1900.

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING AND Co.

the Zanzibar Court has awarded is due either to attending to evidence not properly applicable to the case, or to general considerations which ought not to have been allowed to enter into the mind at all. As regards evidence they have given misleading importance to sales of small building plots within or close to Mombasa; and they have treated the transfer from one set of plaintiffs to the other as if it had some relation to market value. As regards general considerations, possibly that of the behaviour of the Collector, and certainly the large importance attached to "potential values" have been sources of error.

The Zanzibar Court made one decree on both appeals of the plaintiffs. It should have dismissed both with costs. Their Lordships will humbly advise His Majesty the King to make an order to that effect on the defendant's appeals, and to dismiss the plaintiffs' appeals. The plaintiffs must pay to the defendant the costs of the consolidated appeals.

Appeals allowed.

Solicitor for the appellant—*The Solicitor, India Office.*

Solicitors for the respondents—*Messrs. Blyth, Dutton, Hartley and Blyth.*

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Chandavarkar.

VISHNU VASUDEV JUVEKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMLING BHIKLING GURAV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1901. *July* 4.

Res judicata—Civil Procedure Code (Act XIV of 1882), section 13—Khoti Settlement Act (Bombay Act I of 1880), section 33—Suit to recover thal (rent-in-kind) for 1898-99—Previous suit to recover thal for 1897-98.

The plaintiff, a khot, sued to recover *thal* (rent-in-kind) from the defendants for the year 1898-99. He also claimed rent for the betel-nut trees growing on the land. The defence was that under the botkhat (statement) prepared by the Settlement Officer under the Khoti Settlement Act (Bombay Act I of 1880), the plaintiff was not entitled to claim any rent in respect of the betel-nut trees.

* Second Appeal No. 643 of 1900.

1901.

VISHNU v. RAMLING.

A previous suit (No. 718 of 1898) had been brought by the plaintiff against the defendants to recover *thal* for the year 1897-98. In it the plaintiff had claimed *inter alia* rent (*thal*) in respect of the same betel-nut trees, alleging that the present defendants were "liable to pay *thal* to the plaintiff according to practice." The defendants appeared and applied for time to put in their written statement, but their application was refused. The only issue raised in the case was whether the *ábhávani* (estimated produce) was proved. The Judge held it proved and decreed the claim.

It was contended in the present suit that the decision in that suit (No. 718 of 1898) operated as *res judicata*;

Held, by *Fulton, J.*, that the decision in suit No. 718 of 1898 did not bar the defence based on section 33 of the Khoti Settlement Act (Bombay Act I of 1880). The mere fact that in the former suit *thal* or the produce of betel-nuts may have been wrongly awarded could not alter the provisions of the law, and therefore under the circumstances no question of *res judicata* arose.

Held, by *Chandavarkar, J.*, that the claim in respect of the betel-nut trees was not *res judicata* by the decision in the previous suit. The plaintiff in his plaint in that suit did not allege what was the rate according to practice or that according to practice the defendants were liable to pay *thal* in respect of betel-nuts. He merely specified betel-nuts as one of the items in respect of which *thal* was payable to him for the year 1897-98 and the rate at which it was payable that year. The question of defendants' liability in respect of betel-nuts not only for the year 1897-98, but for all years according to practice, was not alleged, and was therefore not directly and substantially in issue in the previous suit. All that the former suit decided was that *thal* was payable in respect of betel-nuts for the year 1897-98 as alleged and claimed in the plaint and not according to practice.

Held, also, on the merits that having regard to the Collector's botkhat (statement) the plaintiff was not entitled to recover rent in respect of betel-nuts.

The rule of English law that where the allegation on the record is uncertain there is no *res judicata* is also the rule embodied in explanation I to section 13 of the Civil Procedure Code (Act XIV of 1882).

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnágiri, confirming the decree of Ráo Sáheb G. D. Deshmukh, Second Class Subordinate Judge of Dápoli.

The plaintiff, a khot, sued to recover Rs. 16-2-9 on account of *thal* (rent-in-kind) of certain khoti land for the year 1898-99 and including a share of the produce of betel-nut trees growing on garden land.

