

present case the item of receipt is admittedly income but it is income which the Act expressly excludes from taxation.

Their Lordships, being of opinion that the High Court has rightly answered question (b) in the negative, find it unnecessary, as did also the High Court, to deal with question (a). The sum originally assessed appears to have been Rs. 97,283; this is an error and the figure which their Lordships find to be exempt from taxation is Rs. 91,283.

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Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed and the judgment of the High Court affirmed. The respondent will have his costs of the appeal.

Solicitor for appellant: Solicitor, India Office.

Solicitors for Respondent: Hy. S. L. Polak & Co.

APPELLATE CIVIL.

Before Wort, J.

DISTRICT BOARD OF DARBHANGA

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Feb. 19.

v.

SURUJ NARAIN SINHA.*

Res Judicata—previous decision on a question of jurisdiction only—matter, whether *res judicata*—Code of Civil Procedure, 1908 (Act V of 1908), section 11—suit brought in the name of Manager, Court of Wards—action, whether maintainable—Court of Wards Act, 1879 (Beng. Act IX of 1879).

* Appeal from Appellate Decree no. 829 of 1932, from a decision of Babu Dwarika Prasad, Subordinate Judge of Darbhanga, dated the 19th of March, 1932, confirming a decision of Babu Kapildeva Sahay, Munsif of Samastipur, dated the 14th of July, 1930.

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section 51.—*Bengal Ferries Act, 1885 (Beng. Act I of 1885), section 17, whether relates to the question of recovery of compensation.*

Section 17 of the Bengal Ferries Act, 1885, refers to the assessment of compensation in the first instance and has no relation to the question of the recovery of compensation.

A decision is none-the-less *res judicata* even if in point of law that decision is wrong. But questions of law are of different kinds as, for instance, questions of procedure, those affecting jurisdiction, questions of limitation.

When a plea of *res judicata* is raised with reference to such matters, in which the Court and the public have an interest, it is at least a question whether special considerations do not apply.

Where, therefore, in a previous litigation between the same parties the Court of appeal had merely held that the plaintiff's claim for recovery of compensation was not maintainable in the Civil Court, the District Magistrate being the only authority to entertain it under section 17 of the Bengal Ferries Act, 1885 :

Held, that the matter was not *res judicata*.

Tarini Charan Bhattacharya v. Kedar Nath Halder(1) and *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*(2), referred to.

Section 51 of the Court of Wards Act, 1879, provides :—

" In every suit brought by or against any ward he shall be therein described as a ward of Court; and the Manager of such ward's property, or if there is no Manager, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward and no other shall be ordered to sue or be sued as next friend or be named as guardian for the suit by any Civil Court in which such suit may be pending."

Where the plaintiff named in the suit was B, Manager of the Court of Wards, and at the time when the suit was brought it was not possible to say who the proprietor was as

(1) (1928) I. L. R. 56 Cal. 723.

(2) (1926) A. C. 94.

there existed a dispute between interested parties as to the proprietorship of the estate :

Held, (i) that there is no provision in the Act which abrogates the rule under the Civil Procedure Code—the fundamental rule for the administration of justice—that a suit must be brought by the person having the cause of action and in his name ;

(ii) that the estate represented by *B* was not a legal entity and neither the estate nor *B* having any cause of action, the suit as framed was not maintainable.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Wort, J.

G. P. Sinha, for the appellants.

Rai G. S. Prasad, for the respondent.

WORT, J.—This appeal arises out of an action in which the plaintiff claimed arrears at the rate of Rs. 250 per annum for compensation under a contract by which the Government had taken over a ferry under Regulation VI of 1819. The ferry appears to have been handed over to the District Board of Darbhanga under a contract by which the District Board was to pay this compensation. There was no dispute as to whether a contract between the proprietors of the estate and the Government could be enforced against the District Board, as, apart from the common law, in India it is clear that an action of that kind would be maintainable. I need not discuss that question further.

The two main questions upon which the Courts below have founded their judgments are on the provisions of the Bengal Ferries Act (Bengal Act I of 1885), and the question of whether the matter in the action could be considered *res judicata* having regard to the following facts: there was a previous action which had gone on appeal to the District Judge against whose

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decision a second appeal had been preferred to the High Court which second appeal had abated on the failure to make substitution in place of the deceased sole appellant. It was upon that case that the question of res judicata was argued in the Court below. The learned Judge in the Court below has come to the conclusion that the dispute was not res judicata on a ground which, in my judgment, was wholly untenable. His reason for so holding was that, as an appeal had been preferred, the decision of the previous Court had lost its finality. As I understand the judgment of the Court below, it must mean that it has no finality because it has lost its effect. Although it is true that a judgment appealed from loses finality for the time being, if the appeal fails or is not proceeded with, the judgment appealed from becomes final. That was the case in the matter which I have before me. But the question of whether, apart from the point relied upon by the Judge in the Court below, a judgment is res judicata is a somewhat difficult one.

In order to decide that question it is necessary to state briefly what happened in that case apart from the facts which I have already related. A judgment had been pronounced by the trial court on the merits. The Judge in appeal, who was the District Judge, had not considered the merits of the case at all, but had come to the conclusion that under section 17 of the Bengal Ferries Act, which after its passing applied to this ferry as well as others taken over, the claim could be made only to the District Magistrate. His decision in that regard was obviously wrong for the reason that section 17 upon which the District Judge relied referred to the assessment of compensation in the first instance and had no relation to the question of recovery of compensation. But it was pointed out in *Tarini Charan Bhattacharya v. Kedar Nath Haldar*⁽¹⁾ that a decision is none-the-less

(1) (1928) I. L. R. 56 Cal. 723.

res judicata even if in point of law that decision is wrong. But the important point in this regard is that what the Judge decided was a pure question of jurisdiction as to whether the action was maintainable in the civil court or whether, as he held, the plaintiff's claim lay before the District Magistrate.

