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that the Sessions Judge has placed a wrong construction on section 250, sub-section (3) as in our opinion that sub-section means that whenever a complainant or informant has been ordered under sub-section (2) to pay compensation exceeding fifty rupees, the right of appeal is given, whether the compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding Rs. 50. To put the construction suggested by counsel for the accused on this sub-section would inevitably cause the difficulty which has resulted from the present decision of the Sessions Judge.

We think, therefore, that in a case where the total compensation awarded is over Rs. 50, the complainant is entitled to appeal. The papers can be returned to the Sessions Judge with this expression of our opinion that he has jurisdiction to deal with the whole of the order awarding compensation.

Order set aside.

R. R.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Pratt and Mr. Justice Crump.

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December 11.

JHALA, AMARSANGJI DUNGARJI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 12), APPELLANTS *v.* JHALA, DEEPSANGJI PAWABHAI AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1, 2 AND DEFENDANTS NOS. 13 TO 19), RESPONDENTS*.

Gujarat Talukdars' Act (Bom. Act VI of 1888), section 16—Talukdari Settlement Officer, decision of—Appeal—District Court—High Court—Second appeal, not competent—Civil Procedure Code (Act V of 1908), section 11—Res judicata—*Decision of Talukdari Settlement Officer under*

* Appeal No. 56 of 1923 from Order.

section 11 of Gujarat Talukdars' Act—Subsequent civil suit between same parties for same relief—Suit not barred as res judicata.

The District Court is, under section 16 of the Gujarat Talukdars' Act (Bom. Act VI of 1888), empowered to hear an appeal from the decision of the Talukdari Settlement Officer, as if it were an appeal from a decree of a Court from whose decision the District Court is authorised to hear appeals; but that is a specific right of appeal, and the analogy on which it is based cannot be extended so as to enable an unsuccessful party to file a second appeal to the High Court.

Jamsang Devabhai v. *Goyabhai Kikabhai*[1], overruled.

Rangoon Botatoung Company v. *The Collector, Rangoon*[2], relied on.

The decision of the Talukdari Settlement Officer, given in proceedings under section 11 of the Gujarat Talukdars' Act and thereafter confirmed on appeal, does not bar as *res judicata* the trial of the same questions in a subsequent suit between the same parties, inasmuch as that officer is not a Court of jurisdiction competent to try such suit within the meaning of section 11 of the Civil Procedure Code, 1908.

Malubhai v. *Sursangji*[3], approved and followed.

THIS was an appeal against the order passed by K. J. Desai, First Class Subordinate Judge, A. P., of Ahmedabad reversing the decree passed by M. E. Kaveeshwar, Subordinate Judge at Dhandhuka.

Suit for declaration.

In 1913, defendants Nos. 1 to 12 who were Talukdars, made an application to the Talukdari Settlement Officer under section 11 of the Gujarat Talukdars' Act for partition and separate possession of their share in the village of Jalia, a Talukdari village in Dhandhuka Taluka, as recorded in the Settlement Register prepared under section 5 of the Gujarat Talukdars' Act. In that proceeding, plaintiffs Nos. 1 and 2, who were also Talukdars, disputed defendants' title to the share claimed by them.

[1] (1891) 16 Bom. 408. [2] (1912) L. R. 39 I. A. 197; 40 Cal. 21.

[3] (1905) 30 Bom. 220.

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The Talukdari Settlement Officer made necessary inquiries under section 15 of the Act and held that the defendants were entitled to the share specified in the Settlement Register and as claimed by them.

The plaintiffs appealed to the District Court under section 16 of the Gujarat Talukdars' Act, but the appeal was unsuccessful. A second appeal was filed in the High Court, but it was dismissed under Order XLI, Rule 11, Civil Procedure Code.

The plaintiffs filed the present suit in 1920, in the Court of the Subordinate Judge at Dhandhuka, for a declaration that the decision in the proceeding before the Talukdari Settlement Officer and in appeals therefrom was without jurisdiction, and not binding on them, and a permanent injunction restraining the defendants from having the decision of the Talukdari Settlement Officer carried out by partition.

The defendants contended *inter alia* that the plaintiffs' suit was barred as *res judicata*. The trial Judge held that the plaintiffs' suit was so barred and dismissed it.

On appeal, the lower appellate Court reversed the decision, and ordered the suit to be heard on merits.

The defendants appealed to the High Court.