The defendants contended that the plaintiff's *ábhávani* (estimate of the produce) was not correct.

The Subordinate Judge awarded the claim except as to the

produce of the betel-nut trees. He rejected the latter claim on the ground that the Survey officer had not determined what should be paid on account of such trees (section 33 (1) of the Khoti Settlement Act, Bombay Act I of 1880).

On appeal by the plaintiff the Judge confirmed the decree.

The following is an extract from his judgment :

On the first point (namely, is the plaintiff entitled to recover *thal* for the betel-nut trees, and if so, what?) I hold in the negative. This case is exactly like that at page 519 of the Printed Judgments for 1895. The Settlement Officer has awarded rent only for jack trees and for trees of no other kind. The plaintiff has sought to put in evidence in appeal certain decrees which he obtained formerly for the produce of betel-nut trees. But first these decrees ought to have been produced in the lower Court ; and secondly, I do not see what good they can do in the face of the explicit terms of section 33 of the Khoti Act and the ruling quoted above.

The plaintiff preferred a second appeal. The plaintiff's pleader having contended during the course of his argument in second appeal that the Judge erred in not admitting in evidence the decrees referred to in his judgment, the High Court adjourned the hearing, and sent for the record in suit No. 718 of 1898, and allowed the plaintiff to put it in evidence. The record showed that the present plaintiff had brought that suit against the present defendants in respect of the same land to recover *thal*

(1) Section 33 of the Khoti Settlement Act (Bombay Act I of 1880) :—

33. The rent payable to the khot by privileged occupants shall be as follows (namely) :

(*a*) by a dhárekari : the survey assessment of his land ;

(*b*) by a quasi-dhárekari : the survey assessment of his land and in addition thereto the amounts of grain or money respectively set forth in the schedule ;

(*c*) by an occupancy tenant : such fixed amount, whether in money or in kind, as may have been agreed upon or as may at the time of the framing of the survey record, or at any subsequent period, be agreed upon between the khot and the said tenant ;

or on the expiry of the term for which any such agreement shall have been, or shall be made, or if no such agreement have been or be made, such fixed share of the gross annual produce of the said tenant's land, not exceeding one-half in the case of rice land, nor one-third in the case of varkas land, and such share, if any, of the produce of the fruit-trees on the said tenant's land as the Survey Officer who frames the survey record shall determine to be the customary amount hitherto paid by occupancy tenants in the village in which the said land is situate.

1901.

VISHNU v. R. MLING.

for the year 1897-98 and also to recover a share of the betel-nut produce. The defendants in that case having failed to file a written statement, applied to the Court to give further time to file one, but the application was refused and the Court awarded the plaintiff's claim.

Mahadeo R. Bodas for the appellant (plaintiff) :— We contend that we are entitled to recover the produce of the betel-nut trees. Section 33 of the Khoti Settlement Act (Bombay Act I of 1880) deals only with rice and varkas lands and not garden lands. Betel-nut crop is not a produce of fruit trees, and therefore the last clause of that section cannot apply. The land in suit is not garden land. We submit that betel-nut should be classed as the produce of ordinary land, and the claim being for a share of the produce of the land, our whole claim ought to have been awarded. The fact that the betel-nut trees are not mentioned in the Collector's record does not affect the question. The entry in the Collector's record is not final, and the Civil Courts have authority to revise or cancel it—*Vithal Atmaram* v. *Yesa*.[1]

Further, we contend that the decision in suit No. 718 of 1898 operates as *res judicata*. In that suit the produce of betel-nut trees was awarded. The defendants cannot raise the same question now in this suit. It is barred under section 13, explanation II, of the Civil Procedure Code.

