APPELLATE CIVIL

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915. *September 22.*

FAKIRCHAND LALLUBHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* NAGINCHAND KALIDAS AND OTHERS (ORIGINAL DEFENDANTS NOS. 3 TO 6), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11—Res Judicata—*Applicability of the principle as against co-defendants.*

A deposit of money in a firm was owned in equal moities by D and L. In a suit brought by D in the High Court of Bombay to recover his moiety of the deposit, his brother L who was a partner in the firm admitted his claim; but it was contested by the other partners, defendants Nos. 1 and 2. Defendants Nos. 3 to 6 contended that they were not partners in the firm at all. The Court passed a decree against L and defendants Nos. 1 and 2. The firm made losses and ceased to work. L, thereupon, filed the present suit in the Court of the Subordinate Judge at Surat for a dissolution of the firm and for taking its accounts. D was made a party to the suit as a creditor of the firm. The defendants Nos. 3 to 6 again contended that they were not partners in the firm. A question having arisen whether the contention was *res judicata* in the present suit:—

Held, that the relief given to D in the earlier suit did not require or involve a decision of any case between the co-defendants, and, therefore, the co-defendants were not to be bound as between each other by the Court's proceeding and decision which were necessary only to the decree which D obtained.

Per BATCHELOR, J.:—"The Court is slow to enforce the principle of *res judicata* as against co-defendants, and the limits of the operation of the principle in such cases seem to me to be narrowly laid down."

SECOND appeal from the decision of T. N. Sanjana, Judge of the Court of Small Causes, with Appellate Powers, at Surat, confirming the decree passed by B. N. Sanjana, Subordinate Judge at Surat.

Suit for dissolution of a partnership and for taking its accounts.

One Bai Samrath had deposited a sum of Rs. 35,000 in the firm carried on in the name and style of Khimchand Kalidas. By a deed of gift she transferred her

* Second Appeal No. 757 of 1914.

right to that amount to her two brothers, Dahyabhai and Lallubhai.

Lallubhai was one of the partners in the firm of Khimchand Kalidas.

Early in 1910, Dahyabhai filed a suit (No. 55 of 1910) in the High Court of Bombay against the firm of Khimchand Kalidas, to recover his moiety of the deposit of Rs. 35,000. Lallubhai admitted the claim, but his other partners (defendants Nos. 1 and 2) contested it. Defendants Nos. 3 to 6 contended that they were not partners in the firm. The Court passed a decree only against Lallubhai and defendants Nos. 1 and 2.

In the meanwhile, the firm of Khimchand Kalidas suffered losses and ceased to work.

On the 20th January 1910, Lallubhai filed the present suit in the Court of the Subordinate Judge at Surat for dissolution of the partnership and for accounts. The defendants to this suit were defendants Nos. 1 and 2, and defendants Nos. 3 to 6 in the previous suit and Dahyabhai (defendant No. 7). The defendants Nos. 3 to 6 again denied that they were partners of the firm.

A question then arose whether the finding in the first suit that defendants Nos. 3 to 6 were not partners in the firm operated as *res judicata* in the present suit; the Subordinate Judge held that it did not, on the following grounds :—

> The Court held that they were not partners and dismissed the suit against them. Thus not only were all the parties here also parties there—though not exactly arranged in the same way, but the precise question raised here was directly and substantially in issue there and actually decided. Still the one essential element to the applicability of the principle of *res judicata*, viz., that the question in both suits must be in issue between the same parties is absent. It is not sufficient that the parties to the two suits are the same and the question in issue is the same. But the question must also be in issue between the same parties. In the former suit the question was in issue between the present defendant No. 7 on one side and the defendants Nos. 3 to 6 on the other.

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The present plaintiff was not interested in the decision of that question in the previous suit, except indirectly. So far as his liability was concerned it was of no consequence how that question was determined. As soon as the two preliminary questions of jurisdiction and limitation raised in that suit were disposed of his liability to the defendant No. 7's claim stood confessed and judgment might have been immediately pronounced against him before even the question of defendants 3 to 6's liability was gone into. It was not even open to him to lead evidence on the point or appeal against the finding on it. Thus though the parties to the two suits are the same and the principal matter in issue is also the same, yet the matter being in issue between different parties the former decision cannot operate as *res judicata*; see *Bhagwant Singh* v. *Tej Kuar*, 8 All. 91.

