APPELLATE CIVIL.

Before Wort and Khaja Mohamad Noor, JJ.

1932.

Oct. 24, 25.

MRS. GERTRUDE OATES,

v.

MRS. MILLICENT D'SILVA.*

Res judicata—doctrine based on general principles of law and not dependent on section 11 of Code of Civil Procedure, 1908 (Act V of 1908)—two suits disposed of by one judgment—common issue tried—appeal from one decree only—unappealed decree, whether operates as res judicata in the other suit at appellate stage.

O brought a suit against *D* praying for an injunction restraining her from carrying on another hotel business contrary to the Articles of Partnership and the main issue in the case was whether the partnership had been dissolved. Later *D* brought a suit against *O* for rent for her portion of the partnership premises and one of the issues involved in this suit was the same, viz., whether the partnership had come to an end. Both the suits were decided by the Munsif and on appeal by the Judicial Commissioner by one judgment. The suit of *O* failed while *D's* action succeeded. *O* appealed to the High Court from the decree made in *D's* suit while no further appeal was preferred from the decree in the other suit.

Held, that the decision in *O's* suit, which had become final, operated as res judicata, as regards the common issue, in the suit of *D* at the appellate stage.

Dhani Singh v. *Sri Chandra Choor Deo*(1) and *Isup Ali* v. *Gour Chandra Deb*(2), followed.

Held, further, that the doctrine of res judicata is not dependent on the limited provisions of section 11 of the Code of Civil Procedure, 1908, but is based on the general principles of law that multiplicity of suits should be avoided.

Hook v. *Administrator-General of Bengal*(3), followed.

* Appeal from Appellate Decree no. 545 of 1930, from a decision of H. R. Meredith, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 10th February, 1930, confirming a decision of Babu Gopal Chandra De, Munsif of Ranchi, dated the 30th August, 1928.

(1) (1923) 75 Ind Cas. 570.

(2) (1922) 37 Cal. L. J. 184.

(3) (1924) L. R. 48, I. A. 187.

1932.

MRS. GERTRUDE OATES v. MRS. MILLICENT D'SILVA.

Appeal by the defendant.

The facts of the case material to this report will appear from the judgment of Wort, J.

Sir Ali Imam (with him *S. K. Mitra* and *L. K. Chowdhry*), for the appellant.

B. C. De and *K. K. Bannerjie*, for the respondent.

WORT J.—On the 2nd September, 1925, Mrs. Gertrude Oates on the one part and Mrs. Millicent D'Silva of the other part entered into a partnership deed, and thereafter it appears carried on business as hotel proprietors at the Silver O'aks Hotel, Ranchi. On the 26th of October, 1927, there was an agreement on the part of Mrs. Oates to pay Mrs. D'Silva rent for her portion of the hotel premises. Out of those two facts arose two actions which first of all came before the learned Munsif and eventually on appeal before the learned Judicial Commissioner of Chota Nagpur. As regards the first action Mrs. Oates claimed against Mrs. D'Silva an injunction restraining her from carrying on another hotel business contrary to the Articles of Partnership, and the main issue in that case was whether on the 1st of April, 1926, the partnership had been dissolved or not. The learned Munsif in the trial Court and the learned Judicial Commissioner in the appellate Court came to the conclusion that it had. In those circumstances Mrs. Oates failed in her action, and, as I have stated, it was in October of 1927, after certain events, to which I shall presently briefly refer, that an undertaking was given by Mrs. Oates to pay Mrs. D'Silva rent for her portion of the premises. As appears from the judgment of the learned Munsif, as regards the buildings of the Silver O'aks hotel, the two ladies were proprietors each enjoying a moiety. At the same time as the action, to which I have already referred as the partnership action, was brought, Mrs. D'Silva brought an action against Mrs. Oates for rent, and it is that action out of which this appeal arises. To understand the points which have been

raised, it is necessary, perhaps, to state one or two other facts.

It was in March, 1926, about six months after the partnership had started, that these two ladies came to consider the question of selling their respective shares in the Silver O'aks hotel. The reason, as far as I know, was not stated, but they were minded, as I have said, to sell their shares, and while they were considering the matter, a Mr. Clayton came along and offered to rent the Silver O'aks hotel, as it would appear his lease at a competing hotel was coming to an end and the landlord of the premises was asking him to pay an enhanced rent which, in his view, was exorbitant. Negotiations then took place between Mr. Clayton and these two ladies, and ultimately on the 1st of April Mrs. D'Silva wrote to Mrs. Oates saying that she had allowed Mr. Clayton to go into possession, in the meantime, on the 26th of March, after some correspondence between Mrs. D'Silva and Mrs. Oates, Mrs. Oates having sent a telegram which was to the effect

"Accept Clayton's offer writing".

