APPELLATE CIVIL.

Before Mr. Justice Bevan-Petman.

BHAN SINGH (DEFENDANT)—*Appellant,*

versus

GOKAL CHAND (PLAINTIFF)—*Respondent.*

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May 27.

Civil Appeal No. 574 of 1919.

Res judicata—*where both parties appealed from decree of first Court and Appellate Court disposed of both appeals by one judgment accepting plaintiff's appeal and rejecting that of defendant, separate decrees being given—and defendant in his second appeal did not file a copy of the decree passed on his appeal—Civil Procedure Code, Act V of 1908, order 42, rule 1—Entries in* bahis*—silent as to interest—whether oral evidence of agreement to pay interest is admissible—Indian Evidence Act, I of 1872, section 92, proviso (2).*

Plaintiff-respondent sued for recovery of Rs. 825 principal and Rs. 412-8-0 interest on a *bahi* entry which made no mention of interest. First Court decreed Rs. 825 and interest at Rs. 2 *per cent. per mensem,* making a total of Rs. 448-8-0. Both parties appealed, and the Lower Appellate Court wrote a judgment in defendant's appeal covering both appeals and accepted plaintiff's appeal allowing Rs. 825, the amount given in the entry and Rs. 264 as interest, total Rs. 1,089, and dismissed defendant's appeal. A short judgment was also written in the plaintiff's appeal referring to the other and separate decrees were given in the two appeals. Defendant then preferred a second appeal to this Court attaching thereto copies of the two judgments and of the decree in plaintiff's appeal but not of the decree passed in his own appeal.

Held, that as there was no valid appeal before this Court in respect of the decree of the Lower Appellate Court on defendant's appeal, the decision relating to the sum of Rs. 448-8-0 was final and the present appeal in respect of this item was barred as *res-judicata*.

C. v. *C. and B.* (1) referred to; *Jogal Kishore* v. *Chammo* (2), distinguished.

Held, also, that having regard to the concluding words of *proviso* (2) of section 92 of the Evidence Act, oral evidence of an agreement to pay interest on the amount shown due in the entry was admissible, such entries in *bahis* not being of a formal character.

Kishor Chand v. *Guran Ditta Mal* (3), distinguished.

Bura v. *Mailia Shah* (4) and *Raghu Mal* v. *Bandu* (5), referred to.

(1) 22 P. R. 1903.
(2) 85 P. R. 1905 (F. B.).
(3) 52 P. R. 1911.
(4) 104 P. R. 1901.
(5) 110 P. R. 1908.

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Second appeal from the decree of A. H. Brasher, Esq., District Judge, Amritsar, dated the 4th December 1918, varying that of Khan Ghulam Hassan Khan, Sub-Judge, Amritsar, dated the 6th July 1918, decreeing the claim in part.

KHARAK SINGH, for Appellant.

PARDUMAN DAS, for Respondent.

BEVAN-PETMAN, J.—The facts necessary to be mentioned for the purposes of this second appeal are that the plaintiff-respondent instituted a suit against the defendant-appellant for the recovery of Rs. 825 principal and Rs. 412-8-0 interest on a *bahi* entry executed by the defendant. The plaintiff's case was that the defendant owed him Rs. 725 on a previous *bahi* account and that *lahi* had been lost, while Rs. 100 had been advanced to the defendant at the time of signing the entry of Rs. 825 now sued on. The Rs. 725 were made up of three items, namely, Rs. 150, Rs. 350 and Rs. 225. The first Court held that the plaintiff had failed to prove the items of Rs. 150 and Rs. 350 and gave him a decree for Rs. 325 with interest at 2 *per cent. per mensem*, making a total of Rs. 448-8-0. Both parties appealed; the appeal of the defendant being No. 345 of 1918 and that of plaintiff No. 351 of 1918. The Lower Appellate Court wrote a judgment in Appeal No. 345 covering both appeals and thereby he dismissed the defendant's Appeal No. 345 and accepted the plaintiff's Appeal No. 351, allowing the latter Rs. 825 principal and Rs. 264 interest, or a total of Rs. 1,089. The usual brief judgment was also written in Appeal No. 351 wherein the plaintiff's appeal was accepted for the reasons given in Appeal No. 345. Separate decrees were given in the two appeals. To his grounds of second appeal in this Court the appellant attached copies of the judgment of the first Court, the two judgments in appeal and of the decree in Appeal No. 351, but no copy of the decree in Appeal No. 345.

