1903.

BOMBAY BURMAH TRADING CORPORATION *v.* DORABJI C. SHROFF.

parties is one to which it is impossible to give a numerical expression. It is, however, obvious that the financial and commercial position of the Company may be seriously affected by the questions at issue, and having regard to that and to the importance to Indian Companies generally that these rights should be precisely defined in relation to the point that has arisen in this case, I think that we ought to certify that the case is a fit one for appeal to His Majesty in Council, and we accordingly do so certify.

I have dealt with the case under the Code, because I think that by virtue of section 647 of the Code the present proceedings come within the provisions of Chapter XLV.

The costs to be costs in the appeal.

Attorneys for the Company—*Messrs. Craigie, Lynch and Owen.*

Attorneys for the opponent—*Messrs. Ardesar, Hormasji and Dinsha.*

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

1903. *April* 1.

BHIKABHAI RATANCHAND (ORIGINAL DEFENDANT 2), APPELLANT, *v.* BAI BHURI (ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Civil Procedure Code (Act XIV of 1882), section 13—Suit for arrears of maintenance—Former suit for arrears for a different period—Surety—Continuing guarantee—Pleadings by surety denying liability in a suit do not operate as notice of revocation of suretyship—Contract Act (IX of 1872), section 130.

By a settlement executed in 1896 the first defendant agreed (*inter alia*) to pay maintenance to the plaintiff (his wife) at the rate of Rs. 91 per annum. The second defendant signed the deed as surety. In 1898 the plaintiff sued both defendants to enforce her rights under the settlement and (*inter alia*) for arrears of maintenance for ten months and sixteen days from the 10th November 1897. The defendants pleaded that the deed was void for want of consideration. The first Court found that the settlement was not void, and passed a decree against both the defendants, but as to the payment of arrears of maintenance the

* Second Appeal No. 690 of 1902.

decree was against the first defendant only. The second defendant appealed against the decree so far as it was against him, contending that the settlement was not in any way binding on him. The plaintiff filed cross-objections to the decree, contending that the second defendant ought to have been held liable for the arrears of maintenance. At the hearing of the appeal, however, the plaintiff withdrew her cross-objections, and the decree of the first Court was confirmed with costs.

In 1901 the plaintiff filed this suit against both defendants to recover arrears of maintenance for two years and nine months, commencing from the 27th September, 1898. The second defendant pleaded that, inasmuch as he had not been held liable for maintenance in the former suit, the plaintiff's claim was *res judicata.*

The lower Courts passed a decree for the plaintiff, holding that her claim was not *res judicata.* On appeal to the High Court,

Held, confirming the decree of the lower Courts, that the plaintiff's claim against the second defendant in this suit was not *res judicata.* The only point that was *res judicata* against her by the former suit was her right to the arrears therein claimed, but that did not bar her right to sue the second defendant as surety in respect of the subsequent arrears claimed in the present suit.

It was contended for the second defendant that the pleadings in the former suit operated as notice under section 130 of the Contract Act (IX of 1872), and put an end to his contract of guarantee.

Held, that the denial by the second defendant of his liability in the pleadings in that suit was made for the purposes of pleading and could not have any other effect than was given to it in the suit itself. It could not operate as notice under section 130 of the Contract Act.

SECOND appeal from the decision of Mr. S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

Suit by a wife to recover arrears of maintenance from her husband (defendant 1) and his surety (defendant 2).

By a deed of settlement dated the 23rd June, 1896, the first defendant agreed to provide a house for the plaintiff (his wife), or in default to pay her Rs. 1,000 as its price, and further to pay her maintenance at the rate of Rs. 91 per annum. This deed was signed by the second defendant as surety for the first defendant.

In 1898 the plaintiff sued both the defendants (Suit No. 568 of 1898) for the settlement of the house or its price and for arrear of maintenance for ten months and sixteen days from the 10th November, 1897.

1903.

BHIKABHAI
v.
BAI BHURI.

The defendants pleaded (*inter alia*) that the deed was void as being without consideration.

The Court of first instance held that the deed was not void for want of consideration, and passed a decree against both the defendants so far as the prayer for the house was concerned, but as regards the arrears of maintenance it passed a decree against the first defendant only.

The second defendant appealed against that decree (so far as it was against him) on the ground that the agreement in question was not binding upon him; and the plaintiff filed cross-objections that the second defendant was liable for the arrears of maintenance under the agreement.