Chintamani A. Rele for the respondents (defendants) :—The entry in the Collector's record is final under section 17 of the Khoti Act and the Civil Courts have no power to modify or revise it. It is silent as to the produce of betel-nut trees. It is an entry specifying the nature and amount of rent, and as such is final—*Balaji Raghunath* v. *Bal bin Raghoji*,[2] *Krishnaji* v. *Krishnaji*.[3] The ruling in *Hari bin Janu* v. *Balaji Narayan*[4] relied on by the Judge applies. The decision in *Vithal Atmaram* v. *Yesa*[5] is not in point as it related to an entry concerning tenure. Section 33 of the Khoti Act relates to three sorts of lands, namely, varkas

(1) (1896) 22 Bom. 95.
(2) (1895) 21 Bom. 235.
(3) (1896) 21 Bom. 467.
(4) P. J. 1895, p. 519.
(5) (1896) 22 Bom. 95.

land, rice land, and land containing fruit trees. Betel-nut trees are fruit trees. If the plaintiff is dissatisfied with the entry, his remedy is to apply to the Revenue authorities.

Our next contention is that the decision in suit No. 718 of 1898 cannot operate as *res judicata*. In that suit no time was given to the defendants to put in their written statement. They had therefore no opportunity of defending the suit. The decree was in the nature of an *ex-parte* decree. As to the value to be attached to *ex-parte* decrees in suits for the recovery of rent when the question of *res judicata* is raised, we rely upon *Modhusudun Shaha* v. *Brae*,(1) *Goga Pershad* v. *Tarinee Kant*.(2) In suit No. 718 of 1898 no issue was raised except the general issue, namely, whether or not the sum claimed was due. In the present case the cause of action is different, each year's rent being itself a separate and entire cause of action. If the determination in the previous suit had been with respect to title to recover rent generally and had not been limited to the rent of a particular year, then the question would be *res judicata*. The rent claimed in the present suit accrued due after the decree in suit No. 718 of 1898. The subject-matter of the two suits is different. All that the Court decided in that suit was that a particular amount of rent was due for a particular year. The present claim was not then directly and substantially in issue. Therefore explanation II, section 13, of the Civil Procedure Code has no application—*Roghoonath Mundul* v. *Juggut Bundhoo*,(3) *Punnoo Singh* v. *Nirghin Singh*,(4) *Modhusudun Shaha* v. *Brae*,(5) *Hurry Behari* v. *Pargun Ahir*,(6) *Nil Madhub* v. *Brojo Nath*,(7) *Kailash Mondul* v. *Baroda Sundari*,(8) *Sarkum Abu* v. *Rahaman Buksh*,(9) *Sukh Lal* v. *Bhikhi*.(10)

The next point is, if the entry in the Collector's record is final, the question of *res judicata* does not arise at all. An issue of law can never be *res judicata*—*Chimanlal* v. *Bapubhai*,(11) *Parthasarada* v. *Chinnakrishna*.(12)

(1) (1889) 16 Cal. 300.
(2) (1874) 23 Cal. W. R. 140.
(3) (1881) 7 Cal. 214.
(4) (1881) *Ibid*. 298.
(5) (1889) 16 Cal. 300.
(6) (1890) 19 Cal. 656.
(7) (1893) 21 Cal. 236.
(8) (1897) 24 Cal. 711.
(9) (1896) *Ibid*. 83.
(10) (1888) 11 All. 187.
(11) (1897) 22 Bom. 669.
(12) (1882) 5 Mad. 304.

1901.

VISHNU v. RAMLING.

The decision in suit No. 718 of 1898 has the effect of modifying an entry which was made under section 33 of the Khoti Act. Civil Courts have no jurisdiction to modify such entry. A Court in which a plea of *res judicata* is raised can inquire into the jurisdiction of the Court which passed the previous decree—*Gunnesh Pattro* v. *Ram Nidhee*.(1)

Mahadeo R. Bodas in reply :—The former decree cannot be said to be *ex-parte*. It was owing to the defendant's default that there was no written statement. In that suit our title to the share of the betel-nut produce was decided. In the present suit the question is as to the same title. We rely on *Kishan Sahai* v. *Aladad Khan*.(2)

FULTON, J. :—I think that the decision in suit No. 718 of 1898 does not bar the defence based on section 33 of the Bombay Act I of 1880. The mere fact that in the former suit *thal* on the produce of betel-nuts may have been erroneously awarded cannot alter the provisions of the law. It is not alleged that the claim is founded on agreement. It is based on practice, and for such a case the law allows the khot to recover only such share, if any, of the produce of the fruit trees as the Survey Officer who frames the survey record shall determine to be customary. In these circumstances I agree with the District Judge in thinking that no question of *res judicata* can arise—*Chimanlal* v. *Bapubhai* (3) and *Parthasaradi* v. *Chinnakkrishna*.(4)

I therefore concur in confirming the decree with costs.