For the plaintiff-respondent various preliminary objections are raised. The first is that the appeal is barred by time. In reply it is contended that the appeal is not barred if the time occupied in obtaining a copy of the first Court's judgment

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is allowed and it is prayed that this be allowed. Although at present the attaching of the copy of the first Court's judgment with the appeal is not a rule of Court it is a practice which is observed and insisted upon. The advantages of having a copy of the first Court's judgment attached to the appeal are so obvious that it is probable that the matter will be provided for in the rules. Under section 5 of the Limitation Act I allow an extension of the period of limitation as prayed for.

The next preliminary objection is that there is no legal and valid appeal before this Court in respect of the decree passed in Appeal No. 345 in the Lower Appellate Court because a copy of that decree does not accompany the grounds of this appeal, and that, therefore, the decree in that appeal is final and the items covered by that decree are *res judicata* and cannot be dealt with now. Reliance is placed on Order XLI, Rule 1 of the Code of Civil Procedure and a number of authorities including *C.* v. *C. and B.* (1). For the appellant it is contended in reply that it is not necessary that copies of both the appeals should accompany the grounds of appeal in a consolidated judgment and reliance is placed on *Jogal Kishore* v. *Chammo* (2).

It is clear that for the reasons urged by the respondent, there is no valid appeal in this Court from the decree in Appeal No. 345, but that, to my mind, does not conclude the matter. The decision in *Jogal Kishore* v. *Chammo* (2), relied on by the appellant, is not on all fours with the present case. In that case two suits for pre-emption were instituted by two rival pre-emptors against the same defendant in respect of the same property. Both cases were tried together and disposed of by one judgment. One plaintiff was granted a decree giving her the right to pre-empt within a certain time and the other was granted a decree giving him the same right on the failure of the first. The headnote is apparently wrong in stating that the same decree was given and that each pre-emptor was impleaded as a defendant in the suit of the other, but that is not material for the present purpose. The latter plaintiff

(1) 22P. R. 1903. (2) 85 P. R. 1905 (F. B.).

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appealed only from the decree in his own suit and the Lower Appellate Court held that the existence of the other judgment and decree which had become final were a bar to the appeal and dismissed it. It was held by a Full Bench of the Chief Court of the Punjab, whilst admitting that the question was one of difficulty, that it was not necessary to appeal from both the decrees. But that case is distinguishable. In the present case the two appeals in the Lower Appellate Court were distinct and related to different subject matters. In Appeal No. 345 the defendant's claim was that the plaintiff was not entitled to the sum of Rs. 448-8-0 which had been allowed him by the first Court and in Appeal No. 351 the plaintiff claimed that he was entitled to Rs. 500 and interest which the first Court had disallowed.

The law of *res judicata* in relation to two simultaneous decrees between the same parties is a difficult subject and the High Courts in India have not held the same views and I may add that, beyond merely referring me to the judgment in *Jogal Kishore* v. *Chammo* (1), no attempt has been made to argue the point involved and no authority has been cited dealing with circumstances similar to the present. It appears to me on the general principles of the law of *res judicata* that the present appeal in respect of Rs. 448-8-0 is barred. It would be convenient here to state that the decree in Appeal No. 351, a copy of which has been attached, is not merely for the further sum of Rs. 500 and interest claimed in that appeal, but includes the sum of Rs. 448-8-0 which is the subject-matter of appeal No. 345 and grants a decree for Rs. 1,089. It might be argued for the appellant that the present appeal arises out of the original suit for Rs. 825 and interest, and that the question in issue between the parties in both the first and the Lower Appellate Courts was whether that money was due, or not, and that a decree having ultimately been passed against him for Rs. 1,089, he is entitled to raise all questions permitted in second appeal included in, or covered by, that decree, and that he is so entitled irrespective of the fact that there may be another simultaneous decree which purported

(1) 85 P. R. 1905 (F. B.)

to modify the decree of the first Court and dismissed his Appeal No. 345. But in my opinion, the proper test is not the contents of a decree. We have to see what was the matter directly and substantially in issue in Appeal No. 345 and the only matter there in issue related to the sum of Rs. 448-8-0. The decision was against the defendant-appellant and as I have already held that there is no valid appeal before this Court in respect of Appeal No. 345, it follows that the decision is final and this appeal in respect of the Rs. 448-8-0 is barred as *res judicata*. The matter in issue in Appeal No. 351 was different and it can make no difference that both matters were dealt with by the same judgment, though, as explained, there are two judgments, and that the decree in Appeal No 351 included the Rs. 448-8-0.