On a consideration of the merits of the case, the learned Judge came to the conclusion that defendants Nos. 3 to 6 were not partners in the firm. He, therefore, passed a decree for dissolution of partnership as between Lallubhai and defendants Nos. 1 and 2; and ordered accounts to be taken.

On appeal, the lower appellate Court came to the conclusion that the bar of *res judicata* applied, on the following grounds:—

It is true that in that suit the plaintiff and the defendants Nos. 1 to 6 in this suit were all arrayed on one side, but even as between co-defendants a matter may be *res judicata*. But for this effect to arise there must be (*a*) a conflict of interest between the defendants, and (*b*) an adjudication between the defendants necessary to give the appropriate relief to the plaintiff, and (*c*) a judgment defining the real rights and obligations of the defendants *inter se* given. Without necessity a judgment will not be *res judicata* amongst them by mere inference from the fact that they have been effectively defeated in resisting a claim to a share made against them as a group (11 Bom. 216; 25 Bom. 74; 18 All. 65; 22 All. 386; 29 Mad. 515; 30 Mad. 447 and 31 Cal. 95).

This being the law, the first question is, was there a conflict of interests between the defendants *inter se*. Beyond doubt, in that suit the conflict was not only between the plaintiff on one side and the defendants or some of them on the other; but it was between the defendants themselves as to whether all seven of them constituted the firm of Khimchand Kalidas and were liable to the plaintiff's claim or only three of them. Who were the members of that firm was a matter in issue not only between the plaintiff and the defendants in

that suit but also between the defendants themselves. The present plaintiff who was the defendant No. 4 in that suit sided with his brother, the plaintiff in that suit, and contended that all seven constituted the firm and all seven were liable for the claim. At the time this suit was pending he was as much interested as the plaintiff in that case in having the decision in his favour on the point. The other defendants contended that only three of them, namely, the plaintiff and the defendants Nos. 1 and 2 in this suit were liable and not the rest.

Secondly, an adjudication on this point in conflict was necessary to give the appropriate relief to the plaintiff in that case. The suit was brought not against the defendants individually, but against them as representing the firm of Khimchand Kalidas. Without determining who constituted that firm the decree could not have been passed against any of the defendants individually. In order to decide whether the plaintiff should have the decree against all seven or against three only as representing the firm it was necessary to decide as between the defendants themselves whether all seven were partners in the firm as alleged by the defendant No. 4 in that suit (*i.e.*, the plaintiff in this case) or three only as alleged by the other defendants.

Thirdly, a final judgment determining the real rights and obligations of the defendants *inter se* in the firm has been given by a competent Court after hearing all the parties. That judgment determined not only who were liable to pay the amount sued for by the plaintiff in that case, but also determined as between the defendants who were the members of the firm of Khimchand Kalidas which was admittedly liable to pay the amount. I, therefore, hold that all three ingredients mentioned above exist in this case and the adjudication operates as *res judicata*.

To hold otherwise would be to court two different judgments on one and the same point of fact between the same parties in case this Court was forced on the evidence before it to come to a different conclusion from that arrived at by the High Court in the other suit. It is only when the plaintiff in the subsequent suit was only a nominal party in the prior suit that the previous judgment does not operate as *res judicata* (25 Bom. 74). It was open to the present plaintiff to lead evidence in that suit to show that all seven were partners in the firm and it was open to him to appeal against the decision given in that suit. All the ingredients necessary to constitute an adjudication a *res judicata* existed in this case.

The decree passed by the first Court was confirmed on the above ground only.

The heirs of the plaintiff Lallubhai appealed to the High Court.