H. V. Divatia, for the appellants:—Under section 11 of the Gujarat Talukdars' Act, an application for settling questions of partition can be made to the Talukdari Settlement Officer, who is authorised to take evidence (section 15). Section 15 (3) of the Act enacts that the procedure to be observed is that laid down by the Code of Civil Procedure. An appeal from his decision lies to the District Court (section 16). A further appeal lies to the High Court: see *Jamsang Devabhai* v. *Goyabhai Kikabhai*[1].

[1] (1891) 16 Bom. 408.

The decision arrived at by the Talukdari Settlement Officer in a partition inquiry under the Gujarat Talukars' Act is, therefore, a decree of a competent Court. In the present case, the second suit for re-opening the partition is between the same parties, and they pray for the very same reliefs. Section 21 of the Act makes the decision of the Talukdari Settlement Officer final. The second suit is, therefore, barred.

G. S. Rao, with *M. K. Thakore*, for the respondents:—We submit that *Jamsang Devabhai* v. *Goyabhai Kikabhai*[1] is not correctly decided. The Gujarat Talukdars' Act (section 16) provides only an appeal to the District Court. It does not provide for a second appeal to the High Court. The right of appeal is a creature of statute : see *Rangoon Botatoung Company* v. *The Collector, Rangoon*[2].

Section 21 of the Act does not oust the jurisdiction of Civil Courts to determine questions of title between co-sharers *inter se*. The Talukdari Settlement Officer who is authorised to make an actual partition, is merely a revenue or an administrative officer and not a Court. The Settlement Register prepared under section 5 of the Act is subject to revision from time to time in accordance with the decree of the civil Court determining the rights of the co-sharers (see section 8). It is, therefore, not conclusive.

C. A. V.

MACLEOD, C. J.:—The plaintiffs sued for a declaration that the decision in the Suit No. 2 of 1913 before the Talukdari Settlement Officer, in Appeal No. 541 of 1916 of the District Court and Second Appeal No. 919 of 1919 in the High Court was without jurisdiction, null and void, and not binding on the plaintiffs, that the plaintiffs owned 1/36 in Tajabhai Sursanji's property in Jalia village, and that they were entitled to

[1] (1891) 16 Bom. 408. [2] (1912) L. R. 39 I. A. 197 ; 40 Cal. 21.

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have the shares separated. The defendants pleaded that the suit was barred on the principle of *res judicata* owing to the proceedings before the Talukdari Settlement Officer. The trial Court held that the plaintiffs' suit was barred by *res judicata* and dismissed it. On appeal the First Class Subordinate Judge with appellate powers reversed the decision of the trial Court on the issue of *res judicata* and sent the suit back for trial on the remaining issues.

Defendants Nos. 1 to 12 have appealed to the High Court. Defendants Nos. 1 to 12 made an application No. 2 of 1913 to the Talukdari Settlement Officer under section 11 of the Gujarat Talukdars' Act for partition and separate possession of their shares in the village of Jalia, a Talukdari village, as recorded in the Settlement Register prepared under section 5 of the Act. The present plaintiff and others disputed their title to the share claimed by them. The Talukdari Settlement Officer held the applicants to be entitled to the share specified in the Settlement Register as claimed by them. On appeal to the District Judge under section 16 of the Act the decision of the Talukdari Settlement Officer was confirmed. A second appeal No. 919 of 1919 was filed in the High Court but was dismissed under Order XLI, Rule 11. As the plaintiffs now ask for a declaration that the decision in that second appeal was without jurisdiction, it is necessary for us to consider whether an appeal lies to the High Court from a decision of the District Judge under section 16 of the Act.

In *Jamsang Devabhai* v. *Goyabhai Kikabhai*[1] it was held that the decision of the District Court on appeal from the Talukdari Settlement Officer was subject to a second appeal to the High Court. Sargent C. J. said (p. 413) :" We think that the effect of the concluding

[1] (1891) 16 Bom. 408.

words of section 16 of Act VI of 1888 is to give the decision of the District Court on appeal from the Talukdari Officer the same character in all respects as a decree from an ordinary suit before a subordinate officer, and that, therefore, like all such decrees, such decision is subject to second appeal to this Court. This view is assisted by the concluding words of section 21, which shows that they must, if possible, be construed so as not to affect the High Court's jurisdiction." With the greatest respect we cannot agree. The High Court has jurisdiction to hear second appeals by virtue of the provisions of section 100 of the Civil Procedure Code, which enacts that save when otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the grounds therein mentioned. Under section 99 an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. The Talukdari Settlement Officer is not a Court exercising original jurisdiction, and it cannot be said that because section 16 of the Act gives a right of appeal to the District Judge from his decision, that decision is a decree within the definition in section 2 (2) of the Civil Procedure Code. The District Court hears the appeal as if it were an appeal from a decree of a Court from whose decision the District Court is authorised to hear appeals, but that is a specific right of appeal based on analogy, and the analogy cannot be extended further so as to entitle a dissatisfied party to take a second appeal to the High Court.