The third preliminary objection is that no second appeal lies in respect of the items of Rs. 150 and Rs. 350, that mere alleged error in weighing evidence is insufficient and that the findings as to these items are ones of fact. The appellant contends that there is no evidence whatever on the record in support of the findings inasmuch as the statement of the plaintiff relied on by the Court was not made as a witness but as a party and no opportunity was given to cross-examine him. The record does not bear out the contention. The plaintiff was examined after the issues were fixed, on a day fixed for evidence, he was given the number 1 and the next witness was numbered 2. He was not cross-examined but that is immaterial. I hold no second appeal lies in respect of these items.

There remains only the question raised by the appellant regarding the liability to pay interest. He contends that the *bahi* entry of Rs. 825 contains no reference to interest and that, under section 92 of the Evidence Act, the evidence of witnesses, who allege that it was settled at the time that interest was to be paid, is inadmissible, that there are no preceding transactions between the parties from which an agreement to pay interest can be implied, nor is there any direct evidence on the point and that the plaintiff has admitted that no interest was agreed to, or fixed at the time of borrowing the Rs. 150 and Rs. 350. Reliance

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was placed on *Bura* v. *Mailia Shah* (1), *Raghu Mal* v. *Bandu* (2) and *Kishor Chand* v. *Guran Ditta Mal* (3). It is also urged that the circumstances were peculiar as the defendant was suspected of being a party to the destruction of the previous *bahi* and that the probabilities are that he was induced to sign a fresh account on the advance of another Rs. 100 and the promise that no interest would be charged and that, otherwise, there is no explanation of an omission to make any entry as to interest. The respondent contends that Rs. 123 out of the total amount of interestallowed is part of the Rs. 448-8-0 and cannot be gone into and I hold that this contention is correct. He also contends that the item of Rs. 225 is admittedly made up of Rs. 220 principal and Rs. 25 interest from which an implied agreement with regard to the payment of interest can be implied. The question of interest has been somewhat perfunctorily dealt with by both the Lower Courts. The finding of the first Court is not very clearly expressed, but what it, apparently, found was that the plaintiff had proved that, at the time the entries relating to the Rs. 825 were made, there was an oral agreement between the parties that interest was to be paid, but that the rate of interest had either not been agreed upon, or had not been proved. The Lower Appellate Court in effect accepts this finding and also holds that the rate of interest allowed is reasonable. The contention of the appellant that evidence regarding the oral agreement is inadmissible under section 92 of the Evidence Act is untenable. The judgment in *Kishor Chand* v. *Guran Ditta Mal* (3) relied on by him in support of his contention is inapplicable. The grounds of that decision are that the instruments sued on were *Shah Jog hundis* drawn with the utmost formality and could not be regarded but as documents of a very formal nature and that, therefore, the alleged oral agreement as to interest on which the *hundis* were silent, was not saved by the second proviso to section 92 of the Evidence Act. The concluding words of that proviso, which are very material, are as follows :—"In considering whether or not this proviso applies the

(1) 104 P. R. 1901. (2) 110 P. R. 1908.
(3) 52 P. R. 1911.

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Court shall have regard to the degree of formality of the document." Entries in *bahis* cannot be said to bear any formal character and may be of various descriptions. I hold, therefore, that the evidence relating to an oral agreement to pay interest is admissible under the second proviso to section 92 of the Evidence Act and that the existence of such an agreement is a question of fact which cannot be considered in second appeal.

For the above reasons I dismiss the appeal with costs throughout.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Bevan-Petman.

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June 4.

KHANDU LAL (DEFENDANT)—*Appellant,*

versus

FAZAL (PLAINTIFF)—*Respondent.*

Civil Appeal No. 2800 of 1918.

Indian Limitation Act, IX of 1908, Article 148—suit for redemption of a lekha mukhi *mortgage—Limitation—starting point of.*

Held, that a suit for redemption of a *lekha-mukhi* mortgage is governed by article 148 of the Limitation Act and the starting point of limitation is the date of the mortgage.

Ranja *v. Mussammat* Fiaree (1), and Gahi Mal *v.* Shera (2) referred to—Also Rattigan's Customary Law, VIII edition, page 151, and Ghose's Law of Mortgage, IV edition, volume I, page 103.

Miscellaneous second appeal from the order of J. Coldstream, Esquire, District Judge, Multan, dated the 6th July 1918, reversing that of Lala Parsotam Lal, Munsif, Multan, dated the 14th February 1918 dismissing the suit.

MOTI SAGAR, for Appellant.

M. L. PURI, for Respondent.

(1) 99 P. R. 1869. (2) 90 P. R. 1881.