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T. R. Desai for the appellants.—The first suit was brought by a creditor of the firm of Khimchand Kalidas: all persons who were alleged to be partners in the firm were made defendants. It was there decided that Lallubhai and defendants Nos. 1 and 2 were partners and that defendants Nos. 3 to 6 were not partners. In the present suit, Lallubhai who was plaintiff in the first suit is joined as defendant No. 7. The parties to both suits are the same though they are differently arrayed. The question for decision in the second suit is the question which was litigated in the first suit, viz., are defendants Nos. 3 to 6 liable as partners. We submit that the decision of the question is not barred as *res judicata*; for the finding arrived at on the point in the first suit was one as between the defendants *inter se*: see *Bhagwant Singh* v. *Tej Kuar* [1]; *Cottingham* v. *Earl of Shrewsbury* [2]; *Ramchandra Narayan* v. *Narayan Mahadev* [3]. Further, to amount to *res judicata* there must be a conflict of interests among defendants and a judgment defining the rights and obligations of the defendants *inter se*. There can be no *res judicata* by mere inference from the fact that the present plaintiff and defendants were in 1910 collectively defeated in resisting a claim made against them as a group: see *Balambhat* v. *Narayanbhat* [4] and *Ahmad Ali* v. *Najabat Khan* [5].

G. N. Thakor for respondents Nos. 1 and 2:—The bar of *res judicata* is clearly applicable to the present case. All the requirements necessary to be complied with under section 11 of the Civil Procedure Code (Act V of 1908) are present here: viz., (1) the same parties; (2) a conflict of interest between defendants *inter se*; and (3) a decision on the same issue.

[1] (1885) 8 All. 91.
[2] (1843) 3 Hare 627 at p. 638.
[3] (1886) 11 Bom. 216 at p. 219.
[4] (1900) 25 Bom. 74.
[5] (1895) 18 All. 65.

The judgment in the first suit deals with the point as if raising conflict among defendants *inter se*. The defence of each affects the liability of others: see *Ramchandra Narayan* v. *Narayan Mahadev* [1] and *Balambhat* v. *Narayanbhat* [2]. The case of *Bhagwant Singh* v. *Tej Kuar* [3] does not apply.

M. D. Daru for respondents Nos. 3 and 4, supported respondents Nos. 1 and 2.

BATCHELOR, J. :—The only question involved in this appeal is, whether Mr. Justice Russell's decision in Suit No. 55 of 1910 brought in this Court is now *res judicata* between the parties. The learned Judge of the lower appellate Court has held that the decision is *res judicata*, and the plaintiffs-appellants contend that that view is erroneous.

The suit of 1910 was brought by the present plaintiffs' brother, an outside creditor, against the then defendants as being members of a partnership firm in which a sum of Rs. 17,500 had been deposited. It is admitted that that suit and the present suit were between the same parties. In the earlier suit, the father of the plaintiff No. 1 was defendant No. 4. He admitted his liability to the then plaintiff. The plaintiff in that suit had contended that the present respondents were liable as members of the partnership firm which had received the deposit, and the then 4th defendant, now the plaintiff, admitted or contended that that was the case. In other words he made common cause with the then plaintiff in asserting that the present respondents were partners in the firm. The Court decided that the present respondents were not partners in the firm, and it is this decision which has been held by the lower appellate Court to act as *res judicata* in this suit.

[1] (1886) 11 Bom. 216 at p. 219. [2] (1900) 25 Bom. 74.
[3] (1885) 8 All. 91.

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As I have indicated, the parties between whom the decision is now claimed as *res judicata* were co-defendants in the earlier suit. In considering whether the determination operates as *res judicata*, I think the first consideration to be borne in mind is that the Court is slow to enforce the principle of *res judicata* as against co-defendants, and the limits of the operation of the principle in such cases seem to me to be narrowly laid down. The leading case on the subject in Bombay is Mr. Justice West's decision in the case of *Ramchandra Narayan* v. *Narayan Mahadev*, [1] where the learned Judge observes: "Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication...and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants." That exposition followed upon what was said by Vice-Chancellor Wigram in *Cottingham* v. *Earl of Shrewsbury*, [2] where the Vice-Chancellor observed: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." These pronouncements seem to me to indicate the reluctance which the Courts ordinarily feel to extending the doctrine of *res judicata* to co-defendants. In the

[1] (1886) 11 Bom. 216 at p. 220. [2] (1843) 3 Hare 627 at p. 638.