Now, in the partnership action it was contended, and the contention succeeded, that it was this letting Mr. Clayton into possession of the hotel by mutual consent of both parties, that is to say, Mrs. D'Silva on the one hand and Mrs. Oates on the other, that had brought the partnership to an end. The learned Judges did not express themselves in this way, but it seems to have been in the minds of the Judges that what had happened was that these two partners, by allowing Mr. Clayton to go into possession, had put it beyond their power to continue the partnership, and, therefore, it must be deemed to have come to an end. That was certainly the view which Mrs. D'Silva took.

Now as regards this suit for rent which, as I have said, was instituted in October, 1927, Mrs. Oates had agreed to pay rent at the rate of Rs. 150 a month.

1932

MRS. GERTRUDE OATES v. MRS. MILLICENT D'SILVA.

WORT, J.

Rent was paid for a month or two but later it fell into arrear and eventually there was a claim for Rs. 1,878-9-0. The contention before us in this appeal is that the partnership had not come to an end and that consequently what the plaintiff was claiming in the action could only be a share of the profits of the partnership and that in no circumstances could rent be said to have accrued. I should add that the plaintiff in the action claimed, by reason of a letter dated the 13th of May, 1926, to have raised the rent as from the 1st of June, 1927, but both the Courts, that is to say, the Court of the Munsif and the Court of the Judicial Commissioner rejected that claim made by the plaintiff on the ground that there was no consent by the defendant to pay this enhanced rent of Rs. 200 a month. Whether that decision was right or wrong we are not concerned, because there is no appeal in regard to that question in this action; but we are here concerned with the matter of whether, as contended by the defendant, the partnership is still subsisting. It seems to me that the answer to that question is very clear, and clear for several reasons. In the first place the question of whether the partnership had come to an end or not was clearly a question of fact and the two Courts, which had jurisdiction to determine it, have come to a clear finding. It is contended by Sir Ali Imam on behalf of the defendant that this is a question of law; it is a question of construction of letters which passed between the parties and, therefore, is a matter of law in that sense. But what the learned Judges had to determine was whether on all the facts and circumstances of the case, it could be held that by mutual consent the partnership had ceased. Although the learned Judicial Commissioner has referred to letters, he refers to them merely for the purpose of determining what the views of the partners themselves were on this matter. On that account alone I should have, in my judgment, to hold that this appeal fails. But a further point is raised and that is, so far as the question of dissolution of

partnership is concerned, that it is a matter which has been finally decided between the parties and, therefore, we are precluded from further investigating it: in other words, the principle of res judicata applies.

Sir Ali Imam contends that section 11 of the Code of Civil Procedure does not apply to the facts of this case. I should have stated, in mentioning this matter, that when these two actions came on they were tried together and they were the subject-matter of one judgment, although the Courts passed separate decrees.

The clause to which reference is made is *Explanation I* to section 11. The expression " former suit " denotes a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. As I understand the contention it is this, that when the Judicial Commissioner came to decide this question he decided both questions involving the same point, namely, whether there had been a dissolution of partnership. On this point Sir Ali Imam admits that that matter has to be decided on the day on which we are hearing this appeal, and the question that we have got to ask ourselves is whether at this moment there has been a decision on the question of dissolution of the partnership. In my judgment the case of *Isup Ali* v. *Gour Chandra Deb*(1) disposes of this question. It is true that there have been differences of opinion in the matter, the Madras High Court in particular coming to a decision different from that which has been arrived in the case to which I have just made reference, but the facts of the case of *Isup Ali*(1) are almost identical with those which we have to deal with in this case. There were two cases there which I shall call, one the earlier case and the other the later case; they were the subject-matter of a common judgment but by reason of defects in the

(1) (1922) 37 Cal. L. J. 184.

1922.

MRS. GERTRUDE OATES v. MRS. MILLICENT D'SILVA.

WORT, J.

notices of appeal and other proceedings one appeal failed, that which related to the later case, and the earlier one came on for hearing. The same question, however, arose in both actions, and it was held in those circumstances that, although in point of time the question which had to be decided was finally decided in the appeal of the later of the two cases, the decision which was arrived at in that case was binding on the High Court when it came before it in appeal. But quite apart from the decision in that case, it seems to me that the decision of the question is concluded by general principles of law. My learned brother pointed out in the course of the argument that if we were to hold otherwise, it might result in the defendant on the one hand having a decision in her favour on that point and the plaintiff on the other, by reason of the judgment of the Judicial Commissioner, having a decision to the opposite effect. It is in the public interest that litigation should cease. That is a free translation of a very wellknown legal maxim. In this connection I should like to refer to a decision of the Judicial Committee in the case of *Hook* v. *Administrator-General of Bengal*(1). There, to quote the words of Lord Buckmaster, who delivered the opinion of the Judicial Committee, it was said—"The learned Judge held that this matter has already been definitely settled and in addition gave reasons why he adhered to his former opinion". Lord Buckmaster pointed out that this was superfluous: "the question as to the perpetuity had been definitely and properly before him in the former case and was in fact decided without any reservation, as is made plain by the terms of the judgment itself which showed that the determination of the dispute as to the perpetuity was the foundation of the whole judgment". Lord Buckmaster went on to point out "that therefore the matter was finally settled". Then he stated—"The appellate Court, however, took a different view, and regarding the question as still open decided it against the appellant.