That brings me to the question—whether a question of law can be said to be subject to the principle of res judicata? That matter, amongst others, was considered in the decision to which I have already referred. That was a Full Bench decision of the Calcutta High Court and amongst the points there decided was the one to which I have already made reference. Sir George Rankin in discussing the various classes of cases which might be considered res judicata, came to this conclusion: “ Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration. The court and the public have an interest. When a plea of res judicata is raised with reference to such matters it is at least a question whether special considerations do not apply”. It will be seen that this Full Bench judgment of the Calcutta High Court delivered by Rankin, C. J., the other four Judges agreeing, did not definitely decide this question but suggested that the matter was capable of other and special considerations.

Now this matter was dealt with in a case which came from Australia. I refer to the case of *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*⁽¹⁾. That was a question between the Broken Hill Proprietary Company and the Municipal Council and related to a matter of rating. There had been a previous question between

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the same parties for previous years, and the substance of the question was in what manner under the statute was the rating to be calculated? It was calculated in the one way in the action to which I have made reference, and then when the matter came up on appeal before their Lordships of the Judicial Committee it was contended that the decision ought to be considered as *res judicata*. Their Lordships of the Judicial Committee made this statement referring to the previous case: "The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply". The point which was raised in the case to which I have just referred was so stronger in favour of the plea that the matter was *res judicata*, than the present one before me. In the question of jurisdiction not only the parties themselves but the Court and the public had an interest. In my judgment to hold that the decision of the District Judge between these parties in a previous case was *res judicata* would be wrong. There are obvious objections to that matter to which I need not refer. But amongst them I might mention the fact that as regards these parties the Magistrate of the district had jurisdiction whereas for other persons claiming under the Act there would be an order to proceed in the civil court. I would, therefore, hold that this matter was not *res judicata*.

The other point made was that the Bengal Ferries Act not only governed the ferries taken over subsequent to the Act but in a previous transaction of the same kind relating to ferries they were precluded from having more than the average of five years of the annual net profit; and in this case it was contended that the plaintiff had received a sum in excess of that

amount. In my view the Judge in the Court below was right in holding that that point had no substance. There was no evidence what the annual profits were; and the admission which had been referred to by the learned Munsif—an admission made by the pleader in the former suit that the minimum fixed by section 17 had already exceeded—is a matter which, in my judgment, could not be taken in evidence.

Disposal of these points would clear the way for the success of the plaintiff in this action but for a point which is raised by the learned Advocate appearing on behalf of the appellant—a point which was not raised in the notice of appeal nor in the Court below, and leave is asked now to raise it. The point is that the plaintiff named in the suit in any event is not entitled to succeed. The plaintiff named was Mr. G. C. Blake, Manager of the Court of Wards, and it is contended that it is incumbent for him to bring a suit on behalf of the estate. It is not suggested that he represents the proprietor; it is not suggested that he is the guardian or the next friend under section 51 of the Court of Wards Act, 1879 (Act IX: B. C. of 1879), because it is admitted that at this moment it is impossible to say who was the proprietor as there was dispute between the interested parties as to the proprietorship. Now section 51 of the Act quite clearly lays down that a proprietor shall be described as a 'Ward' of the Court, and the Manager shall be named the 'next friend'. Nowhere can it be suggested is there any provision which abrogates the rule under the Civil Procedure Code—the fundamental rule for the administration of justice—that a suit must be brought by the person having the cause of action and in his name. The Government Pleader relies on sections 13 and 14 of the Act for this purpose. Section 13 quite clearly does not deal with the matter. Section 14 merely allows the Court through the Manager to do certain acts. It would be impossible to hold that that section in any way abrogated the general rule that the

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person who has got the cause of action must bring the suit in his own name. The estate which Mr. Blake here represents is not a legal entity; he could not represent it. If it were a legal entity the action would have to be brought in the name of the estate or of some person allowed by the Civil Procedure Code as being the representative of the estate. No such form of action is known to the law, and it is impossible to hold under any consideration that the Manager was entitled to bring the suit. He has got no cause of action nor has the estate inasmuch as, as I have said already, the estate is not a legal entity. The only person entitled to bring the suit is the proprietor. In those circumstances it seems to me that the point which is now taken must succeed and the action in its present form held to be incompetent.

With these observations I would allow the appeal and dismiss the claim without costs.

Leave to appeal under the Letters Patent is refused.

Appeal allowed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Dhaole, J.

MUSAMMAT RAMESHWAR KUER

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Feb. 5, 11,
12, 13, 20.

Hindu Law—gift—grant of absolute estate subject to defeasance in the event of donee dying issueless—deed. whether confers life estate with gift over—construction—intention of donor—Transfer of Property Act, 1882 (Act IV of 1882). sections 28 and 31—“ interest ”, meaning of.

Section 28 of the Transfer of Property Act, 1882, deals with a case in which, on the happening of a specified

* Appeal from Original Decree no. 255 of 1930, from a decision of Babu Narendra Nath Chakravarti, Subordinate Judge of Patna, dated the 23rd December, 1929.