In *Hari* v. *The Secretary of State for India*[1], it was held that the appellate jurisdiction could only come

[1] (1903) 27 Bom. 424.

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into play where there had been a decision of a Court, and that although a right of appeal to the High Court was given by section 48 (II) of the City of Bombay Improvement Trust Act from a decision of the Tribunal of Appeal if the President granted a certificate, the appeal was not competent because the Local Legislature had no power to control or affect by these Acts the jurisdiction or procedure of the High Court. Again under section 54 of the Land Acquisition Act I of 1894, an appeal lies to the High Court from the award of the Court in any proceedings under the Act, subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees. For many years appeals were admitted by the Judicial Committee of the Privy Council from appellate decisions of the High Courts under that section, but in *Rangoon Botatoung Company* v. *The Collector, Rangoon*[1] it was decided that such an appeal was not competent. Lord Macnaghten said: "That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in course of its ordinary jurisdiction." This decision is directly in point and we must hold that the decision in *Jamsang Devabhai* v. *Goyabhai Kikabhai*[2] cannot be supported.

Whether the decision of the District Court under section 16 of the Act or the decision of the High Court, assuming a second appeal lies, bars a regular suit on

[1] (1912) L. R. 39 I. A. 197 ; 40 Cal. 21. [2] (1891) 16 Bom. 408.

the principle of *res judicata* was considered in *Malubhai* v. *Sursangji*[1].

The facts were similar to those in the case before us.

There had been an original application to the Talukdari Settlement Officer under section 11 of the Act. From his decision an appeal was preferred under section 16 to the District Court and from that decree there was an appeal to the High Court.

The question of the competency of the High Court to hear that appeal was considered as concluded by the decision in *Jamsang Devabhai* v. *Goyabhai Kikabhai*[2]. The plaintiffs then filed a suit to obtain the final decree of a Court of competent jurisdiction declaring them to be entitled to a share of a Talukdari estate. It was contended that the decision in the previous proceedings constituted *res judicata* at any rate so far as concerned the present litigants who were parties to those proceedings. Jenkins C. J. said (p. 224): "The law of *res judicata* is to be found in section 13 of the Civil Procedure Code, and to make its term applicable it must be shown that the Talukdari Settlement Officer is a Court of jurisdiction competent to try this suit. But this he clearly is not: he is an administrative Officer and not a Court: and by no straining of words can he be described as a Court of jurisdiction competent to try this suit." It was further held, following *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee*[3] and *Bharasi Lal Chowdhry* v. *Sarat Chunder Dass*[4], that in considering a question of *res judicata* a Court must look to the power of the Court in which the suit was instituted and not to the power of the Court by which that suit was decided on appeal. The correctness of those propositions cannot be disputed. Reference may also be made to section 11, explanation II, of the Civil Procedure

(1) (1905) 30 Bom. 220.
(2) (1891) 16 Bom. 408.
(3) (1880) 5 Cal. 8 2.
(4) (1895) 23 Cal. 415.

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Code. Consequently the principle of *res judicata* cannot apply to the previous proceedings between the parties to this suit, and the decision of the appellate Court was right.

The appeal is dismissed with costs.

PRATT, J.:—I agree.

CRUMP, J.:—I agree.

Answer accordingly.

R. R.

CRIMINAL APPELLATE.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

1924.

EMPEROR v. MANGAL NARAN *.

December 17.

Criminal Procedure Code (Act V of 1898), section 439—Criminal appeal—High Court—Disposal of appeal—Notice to enhance sentence—Practice and procedure.

In a criminal appeal it is desirable that the High Court should first deal with the appeal on its merits. It might then consider whether or not a notice to enhance the sentence should issue under section 439 of the Criminal Procedure Code.

THIS was an appeal from conviction and sentence passed by M. I. Kadri, Additional Sessions Judge at Ahmedabad.

The facts of the case are sufficiently set forth in the judgment.

MACLEOD, C. J.:—The accused in this case was found guilty of (1) kidnapping a girl in order to commit murder under section 364, Indian Penal Code, and (2) having murdered the girl and so having committed an offence under section 302, Indian Penal Code. For the first offence he was sentenced to three years rigorous imprisonment, and for the second offence he was sentenced to transportation for life.

* Criminal Appeal No. 439 of 1924.