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being prevented, as they knew, from paying on the 20th or 21st April, could avoid incurring the alternative liability only by payment before the former date. They failed to pay in time, and thus part of the decree being no longer applicable they must pay according to its other command. We must, for these reasons, reverse the orders of the Courts below, and direct payment of Rs. 2,740 by the first judgment-debtor.

"The parties respectively to bear their own costs." (*See* Printed Judgments for 1875, p. 366.)

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1886 *March* 8.

RANCHHODDA'S KRISHNA'DA'S, PLAINTIFFS, *v.* BA'PU NARHAR, DEFENDANT.*

Evidence Act I of 1872, *Secs.* 11, 13 *and* 40—*Judgments between third parties—Admissibility of such judgment.*

The plaintiff sued to recover arrears of rent for a certain shop, alleging the annual rent to be Rs. 250. The defendant contended that t was only Rs. 60. The defendant and the plaintiff's brother were partners in business, and the plaintiff relied upon the evidence of his brother and on two entries in the firm's books in the writing of his brother. To prove the *bona fides* of these entries, the plaintiff tendered, in evidence, a judgment passed against the defendant in a suit brought by the defendant against the plaintiff's brother, charging him with having improperly debited their firm with Rs. 250 as the rent of the shop.

Held, that the judgment was not admissible as evidence against the defendant in the present suit.

Náranji Bhikábhái v. *Dipá Umed* (1) referred to and distinguished.

THIS was a reference by Ráv Sáheb Dinánáth Atmárám Dalvi, Joint Second Class Subordinate Judge of Ahmednagar, under section 617 of the Civil Procedure Code (Act XIV of 1882).

This was a suit to recover arrears of rent for a shop. The plaintiff alleged that the rent was Rs. 250 *per annum*, while the defendant contended that it was Rs. 60. In support of his allegation, the plaintiff relied upon the evidence of his brother and two entries in his handwriting in the books of the firm, of which the plaintiff's brother and the defendant were partners. To prove

* Civil Reference, No. 40 of 1885.

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the *bona fides* of these entries, the plaintiff offered in evidence a judgment given in favour of the plaintiff's brother in a suit brought by the defendant, charging him (the plaintiff's brother) with improperly debiting their firm with Rs. 250 as the rent of the shop.

The question referred by the Subordinate Judge was, whether that judgment was admissible in evidence in the present suit by the plaintiff.

Gangárám B. Rele for the plaintiff:—The judgment is admissible in evidence, though the parties to the former suit were not the same—*Náranji Bhikábhái* v. *Dipá Umed*(1). The term "transaction" will include such a judgment—*Neamut Ali* v. *Gooroo Doss*(2); *Peari Mohun Mukerji* v. *Drobomoyi Dabia*(3). The only case against me is *Gujju Lall* v. *Fatteh Lall*(4); but where there are conflicting decisions of several Courts, lower Courts are bound to follow those of the Courts to which they are subordinate.

Ghanashám Nilkanth Nádkarni for the defendant:—Section 13 of the Evidence Act (I of 1872) supposes the existence of a right or custom. There is none in this case. The Evidence Act separately provides for the admissibility of judgments. For a judgment to amount to a "transaction" it must be such as is contemplated by section 42—*Gujju Lall* v. *Fatteh Lall*(4). The present judgment would have been admissible under section 43 if its existence had been denied.

SARGENT, C.J.:—The plaintiff sues to recover arrears of rent for a shop. The material question in the case is, whether the rent was Rs. 250 per annum as alleged by plaintiff, or only Rs. 60 as alleged by defendant. The plaintiff relies upon the evidence of his brother, who was a partner of the defendant, and two entries in the firm's books in the handwriting of his brother. In support of the *bona fides* of those entries, he wishes to give in evidence the judgment in a previous suit between the defendant in this suit and plaintiff's brother, in which the former complained that the partnership had been improperly debited

(1) I. L. R., 3 Bom., 3.
(2) 22 Calc. W. R., Civ. Rul., 365.
(3) I. L. R., 11 Calc., 745.
(4) I. L. R., 6 Calc., 171.

by the latter with Rs. 250; and the Court decided against the present defendant. The question referred to us is, whether the judgment in that suit is admissible in evidence. If it is so, it must be under the combined operation of section 43 with either section 11 or section 13 of the Evidence Act I of 1872.