At the hearing of the appeal the plaintiff orally withdrew her cross-objections, and the decree of the Court of first instance was confirmed.

In 1901 the plaintiff filed the present suit against both the defendants to recover arrears of maintenance at the rate of Rs. 91 per year for two years and nine months, commencing from the 27th September, 1898.

The first defendant pleaded poverty, but offered to pay Rs. 50 per year as maintenance to the plaintiff.

The second defendant pleaded that, inasmuch as by the decree in the former suit he was not held liable for maintenance, the plaintiff's present claim as against him was *res judicata*.

The Subordinate Judge passed a decree for the plaintiff against both the defendants. In his judgment he said:

The second defendant contends that the claim for maintenance as against him is barred under the provisions of section 13 of the Code of Civil Procedure. It cannot be denied that there was a suit by the present plaintiff against the present defendants to recover maintenance for previous months. The lower Court awarded that claim against defendant 1, and rejected it, though not in so many terms, as against the second defendant. No reasons were given for the dismissal of the claim as against the second defendant, and the order of dismissal was appealed against, but the objection was withdrawn in appeal. The subject-matter in that case was different from the subject-matter in this suit.

On appeal the decree was confirmed by the District Judge on the following grounds:

The point is whether in that (former) suit the question of appellant's liability under the deed was heard and determined within the meaning of section 13 of the Civil Procedure Code. It appears to me clear that it was not. The pleadings, the issues and the judgment in Exhibit 22 all show that the two defendants then made common cause. The issues were concerned with the genuineness of Exhibit 18, the liability of the two defendants jointly to purchase a house for plaintiff and to pay her the arrears of maintenance . . . . No question was raised as to defendant 2's separate position, or whether for any reason he was entitled to be discharged from his liability as surety, nor is there a word said in the judgment on these points until we come to the decretal order, where the Subordinate Judge, for some reason unexplained, orders that the maintenance shall be recoverable from the husband (defendant 1) only. Both the defendants were made liable for the purchase of the house, and against this part of the decree defendant 2 appealed, while plaintiff filed cross-objections maintaining that defendant 2 was equally liable for plaintiff's maintenance. These cross-objections were, however, orally withdrawn in argument by plaintiff's pleader, and the Appellate Court thus merely confirmed the original Court's decree. On these facts I am of opinion that appellant cannot now claim the benefit of section 13, Civil Procedure Code, since the matter now in issue—his separate liability as a surety—was not directly and substantially in issue in the former suit and was not heard and decided. It was for defendant 2 (appellant) to take this present objection in the former suit; as he failed to do so, I think he cannot now claim that the point was judicially decided, merely because the Subordinate Judge in his decretal order, for no reason which can be collected from the judgment, restricted to defendant 1 the liability for arrears of maintenance then due. Moreover, the main relief prayed for in the former suit was the purchase of a house, and that relief was granted as against both defendants. For these reasons I think the plea of *res judicata* fails.

The second defendant appealed to the High Court.

P. M. Mehta (with him *L. A. Shah*) for the appellant (defendant 2):—The plaintiff's claim against the second defendant is *res judicata*. The same claim was made in the former suit, but the decree in that suit as regards maintenance was against the first defendant only. Therefore under explanation III of section 13 of the Civil Procedure Code (XIV of 1882) it must be deemed to have been refused. That decree was confirmed in appeal, and the cross-objections filed by the plaintiff on the point of the second defendant's liability were withdrawn. Under explanation II of section 13 it was necessary for the plaintiff in that former suit to raise the general question of the second defendant's liability for maintenance in order to establish her claim against him.

1903.

BHIKABHAI v. BAI BHURI.

The question, therefore, must be deemed to have been heard and decided against her: *Kameswar Pershad* v. *Rajkumari Ruttun Koer*(1); *Peary Mohun Mukerjee* v. *Ambica Churan*.(2) Next, we submit that, having regard to the pleadings in the former suit, the guarantee of the second defendant is at an end: section 130 of the Contract Act (IX of 1872).

M. P. Modi (with him *G. S. Rao*) for the respondent (plaintiff):—In the previous litigation the general question as to the binding character of the agreement was raised and decided against both the defendants. No doubt we claimed arrears of maintenance from both the defendants, and so far the relief against the second defendant must be deemed to have been refused. But the general question whether or not the agreement was bad for want of consideration was decided against both the defendants and is now *res judicata* against the second defendant. It was not necessary for us to raise separately the question of the general liability of the second defendant for maintenance, and it could not be treated as having been decided against us. As regards the second point, admittedly no notice was given under section 130 of the Contract Act (IX of 1872), and the pleadings in the previous suit cannot be treated as notice under that section.

