APPELLATE CIVIL.

Before Skemp J.

HAYAT MOHAMMAD (DEFENDANT) Appellant,

versus

THE BAR GAU SHALA, LTD., LYALLPUR (PLAINTIFF) Respondent.

1938

July 5.

Regular Second Appeal No. 334 of 1938.

Civil Procedure Code (Act V of 1908), S. 11 — Res Judicata — *Finding by a Court of Small Causes in a previous suit for rent that defendant was a tenant of plaintiff* — *Whether operates as* res-judicata *in a subsequent suit for rent and ejectment by plaintiff against defendant* — *Court of exclusive jurisdiction, decision by* — *when* res-judicata — *S. 11 of Civil Procedure Code* — *Application of.*

The plaintiff sued defendant for house rent as well as for his ejectment from the house. The trial Court dismissed his suit holding that he had not established his title to the house (though this was not immediately relevant and all that was necessary to find was that the defendant was not his tenant). On appeal the Senior Subordinate Judge, while agreeing with the trial Court on the merits, held that the suit was *res-judicata* because in a previous suit for rent the Judge of the Small Cause Court had found that the defendant was a tenant of the plaintiff and had ordered him to pay rent.

Held, (reversing the decision of the lower Appellate Court) that the finding of the Small Cause Court in this case that the defendant is the tenant of the plaintiff is not *res-judicata* because the Small Couse Court had no jurisdiction to decide the question of title as such, nor to decide the fact or character of the plaintiff's or the defendant's possession.

That the law is that S. 11 of the Code of Civil Procedure must be applied where it can be applied and that the general doctrine of *res-judicata* can only be invoked in cases where S. 11 is silent. A decision by a Court of exclusive jurisdiction is final and operative as *res-judicata* where it has exclusive jurisdiction but not unless it has exclusive jurisdiction.

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Champat v. *Toti Ram* (1) and *Rukmini* v. *Rayaji* (2), followed.

Fazal Hussain v. *Jiwan Shah* (3), *Kapuria* v. *Mst. Ganga Devi* (4) and *Nathumal Manohar Lal* v. *Lachmi Narain-Gauri Shankar* (5), relied upon.

Ishwar Datt v. *General Assurance Society, Ltd.* (6), distinguished.

Other case-law discussed.

Second appeal from the decree of Lala *Purshotam Lal, Senior Subordinate Judge, with Appellate powers, Lyallpur, dated 23rd December, 1937, reversing that of* Malik *Mohammad Aslam Khan, Subordinate Judge, 2nd Class, Lyallpur, dated 26th April, 1937, and decreeing the plaintiff's claim.*

ABDUL KARIM, for Appellant.

J. L. KAPUR, for Respondent.

SKEMP J.—The plaintiff, the Bar Gau Shala, Limited, Lyallpur, sued Hayat Mohammad defendant for Rs.72-14-0 house rent and also sought his ejectment from the house. The trial Judge found that the plaintiff had not established its title to the house in suit, that this was not immediately relevant and all that was necessary to find was that the defendant was not a tenant of the plaintiff. Accordingly the trial Judge dismissed the suit. On appeal the learned Senior Subordinate Judge said : " I am in general agreement with the view taken by the lower Court, so far as the merits of the case are concerned." He gave some reasons for this but held relying on *Ishwar Datt* v. *General Assurance Society, Ltd.* (6) that the suit was *res judicata*, because in a previous suit for rent *Lala* Chhakan Lal, Judge of the Small Cause Court, had

(1) 1934 A. I. R. (Lah.) 324.
(2) I. L. R. (1924) 48 Bom. 541.
(3) I. L. R. (1933) 14 Lah. 369.
(4) I. L. R. (1933) 14 Lah. 437.
(5) 1926 A. I. R. (Lah.) 670.
(6) 1937 A. I. R. (Lah.) 346.

found that the defendant was a tenant of the Gaushala and had ordered him to pay Rs.72 as rent.

The second appeal of Mohammad Hayat has been ably argued by Mr. Abdul Karim. I will say at once that the view of the learned Senior Subordinate Judge as to the application of *res judicata* is wrong.

The facts of *Ishwar Datt* v. *General Assurance Society, Ltd.* (1) are different from the facts of the present case. On the other hand, it has been twice specifically laid down in *Rukmini* v. *Rayaji* (2) and in *Champat* v. *Toti Ram* (3) that the decision of a Small Cause Court on a question of title is not *res judicata* or binding in a regular suit.

The point at issue in the present appeal is the application of section 11 of the Code of Civil Procedure, in particular the words " in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised." The learned lower appellate Judge said in his judgment :—

" Under section 11 the finding in the previous suit would have operated as *res judicata*, if the first Court had jurisdiction to try the subsequent suit. That Court had obviously no jurisdiction to try a suit for ejectment of a tenant. Section 11, therefore, was not applicable, but since the provisions of the Civil Procedure Code are not exhaustive, the matter must be held to be *res judicata* on general principles independently of section 11."

