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there was no wagering or betting. No authority has been cited for the proposition that if one or both parties are under a misapprehension as to the subject of the wager or bet there is no wager or bet made. All that the wagerers in a case like this demand is that they should be paid an amount of money if the horse selected by them wins or is placed at the race in which the horse is to run. When they have made their bet and it has been accepted by the taker the transaction is a complete wager or bet. It may be that in a case like the present where the race meeting is postponed or cancelled the person who has paid his money would be entitled to get the money back, but, in my opinion, it cannot be said that the bet has not been made. Similarly, the abetment of an offence is under the Indian Penal Code punishable whether the offence abetted is or is not committed. I am, therefore, of opinion that the fact that the race meeting was in this case postponed does not mean that there was no gaming.

Answers accordingly.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Madgavkar.

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September 4.

RAGHO RAVJI BHARDE (ORIGINAL PLAINTIFF), APPELLANT *v.* GOPAL JANARDAN AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sections 11, 47 Res judicata—*Dumala Sharkati Inam Village—Decree directing managing Jahagirdar to pay to a co-sharer out of vasuli rakam every year—Revenue suspended—Execution—Executing Court holding that suspension of revenue did not affect payment—Revenue subsequently remitted—Second suit for refund of revenue remitted and declaration not barred.*

The plaintiff was the managing Jahagirdar of a *Dumala Sharkati* Inam village. By a compromise decree passed in 1895 it was directed that the defendants as co-sharers, should receive from the plaintiff a one-sixth share out of the "Vasuli Rakam" every year in the month of May. In 1900 defendant No. 1 applied in execution for the recovery of the one-sixth share, which the plaintiff had declined to pay on the ground that the land revenue

*Second Appeal No. 364 of 1927.

had been suspended by Government. That darkhast (application) was allowed on the ground that "Vasuli Rakam" did not mean the amount actually recovered but the amount assessed. In the years 1918-19 and 1920-21, the recovery of land revenue of the village was again suspended by Government and the plaintiff again withheld payment. In 1921 defendant No. 1 therefore presented a darkhast which was also allowed. In 1922, Government ordered that land revenue for the year 1918-19, which had so far only been suspended, should be remitted. The defendants had, however, already recovered the one-sixth share of the revenue for 1918-19 under the darkhast of 1921. The plaintiff therefore in 1923 sued for a declaration that the defendants had no right to recover their one-sixth share in the year in which Government had suspended or remitted the revenue and claimed a refund of the amount remitted for the year 1918-19. The defendants contended that the suit was barred under sections 11 and 47 of the Civil Procedure Code.

Held, (1) that the suit was not barred under section 47 of the Civil Procedure Code as neither the declaration nor the refund could be claimed under the compromise decree;

(2) that the claim was not barred as *res judicata* under section 11 of the Civil Procedure Code as the question in the suit was a question of the amount remitted and not suspended, and, secondly, it was a question of the refund of the amount for the year 1918-19.

SECOND Appeal from the decision of F. W. Allison, District Judge at Ahmednagar, confirming the decree passed by D. V. Deshmukh, Subordinate Judge of Shevgaon.

Suit for declaration and refund.

The plaintiff was the managing Jahagirdar of the *Dumala Sharkati* Village of Varkhade in Shevgaon Taluka, Ahmednagar District. The defendants had a one-sixth share in the jahagir. In 1895 the defendants filed a suit to recover their share in the jahagir. In that suit a compromise decree was passed the material portion of which was as follows :—

"It is ordered that plaintiffs should receive their 1/6th share in the jahagir *amal* of Varkhade *dumala* in Shevgaon Taluka out of the *vasuli rakam* every year, and that defendants should pay to the plaintiffs their 1/6th share every year in the month of May. On their failing to pay, plaintiff may recover the annual amount through Court."

