APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

BIBI WASILAN

v.

MIR SYED HUSSAIN.*

1928.

June, 18.

Res judicata, plea of, whether can be taken in second appeal—suit by lessee against tenant—former suit by tenant as landlord against lessee—parties litigating under same title—'prior suit,' meaning of—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 11.

The question of res judicata can be raised for the first time in second appeal.

Balkishan v. Kishan Lal (1), *Zaharia v. Debia* (2), *Dhani Singh* v. *Chandra Choor Deo* (3) and *Isup Ali* v. *Gour Chandra Deb* (4), followed.

Abdul Majid v. *Jew Narain Mahto* (5) and *Mariamnissa Bibi* v. *Joynab Bibi* (6), not followed.

S as thikadar instituted a suit against *W*, the tenant, for arrears of rent, and alleged that he was the real thikadar and that *A* was only his farzidar. The defence was that *A* was the real thikadar and not merely a farzidar of *S*. The suit was decreed by the lower appellate court and it was held that *S* was the real thikadar. *W* preferred a second appeal to the High Court. During the pendency of the appeal *W*, who was also a landlord of a fractional share, instituted a suit against *A* in respect of her thika rent and made *S* a pro forma defendant in the suit. The suit was decreed against

*Second Appeals nos. 1147 and 1148 of 1925, from a decision of Babu Narendranath Chakravarti, Subordinate Judge of Monghyr, dated the 30th March, 1925, modifying a decision of Babu Nand Kishore Chaudhri, Munsif of Jamui, dated the 24th September, 1923.

(1) (1889) I. L. R. 11 All. 148.
(2) (1911) I. L. R. 33 All. 51, F. B.
(3) (1923) 75 Ind. Cas. 370.
(4) (1923) 37 Cal. L. J. 184.
(5) (1889) I. L. R. 16 Cal. 233.
(6) (1906) I. L. R. 33 Cal. 1101.

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A but was dismissed against *S*, and it was held that *A* was the real thikadar. A second appeal against that decision was dismissed by the High Court under Order XLI, rule 11, Civil Procedure Code, while *W's* appeal in the suit by *S* was still pending.

Held, (*i*) that *W's* suit was the prior suit within the meaning of *Explanation I* to section 11, Code of Civil Procedure, 1908; (*ii*) that the parties were litigating under different titles and that, therefore, the decision in *W's* suit did not operate as res judicata in the suit by *S*.

Appeals by the defendant.

These appeals came in the first instance before Wort, J., who passed the following order:

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WORT, J.: This case raises an important point as to the construction of section 11 of the Code of Civil Procedure on the doctrine of res judicata. There are two appeals involved in this case: Appeal no. 1147 and Appeal no. 1148. The suit was one for rent, and before the Subordinate Judge the plaintiff succeeded. As regards the appeal no. 1148, which I shall take first, Mr. Hasan Jan argues that the Subordinate Judge was under a misapprehension when he awarded the full amount of rent claimed, namely, Rs. 154-3-3. He states that it was admitted by the plaintiff or one of his witnesses before the Munsif that the jama was Rs. 145-1-6 only. But the question did not come to be determined by the Munsif as he dismissed the suit.

On appeal, it is stated that the point was not argued because the defendant relied upon the admission of the witness before the Munsif and it was supposed that if the appeal succeeded the amount awarded would be the Rs. 145 and not the Rs. 154 which was claimed. However, the learned Subordinate Judge gave, as I have already stated, a decree for the full amount Rs. 154, being the amount claimed by the plaintiff. This question is argued in appeal 1148: but I think it is concluded by the decision of the Munsif when in the course of his judgment he stated

"the objection regarding the correctness of the jamas of the other khatas has not been pressed and I find no reason for holding them to be incorrect."

The respondent relies upon this passage and in the absence of any other statement on the record to the contrary, I must find that the learned Subordinate Judge was right in giving a decree for the full amount claimed. But the question of res judicata is a question, which is common to both appeals: appeal no. 1147 and appeal no. 1148. The plaintiff in the suits is one Mir Saiyid Hussain whose name did not appear as the lessor in the lease under which the defendant held these lands and the case of the defendants before both Courts was that the plaintiff had no right to sue because Saiyid Aulad Ali, who was named in the lease as the lessor, was in fact the lessor and not merely the farzidar as alleged by the plaintiff. This question has been decided against the defendant by the learned Subordinate Judge and the point taken before me is that although he may not be able to contest that question as being a decision on a question of fact, yet this

Court is bound to come to a contrary conclusion as there was a decision on this point between the parties in a former suit. Actually what has taken place is that on a date subsequent to the date on which this suit was instituted another suit was instituted by the defendant against the plaintiff. But in that case the defendant was a lessor and the present plaintiff who was in that suit the defendant was a tenant. It is unnecessary in this case to state exactly how that relationship arises; but it is sufficient to state the fact that the subsequent suit went on appeal and there was a decision on this very question whether Saiyid Aulad Ali was a farzidar or not. It was held there that he was not a farzidar of Mir Saiyid Hussain but was in fact the lessee in that case, for there was an application to this Court which was dismissed summarily on the 24th June, 1927. That is between the date of the decision of the Subordinate Judge in appeals 1147 and 1148 and the hearing before me: and it is argued that in coming to a decision in this case I am bound by the decision in the other case on this question as being res judicata.