Now, the general rule is that where section 11 can be applied, it must be applied, and that general principles of *res judicata* can only be invoked where section 11 is silent. In *Gokul Mandar* v. *Pudmanund Singh* (4), their Lordships of the Privy Council said :—

" The essence of a Code is to be exhaustive on the

(1) 1937 A. I. R. (Lah.) 346. (3) 1934 A. I. R. (Lah.) 324.
(2) I. L. R. (1924) 48 Bom. 541. (4) I. L. R. (1902) 29 Cal. 707, 715 (P.C.).

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matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

In *Hook* v. *Administrator-General of Bengal* (1), their Lordships following a previous judgment of their own, *Ram Kirpal Shukal* v. *Mst. Rup Kuari* (2), applied *res judicata* in an administration suit to which the terms of section 11 did not apply. Similarly in *Ramchandra Rao* v. *Ramchandra Rao* (3), they applied it to a dispute as to the title to receive compensation which had been referred to the Court, to which section 11 also did not apply—

A Division Bench of this Court took the matter further in *Mussammat Sahibzadi Begum* v. *Muhammad Umar* (4), where Fforde J. said :—

" The plea of *res judicata* is not confined to the provisions of section 11 of the Civil Procedure Code, but may be invoked under general principles of law."

This was dissented from by two other Division Benches of this Court in *Fazal Hussain* v. *Jiwan Shah* (5) and *Kapuria* v. *Mst. Ganga Devi* (6). In *Fazal Hussain* v. *Jiwan Shah* (5), Tek Chand J. after quoting *Gokul Mandar* v. *Pudmanund Singh* (7), criticised *Mussammat Sahibzadi Begum* v. *Muhammad Umar* (4), and said :—

" As regards matters which are specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the

(1) I. L. R. (1921) 48 Cal. 499 (P.C.).
(2) (1883) L. R. 11 I. A. 37.
(3) I. L. R. (1922) 45 Mad. 320 (P.C.).
(4) I. L. R. (1927) 8 Lah. 15.
(5) I. L. R. (1933) 14 Lah. 369.
(6) I. L. R. (1933) 14 Lah. 437.
(7) I. L. R. (1902) 29 Cal. 707, 715 (P.C.).

phraseology used by the Legislature, and have no power to ignore the express provisions of the Statute in order to give effect to the 'general principles of law'."

This judgment was approved by another Bench in *Kapuria* v. *Mst. Ganga Devi* (1), which said :—

"The general rule of *res judicata* which exists apart from the provisions of section 11 * * * * can be resorted to only in those cases which do not strictly fall within the four corners of section 11,"

and held that for the decision in a former case to be *res judicata* in a subsequent suit, the Court which tried the former suit must be competent to try the subsequent suit.

Nathumal Manohar Lal v. *Lachmi Narain Gauri Shankar* (2) is also to the effect that general principles of *res judicata* cannot be extended to cases which are within the terms of section 11.

I am in respectful agreement with the three rulings last mentioned, but would observe in passing that although *Mussammat Sahibzadi Begum* v. *Muhammad Umar* (3) does not lay down the law correctly, I think the decision was correct on its particular facts. Fforde J. said :—

"Had the question of the superior claim of *Mussammat* Nazir Begum and *Mussammat* Wazir Begum been raised in the previous suit, Mohammad Umar could not have succeeded in establishing his claim to a portion of *Mussammat* Abadi Begum's property. Having acquired an interest in some of the property upon a suppression of the fact that there were other persons with a superior right to it, he cannot now

(1) I. L. R. (1933) 14 Lah. 437. (2) 1926 A. I. R. (Lah.) 670.
(3) I. L. R. (1927) 8 Lah. 15.

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use that fact to defeat a claim for partition of another portion of the same estate."

Apparently then the case could have been decided on broader principles of estoppel without invoking estoppel by *res judicata*.

There is one apparent exception to the rule that the first Court must be a Court competent to try the subsequent suit, and that is where the first Court is a Court of exclusive jurisdiction, its decision on any matter on which it has exclusive jurisdiction is binding on the other Courts. An instance of this is a decision by a revenue Court on a matter on which it has exclusive jurisdiction; see *Mauj* v. *Sardara* (1), a Letters Patent Appeal, and *Daulat Ram* v. *Munshi Ram* (2). Similarly if a Small Cause Court decides a matter on which it has exclusive jurisdiction, then that decision is binding on subsequent Courts; see *Velji Dayalji* v. *Firm of Nandlal* (3), *Hemraj* v. *Hargolal* (4) and *Ishwar Datt* v. *General Assurance Society, Ltd.* (5). I think this exception is only apparent because section 11 of the Code of Civil Procedure does not consider or refer to matters tried by a Court of exclusive jurisdiction.

In *Velji Dayalji* v. *Firm of Nandlal* (3) one party sued in the Small Cause Court at Amritsar and obtained an *ex parte* decree. Subsequently the other party sued on the same agreement before the Small Cause Court, Karachi, and although the Small Cause Court at Amritsar had jurisdiction only up to Rs.500 whereas the second suit was for Rs. 900, the matter was held *res judicata* with the remark that if the plea were not to prevail in suits of this nature, the very object of the

(1) 1929 A. I. R. (Lah.) 586.
(2) 1932 A. I. R. (Lah.) 623.
(3) 1926 A. I. R. (Sind) 236.
(4) 1934 A. I. R. (Sind) 112.
(5) 1937 A. I. R. (Lah.) 346.