CHANDAVARKAR, J.:—We agree with the Courts below in the view that the present suit, which was brought by the plaintiff to recover the arrears of maintenance for two years and nine months, commencing with the 27th September, 1898, due upon a deed executed by the first defendant, who is her husband, and by the second defendant as surety for him, is not barred so far as the second defendant's liability is concerned by the decree in Suit No. 568 of 1898.

In that suit, no doubt, the plaintiff sought to hold the second defendant liable as surety for the arrears claimed therein on the basis of the deed on which the present action is founded, and it is also true that the Subordinate Judge passed a decree therein for the arrears claimed as against defendant 1 only. But "in order to see what was in issue in a suit or what has been heard

(1) (1892) 20 Cal. 79; 19 I. A. 234.
(2) (1897) 24 Cal. 900.

and decided, the judgment must be looked at. The decree, according to the Code of Civil Procedure, is only to state the relief granted or other determination of the suit": *Kali Krishna Tagore* v. *The Secretary of State for India.*[1] Now, the judgment in the previous suit did not decide the question of the second defendant's liability as surety in his favour. On the other hand, it shows that the Subordinate Judge found that the deed was executed by both the defendants and was supported by consideration, and that the plaintiff was entitled to the reliefs sought. But for some reason or other in the decretal order he held the first defendant only liable for the arrears. Taking the judgment and the decree together, we think we must take them to mean that the Subordinate Judge refused merely the relief as to the arrears claimed in the suit so far as defendant 2 was concerned. That is the only point which is *res judicata* as against the plaintiff. She alleged her right as against that defendant as surety, and that was found in her favour in the judgment, and the mere fact that the arrears of the particular period to which the previous suit related were not allowed by the decree, so far as defendant 2 was concerned, cannot bar her right to sue him as surety on the same document as to the arrears of a subsequent period, the cause of action as to which is distinct and separate. "Where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shown that the plaintiff had an opportunity of recovering, and, but for his own fault, might have recovered in the former suit that which he seeks to recover in the second action": per Willes, J., in *Nelson* v. *Couch.*[2] Applying this principle to the facts of the present case, the plaintiff could not have recovered in the former suit the arrears now claimed, for then they had not become due. All that she could have done in that suit she did. She could have relied on the deed and sought to hold defendant 2 liable on it, and she did both. The judgment was that defendant 2 was liable on the deed; so far

(1) (1888) L. R. 15 I. A. 193; 16 Cal. 173.
(2) (1863) 15 C. B. N. S. 99 at pp. 108, 109.

1903.

BHIKABHAI *v.* BAI BHURI.

her general right based on the deed was found in her favour. All that went against her was the decretal order refusing to award to her the arrears due for the period to which the suit related. Her present suit is not for those arrears, but is for the arrears due for a subsequent period, and in virtue of a general right based on the deed passed by both the defendants and found valid and binding as against both in the previous suit. The plea of *res judicata*, therefore, fails.

As to the second point, the mere fact that the second defendant denied his liability as surety in the previous suit cannot be regarded as a notice putting an end to the contract under section 130 of the Contract Act. That denial was made for the purposes of pleading, and cannot have any other effect given to it than was given in the suit itself. See *Balaji Sitaram* v. *Bhikaji Soyare*,[1] where Westropp, C.J., held that a mere denial of liability by a party in a previous suit cannot operate as notice. Moreover, the second defendant in the previous suit denied the existence of a legal contract; such denial cannot be given the effect of a notice to the plaintiff that the second defendant wished to put an end to a legal contract which is proved. We confirm the decree with costs.

Decree confirmed.

(1) (1881) 8 Bom. 164.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1903. *March* 27. *April* 4, 17.

HARI PANDURANG AND ANOTHER, PLAINTIFFS, *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY AND JAMES McNEILL, SPECIAL COLLECTOR UNDER THE LAND ACQUISITION ACT FOR THE ACQUISITION OF LAND FOR THE PURPOSE OF THE CITY OF BOMBAY IMPROVEMENT TRUST, DEFENDANTS.*

Jurisdiction—Improvement Trust Act (Bom. Act IV of 1898)—Legislative powers of Governor of Bombay in Council—Jurisdiction of High Court to consider whether ultra vires—Subordinate Legislature—Creation of new

* Suit No. 113 of 1903.