellants' case by the District Judge which was confirmed by the High Court and, secondly, the decision of Mr. Justice Foster that the defendants in that case were liable to pay and that the question was not barred as res judicata. The plaintiff in 1923 brought

(1) (1927) A. I. R. (Pat.) 58.

the present suit against the appellants for rent and cess, this time in respect of the years 1327 to 1330; but we are only concerned with the question of cess. The defence to the suit was first, that there is no liability on merits but that point is not seriously pressed; secondly, that the suit is barred as res judicata; and, thirdly, that the question of res judicata is in itself barred (as res judicata) by the decision of the Munsif in the case of 1919. The Munsif decreed the suit and the District Judge on appeal reversed this decision and held that the plea of res judicata succeeded. Mr. Justice Ross sitting singly before whom the case came on second appeal, decided that the plea of res judicata failed.

The learned Judge does not appear to have dealt with the argument that the question whether or not the plea of res judicata was available was itself a matter of res judicata, and the substantial question in this appeal, therefore, is whether the plea of res judicata is settled as between the plaintiff and the defendants in favour of the defendants once for all. The first authority to be considered is *Mohendra Nath Biswas* v. *Shamsuneessa Khatun*(1) and in that case it had been held wrongly in a former suit that the question between the parties was not barred as res judicata. Nevertheless in the second suit it was held that in asmuch as the issue of res judicata had been decided in the former suit, although wrongly decided, it could not be litigated anew by the parties and that it was itself barred as res judicata. That case was followed later by the decision in *Sm. Ayetonnessa Bibi* v. *Amjad Ali*(2) where it was held that a decision that an issue between the parties was barred as res judicata was final, and that the question whether or not it was barred by res judicata could not be reagitated in a subsequent suit. For my own part I am unable for this purpose to distinguish the issue of res judicata as a mixed question of law and fact

(1) (1914) 19 Cal. W. N. 1280.
(2) (1928) 32 Cal. W. N. 828.

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from any other issue that may be raised between the parties. It is misleading to say that the question whether or not an issue is barred as res judicata is a matter of jurisdiction. Section 11 of the Civil Procedure Code states:

> "No Court shall try 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....."

The meaning of the first part of that section is, I apprehend, that no court shall try any suit or an issue *in any suit* in which the subject-matter has been directly and substantially in issue in the former suit between the same parties. It is a matter of law which is laid down by the section and whether or not that law is to apply depends upon the question of fact as to what was directly and substantially in dispute in the former case. Now, in the case with which we are dealing there is no doubt that one of the issues in the case before the Munsif in 1919 was whether or not the issue of liability of the defendants was or was not settled in a former case and, therefore, barred under section 11 as res judicata, and that issue received attention and rightly or wrongly was decided in favour of the defendants. That being so, it is not open to the plaintiff to reagitate the question in the second suit.

It is said that there is one feature about the subject-matter of the action of this case which renders the principles which I have just stated inapplicable. It is said that the former suit was in respect of a certain year of assessment and in respect of a certain sum. The present suit is in respect of a different year of assessment and it may be another sum and that where there is a recurring liability then the issue as between the parties is not of a general character. For this purpose two cases were relied on by the defendants: first, *Hara Chandra Bairagi* v. *Bepin Bihari Das*(1), a decision of Sir Lawrence Jenkins and Mr. Justice Doss confirming a decision of Mookerjee, J. In that the judgment of Mookerjee, J., however,

(1) (1910) 13 Cal. L. J. 38.

is set forth and the confirmation is of the briefest character. It was a rent suit and it was held that where an issue has been raised on a disputed point in a rent suit and has been heard and finally decided, the decree, even though it has been passed ex parte, operates as res judicata in a subsequent suit and Mookerjee, J. observed: "Whether the decision in the previous suit operates as res judicata, must be determined with reference to the question, whether the issue in the previous suit related to the amount of rent payable for a particular period or to the rent payable for the full term of the lease. In the former contingency, the decision is not res judicata, in the latter event it is."

With respect I entirely agree with that criterion but in this case the issue that has been decided in favour of the defendants was from the earliest time the question of liability, that is to say a question of general liability and not the question of liability in respect of any particular year. The other case was *Sheo Prasad Mander* v. *Bateswar Mahto*(1) but this decision is substantially to the same effect as the decision in *Hara Chandra Bairagi* v. *Bepin Behari Das*(2). The plaintiff relied upon the decision in *Pitamber Chaudhury* v. *Sheikh Rahmat Ali*(3) by Jwala Prasad and Ross, JJ. in support of the contention that a decision in a suit for cess cannot operate as res judicata against a claim for cess for subsequent years; but that case was in respect of a claim for cess in respect of land which was held to be lakheraj land. The provisions for the collection of cess from lakheraj land are entirely separate in the Cess Act from those provisions which are applicable to the recovery of cess from rent-paying land and the

(1) (1919) 51 Ind. Cas. 56.

(2) (1910) 13 Cal. L. J. 38.

(3) (1921) I. L. R. 1 Pat. 218.