The question which arises is that this being a Court of appeal it is bound by the decision in the former case. The High Courts have taken different views on this question. The Calcutta High Court, in *Abdul Majid* v. *Jew Narayan Mahto*(1) decides that wherein the expression "no court shall try any suit" is used it means a trial in the first instance and that it does not apply to a Court of appeal, and that if a decision is come to prior to hearing in the Court of appeal which would otherwise be res judicata, it is not binding, however, upon a Court of appeal because they are not trying a suit.

The Madras High Court and the Allahabad High Court held a different view and the decision in *Balkishan* v. *Kishan Lal*(2) is an authority for the construction which is placed upon this section.

As this matter will constantly come up between these parties and as it is a matter of some importance, I am of the opinion that this case should be placed before a Division Bench.

Mohammad Hasan Jan, for the appellant.

Khurshaid Husnain and *Syed Ali Khan*, for the respondent.

Kulwant Sahay, J.—These two appeals are by the defendant and arise out of two suits for rent. Appeal no. 1147 arises out of suit no. 355 of 1922 in which Sheikh Muhammad Kabir was the defendant. He is now dead and is represented by his widow Bibi Wasilan who was the defendant in suit no. 354 of 1922 out of which Second Appeal no. 1148 arises.

(1) (1880) I. L. R. 16 Cal. 233. (2) (1889) I. L. R. 11 All. 148.

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The plaintiff's case is that he is the lessee in respect of 6 annas and odd share out of the 16 annas of mauza Hussainabad. He held 4 annas share under four registered pattas granted by different sets of proprietors, one of the pattas being of the share of Bibi Imaman and Bibi Batul in respect of 1 anna 18 dams 10 kauris odd share. The remaining 2 annas and odd was held by the plaintiff under an amaldastak from the defendants second-party in the present suits. Suit no. 355 was in respect of a holding of 2131 acres of land held by the defendant Muhammad Kabir at a rental of Rs. 116-11-17 dams and the rent was claimed for the years 1327-29. Suit no. 354 against Bibi Wasilan was in respect of five holdings which had been consolidated into one, bearing a consolidated rental of Rs. 152-14-3. The thikas under which the plaintiff claimed stood in the name of one Aulad Ali and the plaintiff alleged that Aulad Ali was his benamidar. The defence of the defendants was that Aulad Ali was the thikadar in respect of the 4 annas covered by the four registered pattas and that he was not the farzidar for the plaintiff and that, as regards the remaining 2 annas and odd, the defence was that the plaintiff did not acquire any right to recover the rent for the years 1327-29 F.S., and there was a plea of payment.

The trial Court dismissed both the suits on the ground that Aulad Ali was the real thikadar and that the plaintiff was not entitled to the rent of the 4 annas and as regards the remaining 2 annas odd, it was held that under the amaldastack the plaintiff was not entitled to the rent for the years 1327-29. There were appeals by the plaintiff in each suit and the learned Subordinate Judge held that Aulad Ali was a farzidar for the plaintiff and the plaintiff was the real thikadar in respect of the 4 annas share, and as regards the amaldastak from the defendants-second-party the learned Subordinate Judge held that the plaintiff was entitled to the rent in respect of the years

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1328-29. He accordingly made a modified decree in favour of the plaintiff.