In 1900, defendant No. 1 made an application (No. 224 of 1900) for the recovery of Rs. 82-1-0 on account of the one-sixth share in the revenue which the judgment-debtor (present plaintiff) declined to pay on

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the ground that the land revenue for the years in question had been suspended by Government. It was contended by the judgment-debtor that no *jahagir vasul* had been received for those years and that he was bound to pay only the one-sixth share of the *jahagir* amount actually received. The executing Court on construction of the decree held that the plaintiff should pay to the defendants one-sixth of the amount to be recovered in the month of May each year and not one-sixth of the amount that was actually recovered; that the Vasuli amount did not mean the amount that was recovered but meant the amount put down in the village papers as recoverable in the month of May in each year. The Darkhast was, therefore, allowed to proceed. This interpretation was upheld in appeal.

For the years 1918-19 and 1920-21 the recovery of land revenue for the village was again suspended by the Government and the plaintiff on that ground withheld the payment of defendants' one-sixth share of the amount fixed for those years. Thereupon defendant No. 1 filed a Darkhast in 1921 to recover the amount of Rs. 155-2-0.

The Subordinate Judge in allowing the Darkhast remarked "It is true that the recovery of these sums is suspended but the plaintiffs need not wait till the actual recovery as has already been declared in the previous Darkhast. It may be that Government may grant remission for those years, and in that case the defendant can recover the sum from the plaintiffs as the whole consideration fails. Plaintiffs are to get the share so long as the sum is held to be recoverable and is not absolutely remitted."

The defendants obtained in execution the sum of Rs. 155-2-0.

The plaintiff appealed against this order but the same was confirmed by the District Court.

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Between the order of the Subordinate Court and the order of the District Court, which latter was made on October 30, 1922, Government remitted entirely the land revenue of the village for the year 1918-19.

In 1923, the plaintiff brought the present suit for a declaration that the defendants had no right to recover their one-sixth share in the year in which Government suspended or remitted the revenue, and for a refund of the amount paid for the year 1918-19. The plaintiff's contention was that the fact that for the first time in 1922 the land revenue of the village as a whole had been entirely remitted by the Government and could, therefore, never be recovered by him entitled him to recover the amount recovered from him in execution proceedings in respect of the year 1918-19.

The defendants pleaded *inter alia* that the claim was barred by *res judicata*.

The Subordinate Judge held that he was bound by the interpretation of the decree made in execution proceedings to the effect that the plaintiff was bound to pay the defendants their one-sixth share of the amount assessed and the suspension or remission of revenue did not affect the right to recover the amount under the decree. The suit was, therefore, dismissed as barred by *res judicata*.

On appeal, the District Judge confirmed the decree on the following grounds:—

"One obvious objection to this suit was taken at once, namely, that this is a question arising between the parties to this suit, and relating to the execution, discharge or satisfaction of the decree in the suit of 1895, and, therefore, plaintiff ought to have made an application under section 47 of the Civil Procedure Code instead of bringing a separate suit. In my opinion, this objection is valid, and although this Court has discretion to treat this suit as a proceeding, there is no particular reason why it should do so in absence of any formal application to that effect. Apart from this objection, however, it seems desirable to dispose of the suit on its merits . . . . So long as the decree in the suit of 1895 is not set aside, and since it has once been finally interpreted by a competent Court, no contrary construction can be placed on

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the decree by any Court, which has to deal with it subsequently (see I. L. R. 7 All. 102). The language used by the learned Subordinate Judge in Darkhast No. 224 of 1900 is wide enough to cover the present contingency. It states plainly that the *rasuli rakam* does not mean the amount actually recovered by the present plaintiff, but means the amount put down in the village papers as recoverable in the month of May in each year. The fact of a subsequent remission by the Government cannot affect the question. Therefore, the lower Court was right in holding that defendant was entitled to execute his decree even for a year for which the land revenue had been remitted and plaintiff is not entitled to recover from the defendant in this suit the amount realised in execution proceedings."

The plaintiff appealed to the High Court.

D. G. Dalvi, for the appellant.

J. G. Rele, for respondent No. 2 and also for heirs of respondent No. 1.

MADGAVKAR, J. :—The question in this appeal is whether the plaintiff-appellant is entitled to a refund of a certain amount which he paid to the defendants-respondents in respect of the latters' one-sixth share of the revenue of the *sharkati* inam jahagir of Varkhade in the Shevgaon Taluka in the Ahmednagar District. Both the lower Courts held that the plaintiff's claim was *res judicata* and that he was not entitled to a refund nor to the declaration he sought of his non-liability for any amount suspended or remitted for subsequent years.