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whole basis of the judgment of Jwala Prasad, J., lies in the fact that in the case of lakheraj land a new liability arises when the notice of the revaluation is served. That that is clear is seen from the passage at page 225 where the learned Judge, after quoting section 56 of the Act, says: "Therefore it is only after the publication of the extracts from the valuation roll that the liability to pay cess to the superior landlord arises in the case of a rent-free tenure. When the provisions of Chapter IV are thus fully complied with then a cess becomes *payable under the Act* and such a cess a superior landlord is entitled to realize 'with the same penalty and in the same manner as if it were an arrear of rent"

Now it follows that in the case of lakheraj land each revaluation involves a fresh liability; but that is not the case in the case of rent-paying land where the liability arises from the general provisions of the Act itself. Therefore, in my opinion, the decision of Jwala Prasad, J., in the case that I have referred to has no bearing as applied to cases of cess payable in respect of rent-paying land as in the case before us, and it is clear that there is no general proposition laid down in that case that in any suit for cess in respect of a particular year the question of general liability is not barred as a matter of res judicata.

For these reasons I would allow this appeal and direct that the suit be dismissed with proportionate costs to the appellants before the Munsif and full costs throughout so far as the cess only is concerned.

CHATTERJI, J.—I agree. The substantial question to be considered is whether the previous decisions operate as res judicata so as to bar the recovery of cess by the plaintiff in the present case. Whether the decision in the case of 1915 or Mr. Harihar Charan's decision of 1921 in the litigation of 1919 was correct or not there can be no question that they would operate as res judicata because whether a final decision is right

or not that must operate as res judicata on the same direct and substantial issue in a subsequent case. In this connection I would refer to the observations of Sir Richard Garth, C.J., in *Gowri Koer* v. *Audh Koer*(1). His Lordship in delivering the judgment of the Full Bench has observed: "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 law, or a view of the law which this Court has subsequently disapproved."

Thus an erroneous decision on a point of law will constitute res judicata as much as a correct decision on a question either of law or of fact. Reference may be made in this connection to the observation of their Lordships of the Privy Council in the case of *T. B. Ramachandra Rao* v. *A. N. S. Ramchandra Rao*(2): "As pointed out in *Badar Bee* v. *Habib Merican Noordin*(3), it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time."

Now, if, as contended by Mr. S. M. Mullick, there was no justification for Mr. Harihar Charan to decide the question of res judicata in the way he did, it was open to him to take this matter to a higher tribunal; but as a matter of fact the decision was taken up to this Court and was affirmed, the appeal having been dismissed summarily. There was a specific issue in the intermediate suit of 1919 as to

(1) (1884) I. L. R. 10 Cal. 1087.
(2) (1922) 49 I. A. 129, 137.
(3) (1909) A. C. 623.

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whether the previous decision operated as res judicata. That was a direct and substantial issue between the same parties and was finally heard and decided and I am unable to appreciate the contention how this decision, even if erroneous, can be ignored.

It is argued that as the cess is an imposition by the statute the plaintiff is entitled to recover the same in spite of the previous decisions; but that is exactly the point which ought to have been made a ground of attack in the previous cases, and I do not think that after the decision of the question in the previous cases and after the finding by Mr. Harihar Charan that the previous decision barred the question on the law of res judicata it is open to the plaintiff to agitate the same point over again.

It is further urged that the previous decisions must be taken as referable to the year in suit in those proceedings and can operate no bar to the recovery of cess for a subsequent period because the cause of action is different. As to this ground, it is enough to say that section 11 of the Code of Civil Procedure uses the words " issue or suit " and takes no note of the fact whether the cause of action is the same or is different. The only point for investigation is whether the matter directly and substantially in issue in the present suit was also directly and substantially in issue in the former suit between the same parties and has been heard and finally decided. Applying this test there can be no doubt that the previous decisions will operate as res judicata. The case of *Pitamber Chaudhury* v. *Sheikh Rahmat Ali*[1] is distinguishable because the facts are different and there was no specific issue raised as to the liability for cess in the previous litigation.

The fact that Mr. Justice Foster in a suit between the plaintiff and another co-sharer mukarraridar has held on the construction of the incidents of

(1) (1921) I. L. R. 1 Pat. 218.

this very tenancy and the terms of the Cess Act that a co-sharer tenant is liable to pay cess to the plaintiff does not alter the position. This will at best show that the previous decisions were erroneous. This cannot in my opinion, affect the application of res judicata. The case would have been different if the legislature had passed a new enactment in the meanwhile. When a legislature passes a new enactment the law is altered and the rights of parties are changed but Mr. Justice Foster did not lay down any new law. He only considered the conditions of the tenancy and the law applicable. Therefore, the view of law taken by him in another proceeding cannot prevent the operation of the rule of res judicata. To perpetuate an error is no doubt an evil, but the rule of res judicata is based on a very sound principle that there should be an end to litigation.

I, therefore, agree with my Lord the Chief Justice that the appeal should be allowed.

Appeal allowed.

APPELLATE CIVIL.

1929.

August, 5.

Before Das and Rowland, JJ.

NAIKA URAON

v.

BUTNA URAON*

Hindu Law—ghardamad—elements necessary to constitute the status.

Under the Hindu law the most important elements of fact which are necessary to constitute the status of a *ghardamad* are *first*, that there must be the definite intention on the

*Appeal from Appellate Decree no. 633 of 1928, from a decision of Babu Kshetra Nath Singh, Subordinate Judge of Ranchi, dated the 10th January, 1928, revising the decision of Babu Sadhu Charan Mahanti, Munsif of Ranchi, dated the 23rd April, 1927.