CHANDAVARKAR, J. :—This is a suit brought by the appellant to recover *thal* from the respondents for the year 1898-99. The appellant, among other amounts, claims rent for the betel-nut trees raised by the respondents on the land held by them. The defence is that under the botkhat prepared by the Settlement Officer under the Khoti Act, the appellant is not entitled to claim any *thal* in respect of the betel-nut trees.

The first question is whether the claim in respect of the betel-nuts is *res judicata* by the decision in suit No. 718 of 1898

(1) (1874) 22 Cal. W. R. 361.
(2) (1891) 14 All. 64.
(3) (1897) 22 Bom. 669.
(4) (1882) 5 Mad. 304.

of the Second Class Subordinate Judge's Court at Dápoli. That was a suit between the same parties, and the present appellant claimed in it *inter alia* rent in respect of betel-nuts for the year 1897-98. In his plaint in that suit the appellant stated that the present respondents were "liable to pay *thal* (rent) to the plaintiff according to practice," and then he gave the value of the fruits and grain due to him as *thal* from the defendants for the year 1897-98. He did not specifically allege that *according to practice* he was entitled to rent in respect of the particular kinds of grain and fruit mentioned in the plaint not only for the year 1897-98 but for every year, nor did he state that the rates mentioned in the plaint were the rates prescribed by practice and therefore applicable to all years. The defendants appeared and asked for time to put in a written statement, but the Subordinate Judge declined to allow any time. The only issue raised in the case was whether the *abhávani* was proved. The Subordinate Judge held that it was and that the claim was correct. He accordingly decreed the claim with costs against the defendants. It is contended that the decision in that suit is *res judicata*, because the Court there must be taken to have finally decided that the plaintiff has a right every year to recover rent in respect of betel-nuts and that it is no longer open to the defendants to re-open the question by relying on the Settlement Officer's decision. Section 13 of the Code of Civil Procedure says that no Court shall try any suit or issue in which the matter directly and substantially in issue has been *directly and substantially* in issue in a former suit between the same parties. In the former suit it is true the plaintiff alleged that the defendants were liable to pay *thal* "*according to practice*," and the question of their liability to pay *thal* must be taken to have been directly and substantially in issue in that suit as it is in the present. But it is one thing to say that plaintiff is entitled to claim *thal* according to practice and another thing to say what that *thal* consists of, according to the same practice. The plaintiff in his plaint in the previous suit did not allege what the rate was according to practice, or that, according to that practice, the defendants were liable to pay *thal* in respect of betel-nuts. He merely specified betel-nuts as one of the items in respect of which *thal* was payable to him for the

1901.

VISHNU v. RAMLING.

year 1897-98 and the rate at which it was payable for that year. The question of the defendants' liability in respect of betel-nuts not only for the year 1897-98 but for all years *according to practice* was not alleged, and therefore not directly and substantially in issue in the previous suit. The defendants were not under the circumstances called upon to plead in defence that, according to practice, they were not liable to pay *thal* in respect of betel-nuts whether for the year 1897-98 or any subsequent period. The rule of English law that where the allegation on the record is uncertain there is no *res judicata* is also the rule embodied in section 13 of the Code. "If a thing be not directly and precisely alleged, it shall be no estoppel."(1) That rule is reproduced in explanation I of section 13, and before it could be said that the defendants might and ought to have made their present contention a ground of defence in the previous suit, we ought to be satisfied that there had been in that suit a precise allegation to which the contention is an answer. All that the former suit must be held to have decided is that *thal* was payable in respect of betel-nuts for the year 1897-98, as alleged and claimed in the plaint, and not according to practice. On these grounds I think the present claim is not barred as *res judicata*.

On the merits we agree with the lower Courts in holding that under the botkhat the plaintiff is not entitled to claim rent in respect of betel-nuts. We therefore confirm the decree with costs.

Decree confirmed.

(1) Co. Litt. 352 b.