The application of the latter sections is one of considerable importance in the law of evidence, and has given rise to much conflict of judicial authority. In *Neamut Ali* v. *Gooroo Doss*(1), where the plaintiff claimed an "*itmamee*" right to land, the Court admitted, in evidence, against the defendant decrees in two suits in which the "*itmamee*" right had been successfully asserted against a former holder of the tenure that was said to have created the right claimed, but to which the defendant had not been a party. Sir Richard Couch, delivering the judgment of the Court, said that he could not think that such judgments were intended to be excluded, and that the expression "transactions" in section 13 was large enough to include proceedings in suits, and that the section did not require the suit to have been between the same parties, but left it to the Court to decide what weight attached to it. In *Náranji Bhikábhai* v. *Dipá Umed*(2), where the plaintiffs sought to recover arrears of a "*chirda hak*," Westropp, C. J., and Melvill, J., adopting the view taken by Couch, C. J., of section 13, held that decrees establishing the right in prior suits between the same persons were admissible in evidence "for the purpose of showing that the right had not only been asserted, but recognized by the tribunals of the country on several occasions." The above sections were subsequently considered by a Full Bench of the Calcutta High Court in *Gujju Lall* v *Fatteh Lall*(3), where it was held (Mr. Justice Mitter dissenting) that "a former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them." The majority of the

(1) 22 Calc. W. R. Civ. Rul., p. 365. (2) I. L. R., 3 Bom., 3.
(3) I. L. R., 6 Calc., 171.

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Court would appear to have thought that the expression "right" in section 13 only applied to incorporeal rights, and that neither "transaction" or "fact" included judgments within the contemplation of sections 13 and 11.

With regard to the term "rights" in section 13 it is worthy of remark that it only occurs once in the Code before that section and that is in the definition of "facts in issue," where it must necessarily have been used in its largest sense. In the absence, therefore, of any qualification, such as is to be found in section 48, "rights and customs" in section 13 must, we think, be understood as comprehending all rights and customs recognized by law, and, therefore, including a right of ownership. As to the term "transaction," it is doubtless one of large import, and might, although by a somewhat strained use of it, be held to be applicable to proceedings in a suit; but as the result of holding it to be so applicable in section 13 would be to effect a most important departure from the English rule of evidence, which would make judgments, decrees and verdicts of juries only admissible in matters of public interest, it may well be doubted whether such was the intention of the framer of the Code. It is true that, although the Code is, in the main, drawn on the lines of the English Law of Evidence, there is no reason to suppose that it was intended to be a servile copy of it; but, in any case, had such an important and radical change been intended, as Couch, C. J., in the case of *Neamut Ali* v. *Gooroo Doss*[1] admits is the necessary result of construing "transaction" in section 13 as including judgments, we should have expected it to be carried out by a special section framed for that purpose amongst those relating to judgments. The same general remarks apply to the term "fact" in section 11, and derive confirmation from the illustration to section 43. It is plain from the judgments in *Neamut Ali* v. *Gooroo Doss*[2] and *Núranji* v. *Dipá*[3] that the Judges were influenced, in the construction they placed on the term "transaction," by the inference, which they drew from the wording of the sections relating to judgments,

(1) 22 Calc. W. R. Civ. Rul., p. 365. (2) 22 Calc. W. R. Civ. Rul., p. 365.
(3) I. L. R., 3 Bom., p. 3.

that certain judgments which had hitherto been considered admissible would otherwise be excluded. In the Bombay case, it is plain that Westropp, C.J., is alluding to judgments on material issues between the same parties or their representatives, which were conclusive under the old law. And it is not clear from the report of the case before Couch, C.J., that the judgment there in question was not of the same nature. We do not, however, think that the exclusion of such judgments is a necessary inference from the Evidence Act without calling in aid sections 11 and 13. Section 40 may, we think, without unduly straining the language, be read as including them. In *Soorjomonee Dayee* v. *Suddánund Mohapatter* (1), the Privy Council held that the term "cause of action" in clause 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms "taking cognizance of a suit" may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include all cases in which the general law relating to *res judicata* inter parties as then understood applied.

Upon the whole, although we might have wished that the door had been opened somewhat wider for the admission of this class of evidence, we are of opinion that, upon the proper construction of the Evidence Act, the judgment in question is not admissible in evidence against the defendant.

(1) 12 Beng. L. R., 304.