The present appeals were preferred by Bibi Wasilan in her own right in one case and as the representative of her late husband, Sheikh Muhammad Kabir, in the other case. The point argued is that the present suits are barred by res judicata on account of the decision in another suit instituted by Bibi Wasilan in which it has been held that Aulad Ali was the real thikadar. The circumstances under which the other suit was instituted are that Bibi Wasilan is also a part proprietor of the village. Subsequently she acquired the interest of Bibi Imaman and Bibi Batul who were the executants of one out of the four pattas under which the plaintiff claimed, to the extent of 6 dams by purchase from Gulam Raza Khan the heir of the two ladies under a deed of sale dated the 24th of February, 1922. The present suits, out of which the appeals now before us arise, were instituted by the present plaintiff Syed Hussain on the 11th of September, 1922. The suits were dismissed by the Munsif on the 24th of September, 1923, and they were decreed by the Subordinate Judge on appeal on the 30th March, 1925, and the present appeals were filed in this Court on the 18th June, 1925. Bibi Wasilan, the defendant in one of the present suits, instituted a suit for rent as proprietor against Aulad Ali as the thikadar in respect of her share in the proprietary interest. This suit was instituted on the 19th of August, 1925, that is after the filing of the present appeals in this Court. The suit was, however, decreed by the Munsif on the 10th of March, 1926, who held that Aulad Ali was the real thikadar, and this decision of the Munsif was upheld in appeal by the District Judge on the 8th January, 1927, and a Second Appeal to this Court was dismissed under Order XLI, rule 11, Civil Procedure Code, on the 24th of June, 1927. Therefore, although Bibi Wasilan's suit for the thika rent was instituted in

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point of time after the institution of the suits out of which the present appeals arise, yet it was finally decided before the final decision in the present appeals, and, it is therefore contended on behalf of the defendant-appellant that the judgment in that suit operates as res judicata and the question whether the plaintiff or Aulad Ali was the real thikadar is no longer open between the parties, and it must be held that Aulad Ali was the real thikadar and the plaintiff could not maintain the present suit for rent.

Another point is taken in Appeal no. 1148, which arises out of suit no. 354, viz., the question of the amount of the rent. Plaintiff claimed rent at Rs. 152-14-3, but the defendant alleged that the rent was Rs. 145-1-6, and the question raised was that the Court below had not decided the amount of rent.

As regards the first point, viz., the question of res judicata, an affidavit has been filed on behalf of the appellant setting out the fact of the institution of the suit for thika rent by Bibi Wasilan and the decision thereof, and copies of the decisions of the Munsif as well as of the District Judge and the order of this Court dismissing the appeal under Order XLI, rule 11, have been produced. There can be no doubt that the question of res judicata can be raised in appeal [*See Balkishan* v. *Kishan Lal* (1) and a decision of this Court in *Dhani Singh* v. *Chandra Choor Deo* (2) in which the previous decisions on the point are noticed]. A different view was taken in *Abdul Majid* v. *Jew Narain Mahto* (3) and in *Mariamnissa Bibi v. Joynab Bibi* (4) by Ghose, C. J. and Harington, J., but Rampini J. dissented from that view and his view was accepted by a Full Bench of the Allahabad High Court in *Zahariq* v. *Debia*(5).

(1) (1889) I. L. R. 11 All. 148.
(2) (1923) 75 Ind. Cas. 370.
(3) (1889) I. L. R. 16 Cal. 233.
(4) (1906) I. L. R. 33 Cal. 1101.
(5) (1911) I. L. R. 33 All. 51, F. B.

Later decisions in the Calcutta High Court have also taken the view that the plea can be taken in appeal [*Isup Ali* v. *Gour Chandra Deb* (1)]. It is thus clear that it is open to the appellant to raise the question of res judicata in the present appeals. Although the suit of Bibi Wasilan for the thika rent was in point of time subsequent to the present suits, yet it was finally decided prior to the final decision of the present suits by this Court, and under *Explanation 1* to section 11 of the Code of Civil Procedure Bibi Wasilan's suit must be taken to be the former suit within the meaning of section 11 of the Code, and if the other elements necessary to constitute res judicata be established the decision in that suit will operate as res judicata in the present suits. The question is whether such elements have been established.

In the suit of Bibi Wasilan, Aulad Ali was the defendant-first-party and Mir Syed Hussain, the present plaintiff, was the defendant-second-party. The suit was for arrears of rent in respect of one of the four thikas under which the present plaintiff bases his title in the present suits, viz., the thika patta executed by Bibi Imaman and Bibi Batul. The thika of these two ladies was in respect of 1 anna 18 dams 10 kauris odd share. Bibi Wasilan had purchased 6 dams out of this share under the deed of sale dated the 24th of February, 1922, and she had instituted the suit against Aulad Ali as the defendant-first-party and Mir Syed Hussain as the defendant-second-party for realization of her share of the thika rent to the extent of 6 dams purchased by her. The title, therefore, under which she was litigating in the former suit was that of a proprietor, and the question raised was whether the relationship of landlord and tenant subsisted between her as proprietor and Aulad Ali as lessee. It was held in that case that Aulad Ali was the lessee. In the present suits the title under which Bibi Wasilan is contesting the suit is that of

(1) (1923) 37 Cal. L. J. 184.