(1) (1921) L. R. 48 Ind. App. 187.

but the error in their judgment is due to the fact that they regarded the question as completely governed by section 11 of the Code of Civil Procedure. That section prevents the retrial of issues that have been directly and substantially in issue in a former suit between the same parties, and this question obviously arises in the same and not in a former suit, but it does not appear that the learned Judge's attention was called to the decision of this Board in *Ram Kirpal Shukul* v. *Rup Kuari*(1) which clearly shows that the plea of res judicata still remains apart from the limited provisions of the Code, and it is that plea which the respondents have to meet in the present case ".

Sir Ali Imam, as I have already stated, endeavoured to confine us to the words of *Explanation I* to section 11 of the Code of Civil Procedure, but, as the Judicial Committee of the Privy Council pointed out, it is not dependent upon the mere words of section 11 of the Code itself. But the question whether it is res judicata or not has to be decided on general principles of law. In my judgment this matter was clearly concluded by the decision of the Judicial Commissioner in the action which was brought under the partnership deed. The other question which Sir Ali Imam puts forward is really a branch of the same point. He contends that what was let out to Mr. Clayton was not merely the building but also the partnership business in the sense that Mrs. Oates and Mrs. D'Silva remained in partnership and that partnership business continued, and further that Mr. Clayton, on taking over the lease of the premises, had in a sense undertaken to manage it for the partnership. All that need be said about this is that there was no suggestion of that in the Courts below and the only possible support that can be given to the contention is that if it was so raised it was raised through paragraph 5 of the written statement. But a perusal of that paragraph and the next paragraph of the written statement quite

(1) (1883) L. R. 11 Ind. App. 37.

1932.

MRS. GERTRUDE OATES v. MRS. MILLICENT D'SILVA.

WORT, J.

clearly shows that what was stated there was a matter entirely divorced from the point which I have stated is now taken by Sir Ali Imam. What clearly we shall have to ask, if the question came to be decided, is whether the letter written to Mr. Clayton offering him a lease of these premises entitled him to carry on the business of the partnership between the two ladies, or whether going into possession under the lease had anything to do with the partnership business in any way. This matter could have been disposed of had the defendant thought fit to produce the lease or the draft lease under which Mr. Clayton went into possession but this was not so produced.

In my judgment, for the reasons which I have already stated, it seems to me that this appeal must fail and must be dismissed with costs.

KHAJA MOHAMAD NOOR, J.—I agree. In my opinion the trial of the issue about the dissolution of the partnership is barred by res judicata. The decision in the case of *Isup Ali* v. *Gour Chandra Deb*(1) which has been referred to by my learned brother is a clear authority for this proposition. As has been pointed out by my learned brother, the doctrine of res judicata is not confined in the provisions of section 11 of the Civil Procedure Code. It is based upon the principle that multiplicity of suits should be avoided and there should be an end to litigations. In *Dhani Singh* v. *Sri Chandra Choor Deo*(2) Kulwant Sahay, J. held that if more than one suit were decided by a common judgment and if the decree in one of them became final by the party not appealing against it, the issue decided in it operated as res judicata in other suits even at the appeal stage. In my opinion, if I may say so, the law has been correctly laid down. Apart from res judicata, the question of dissolution of the partnership is concluded by the concurrent findings of fact arrived at by the courts below. The conclusion

(1) (1922) 37 Cal. L. J. 184.
(2) (1923) 75 Ind. Cas. 570.

of the learned Judicial Commissioner is not based, as is contended, upon the construction of the various letters which have been produced in the case, the meaning of which is clear and there is no dispute about it. His conclusion is based upon the cumulative effect of the letters and upon what the parties themselves understood their position to be when the Silver O'aks Hotel was leased to Mr. Clayton.

The appeal should be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before James and Agarwala, JJ.

THAKUR BAGHESHWARI CHARAN SINGH

v.

BINDHESHWARI CHARAN SINGH.*

1932.

July, 29.

Chota Nagpur Incumbered Estates Act (Beng. Act VI of 1876), sections 12-A and 23—Khorposh grant, whether is an "alienation" within the meaning of section 12-A—decree for maintenance—properties of disqualified proprietor transferred to decree-holder—validity of transfer—section 23, whether applies only to suits instituted during the period of management—res judicata, whether a decision on a question of law operates as—Khorposh grant void ab initio—decree in previous suit holding khorposh grant to be valid, whether operates as res judicata.

Section 12-A, Chota Nagpur Incumbered Estates Act, 1876, provides :—

"(1) When the possession and enjoyment of property is restored, under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner,—

(*a*) to alienate such property, or any part thereof, in any way, or

(*b*) to create any charge thereon extending beyond his life-time."

* Appeal from Original Decree no. 159 of 1928, from a decision of Babu Saudagar Singh, Subordinate Judge of Hazaribagh, dated the 31st of March, 1928.