Legislature in providing for a speedy and summary remedy by conferring exclusive jurisdiction on the Court of Small Causes would be frustrated.

Similarly in *Hemraj* v. *Hargolal* (1), a decision of the Small Cause Court at Amritsar was held *res judicata* in another suit brought by the opposite party on the same agreement in the Small Cause Court at Karachi.

Ishwar Datt v. *General Assurance Society Ltd.* (2) is also very similar. The plaintiff, the agent of an Insurance Company, brought a suit for Rs.108-15-0 in the Small Cause Court, claiming commission from the 1st January, 1932, to the 31st March, 1932. His suit was based upon an agreement with the defendant Insurance Company but was dismissed on the finding that he had violated the terms of the agreement by joining a rival concern. After this he sued in a regular Court claiming commission for similar transactions from the 1st January, 1932, to 3rd August, 1932. The suit was based on the same agreement and actually included the period previously in suit. I have no doubt that it was rightly held to be *res judicata*; but, with deference the statement of the law leaves something to be desired :—

" The principle of *res judicata* is of wider application, as pointed out by their Lordships of the Privy Council in *Hook* v. *Administrator-General of Bengal* (3) and *Ramachandra Rao* v. *Ramachandra Rao* (4). It has been held to govern cases where the matter in issue is the same and has been previously decided by a competent Court. For instance, when a Court has exclusive jurisdiction to try any matter, its decision on that point will operate as *res judicata*."

(1) 1934 A. I. R. (Sind) 112.
(2) 1937 A. I. R. (Lah.) 346.
(3) I. L. R. (1921) 48 Cal. 499 (P.C.).
(4) I. L. R. (1922) 45 Mad. 320 (P.C.).

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This is correct but not complete; it is liable to be misunderstood, and in the present case it has been misunderstood.

Rightly looked at, *Ishwar Datt* v. *General Assurance Society, Ltd.* (1) does not govern the case before me. In the case before me the Small Cause Court had decided a question of title. It had to do so for the purposes of the rent suit it was trying, but far from having exclusive jurisdiction, it had no jurisdiction to try the question of title as such. Hilton J. in *Champat* v. *Toti* (2), put the matter with his customary clarity :—

" The judgment of a Court of exclusive jurisdiction can operate as *res judicata* only on a matter which that Court could exclusively decide. In the present case the Small Cause Court had no exclusive jurisdiction to decide the question of title, nor to decide the fact or character of the plaintiff's or the defendant's possession. At most there was an exclusive jurisdiction to decide the liability to pay rent, which is not the same thing."

This is the true way of putting the matter.

Similarly in *Rukmini* v. *Rayaji* (3), a Division Bench of the Bombay High Court said :—

" No doubt the Small Cause Court had found that the defendant was a tenant of the plaintiff and passed a decree for the plaintiff against the defendant for rent. But that finding of the Small Cause Court could not be *res judicata* under section 11, Civil Procedure Code, unless the Small Cause Court had jurisdiction to decide this suit. This suit is for possession and therefore the finding of the Small Cause Court is not *res judicata*."

This is conclusive and the finding of the Small Cause

(1) 1937 A. I. R. (Lah.) 346. (2) 1934 A. I. R. (Lah.) 324.
(3) I. L. R. (1924) 48 Bom. 541.

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Court in this case that the defendant is the tenant of the plaintiff is not *res judicata*.

For the benefit of the lower Courts in this Province I would repeat that the law is that section 11 must be applied where it can be applied and that the general doctrine of *res judicata* can only be invoked in cases where section 11 is silent. A decision by a Court of exclusive jurisdiction is final and operates as *res judicata* where it has exclusive jurisdiction but not unless it has exclusive jurisdiction. This is only an apparent exception to the rule that section 11 must be applied where it can be.

In the present case if instead of suing for ejectment the Gaushala had sued in the Small Cause Court for rent, the previous judgment would have operated as *res judicata*. It cannot be *res judicata* in the present case because the prayer for ejectment takes the suit away from the jurisdiction of the Court of Small Causes. The respondent's counsel in arguments before me said he was willing to give up the prayer for ejectment; but it was the prayer for ejectment which led to the present suit being lodged in a regular Court. But for that prayer the suit would have been instituted in the Court of Small Causes.

I, therefore, accept this appeal, but as the lower appellate Court, although agreeing with the lower Court, did not give a definite finding on the other matters, saying for instance he "would have found it difficult to hold that the relationship of landlord and tenant is established between the parties," I remand the case to the lower appellate Court for redecision on the merits. The respondent is to pay the appellant's costs in this Court. The parties are to appear before the Senior Subordinate Judge on 5th August, 1938, and ask for a date.

A. K. C.

Appeal accepted.
Case remanded.