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a raiyat in respect of certain land comprised within the thika lease. It is thus clear that in the former suit, although some of the parties, viz., Wasilan and Mir Syed Hussain, were the same, yet they were not litigating under the same title. Moreover, Aulad Ali, who was a party in the former suit, is not a party in the present suits. He has given his evidence as a witness admitting that he was the farzidar for the present plaintiff. Thus all the parties in the two litigations are not the same. It appears that the Munsif expressly left open the question as regards the rights between the two sets of defendants in the former suit, viz., between Aulad Ali and Syed Hussain and dismissed the suit against Syed Hussain. The last sentence in the judgment of the Munsif in the former suit is :

"Be it noted that the rights amongst the two defendants are kept open for a future trial."

From this it is clear that the decision in the former suit does not debar the plaintiff in the present suits from raising the question that he is the real thikadar and is entitled to recover rents from the cultivating raiyats of the share leased to him. All that was decided in the former suit was that the lessor was not bound to recognize any other person as her lessee except the one in whose name the lease stood, but that decision did not debar the present plaintiff from recovering the rent from the cultivating raiyats if he succeeded in establishing as against Aulad Ali that he was entitled to do so. Although Aulad Ali is not a party to the present litigation, he admits in his evidence that the plaintiff is entitled to recover rents. The lessor may not be bound to recognize the present plaintiff, but the cultivating raiyats connot raise the question if the ostensible thikadar admits that the plaintiff is the real thikadar. Wasilan's suit had been dismissed as against the present plaintiff, and the decree being in his favour it is open to doubt whether he could appeal against the finding of the Munsif that Aulad Ali was the real thikadar, and if

he could not appeal against that decree, the decision in that suit cannot operate as res judicata in the present suits. Futhermore, the plaintiff in the present suits claims under four thika pattas. Bibi Wasilan has acquired a fractional share of the interest of the lessor in one of those pattas, and the question of res judicata cannot be raised as regards the title of the plaintiff under the other three pattas and the amaldastak. The issue which was decided in the former suit was: who was liable for the thika rent to the lessor? The issue involved in the present suits is: who is entitled to recover rent from the cultivating raiyats? The issues, therefore, in the two suits are not exactly the same. For all these reasons I am of opinion that the decision in the former suit does not operate as res judicata in the present suits. The finding of the learned Subordinate Judge that Aulad Ali is a farzidar for the plaintiff is a finding of fact and it cannot be interfered with in Second Appeal.

The other point as regards the amount of rent arises only in one of the suits, viz., in the suit giving rise to Appeal no. 1148. The question of amount of rent was raised in issue no. 4 in the trial Court and the learned Munsif had reduced the amount in the suit giving rise to Appeal no. 1147. As regards the suit out of which Appeal no. 1148 arises, the learned Munsif said:

> "The objection regarding the correctness of the jamas of other khatas has not been pressed, and I find no reason to hold them to be incorrect."

The question was not raised in the appeal before the Subordinate Judge, and I am of opinion that it is not open to the appellant to raise this question again in this Second Appeal. These appeals in the first instance came for decision before Wort, J., sitting singly and he found that the learned Subordinate Judge was right in giving a decree for the full amount claimed. He, however, referred these appeals to a Division Bench for a decision of the question of res judicata. I agree with Wort. J., and the contention

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of the appellant as regards the amount of rent must be overruled.

The result is that these appeals are dismissed with costs.

MACPHERSON, J. :—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ

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June, 18.

RAM DAS SINGH

v.

BENI DEO.*

Ghatwali (Rohini)—shikmi ghatwali, whether can be sold in execution of decree—raiyati holding in Santal Parganas saleable—Santal Parganas Settlement Regulation, 1872 (Reg. III of 1872), section 27. A shikmi ghatwali tenure held under the ghatwal of Rohini is not liable to be sold in execution of a decree, *Bally Dobey* v. *Ganei Deo*(1), followed.

Thakur Ashutosh v. *Bansidhar Shroff*(2), referred to.

Obiter dictum : A raiyati holding in the Santal Parganas is not saleable by the regular courts except where transferability is recorded in the record-of-rights.

Appeal by the decree-holder.

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

S. S. Bose, for the appellant.

Bindeshwari Prasad, for the respondent

MACPHERSON, J.—This is an appeal against the decision of the District Judge of the Santal Parganas reversing the order of the Subordinate Judge who had

*Appeal from Appellate Order no. 12 of 1925, from an order of R. E. Russell, Esq., District Judge of the Santal Parganas, dated the 20th October 1924, reversing an order of Babu B. Sarkar, Subordinate Judge of Deoghar, dated the 15th July, 1924.

(1) (1883) I. L. R. 9 Cal. 388. (2) (1928) I. L. R. 7 Pat. 744, P. C.