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case before us I am of opinion that the doctrine is not properly applicable to the co-defendants. In the first place I do not think that there was any real conflict of interests between the defendant No. 4 and the other defendants in the Suit of 1910. It is quite true that the defendant 4 made a different case from the case made by the other defendants. But that, it seems to me, is not tantamount to a real conflict of interest. The only interest which each of the defendants in the Suit of 1910 had was in regard to the full liability of each one of them to the then plaintiff. Now the 4th defendant admitted his liability, and appearing in person, it seems that he put in no written statement. In any event his liability, which he admitted, was not affected by the question whether his co-defendants were or were not liable to the plaintiff. Next, though in this respect the case of the 4th defendant differed from that of the other defendants, I cannot doubt but that the real contest in that suit was, and remained, a contest between the plaintiff and the other defendants. It is the fact that it was necessary for the Court to decide the question whether the other defendants were or were not members of the partnership. But I cannot concede that it was necessary to come to this decision in order to adjust and determine the rights and liabilities of the co-defendants *inter se*. On the contrary, I think that that decision was required in order to determine the contest between the plaintiff and the defendants. Nor does it appear to me how it can properly be said that the decision did in fact determine the rights and liabilities of the defendants *inter se*; for those rights and liabilities were not put in controversy. The controversy was between the then plaintiffs and the present respondents and that remained the only real controversy notwithstanding that the present plaintiff then dissociated himself from his then co-defendants on a point which did not affect his liability in that suit. Applying, therefore, the

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language which I have quoted from the judgment of Vice-Chancellor Wigram in *Cottingham's case* [1], I would say that the relief given to the plaintiff in the suit of 1910 did not require or involve a decision of any case between the co-defendants, and, therefore, the co-defendants are not to be bound as between each other by the Court's proceeding and decision which were necessary only to the decree which the plaintiff obtained.

On these grounds I am of opinion that the appeal should be allowed and the cause be remanded to the lower appellate Court to be heard and decided on the merits.

Costs to be costs in the appeal.

HAYWARD, J. :—I concur. The plaintiff-appellant's brother sought in the former suit to make the plaintiff-appellant and the respondents-defendants liable for a deposit as members of a certain firm. The plaintiff-appellant admitted his liability, but the defendants-respondents were successful in denying their membership of the firm. The plaintiff-appellant in the present suit has sought to make the defendants-respondents liable for accounts upon a dissolution of the firm, and the question which has arisen is whether the membership of the defendants-respondents in the firm is *res judicata* by reason of the former litigation. That question depends upon the consideration whether this matter was really in conflict between them and whether there was a real decision as to their rights in this respect in the former litigation. Those are the principles laid down in the leading case of *Ramchandra Narayan* v. *Narayan Mahadev*.[2]

Now it appears to me that in the former suit the appellant's brother and the respondents were the parties

[1] (1843) 3 Hare 627. [2] (1886) 11 Bom. 216 at p. 220.

actually in conflict. The appellant and respondents had no real conflict *inter se*. Each would have been liable for the claim in full in those proceedings if a member of the firm. Each would have been liable to have been sued separately and each would have been liable even in case of a joint and several decree against all to pay in execution the whole amount due from the firm. The appellant's liability as a member of that firm did not, it seems to me, depend in any way on the respondents being members of that firm so far as his liability then under litigation.

Moreover, it appears to me that there was no real decision in that former suit as to the rights of the appellant and the respondents which comprise such matters as liability for contribution for moneys levied in execution or otherwise in connection with the former litigation and their respective shares in the profits and losses which might prove on account taken to have been the result of the working of the firm. There was no decision at all of such interests and there could not have been any such decision in those proceedings. There was no real decision as to the rights of the appellant and respondents in the present suit which is for dissolution and accounts of the firm.

The decision in the former litigation cannot, in my opinion, be held to be *res judicata* of the questions arising in the present proceedings. The decree, therefore, of the lower appellate Court must be set aside and the appeal remanded for decision on the merits.

Costs costs in the appeal.

Decree set aside : case remanded.

R. R.