The village in question, as stated above is a *dumala sharkati* inam village, that is to say, Government are entitled to half the assessment and the Jahagirdar to the other half. The plaintiff-appellant is the managing Jahagirdar and the defendants-respondents have a one-sixth share in the Jahagir. The assessment is made in a Tharavband and is recovered by Government and the inamdar's one-half is subsequently paid to the managing Jahagirdar the appellant, as appears from the evidence of the Collector's Chitnis, Exhibit 31.

In Suit No. 104 of 1895 of the Shevgaon Court by the defendants-respondents' predecessors against the predecessor of the appellant, a compromise decree was

passed ordering that the plaintiffs in that suit should receive a one-sixth share out of the "*vasuli rakam*" every year and that the defendant should pay to the plaintiffs one-sixth every year in the month of May. In 1900 defendant No. 1 applied in execution for the recovery of the one-sixth share, which the plaintiff had declined to pay, on the ground that the land revenue had been suspended by Government. That darkhast was allowed in favour of defendant No. 1 and similarly the second darkhast in 1921. In 1922, Government ordered that the land revenue for the year 1918-19, which had so far been only suspended, should be remitted. The defendants had already recovered their one-sixth share of the revenue for 1918-19 under the darkhast of 1921. The plaintiff sued in the present suit for a declaration that the defendants had no right to recover this one-sixth share in the year in which the Collector had suspended or remitted the revenue and claimed a refund of the amount remitted for the year 1918-19. The defendants set up the decree and the order in the previous darkhast and contended that the claim was *res judicata*. Both the lower Courts upheld the defendants' contention and dismissed the claim as *res judicata*. The plaintiff appeals.

In the original application the plaintiff included a declaration in respect of the revenue suspended. It is conceded on his behalf in this Court that that claim in so far as it relates to the suspended revenue is *res judicata* by reason of the orders in the two darkhasts of 1900 and 1921. The present appeal is, therefore, confined, whether as to the refund or the declaration, only to the revenue remitted. The lower appellate Court thought that the present claim fell under section 47, Civil Procedure Code. That view is not in my opinion correct. The present claim is for a refund and a declaration. The refund at least could not be claimed under

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the decree. Even in respect of the declaration it cannot be said that it is contained in the decree. The appellant can, at the most, urge that the decree is silent while the respondents contend that the decree on its previous construction in the two darkhasts is inconsistent with the present claim. Under these circumstances, it is necessary for the plaintiff to make the present claim by a suit and not by an application in execution: *Khetrapal Singh Roy* v. *Shyama Prosad Barman*.[1]

The two questions in this appeal are, firstly, whether, the present claim is *res judicata* by reason of the findings and orders of the two darkhasts of 1900 and 1921, and secondly, if not, whether the appellant is entitled to a refund in respect of the revenue remitted in the year 1918-19 and a declaration for the revenue remitted in the subsequent years.

On the first point, both the previous darkhasts were in respect of the revenue suspended. There was no issue nor an express decision on the question of the revenue remitted. The learned Subordinate Judges expressed no opinion as the point did not arise at any rate in those proceedings. The darkhast of 1900 contains no expression of opinion on the point. Such a claim as the present can only be *res judicata* by reason of a decision or at least a finding. None such is forthcoming in the previous darkhasts. The respondents are thrown back upon the construction of the decree in those darkhasts and upon cases such as *Beni Ram* v. *Nanhu Mal*.[2] This case has no application to the present facts. When one darkhast held that the decree gave interest at a certain rate, the question of that rate of interest in the decree could not be subsequently re-agitated in a second darkhast. Here the construction would, at the most, be a *ratio decidendi* and cannot support the plea of *res judicata*. Even on the question

[1] (1904) 32 Cal. 265.

[2] (1884) 7 All. 102.

of construction, the previous construction merely came to this: The question in the previous darkhast was the meaning of the words *vasuli rakam* in the decree. The plaintiff contended that by *vasuli rakam* was meant the amounts actually received in his hands from Government. The defendants contended that the amount meant the assessed amount. The plaintiff's contention was negatived and the defendants' contention was accepted. The question in both the darkhasts as observed was, whether the defendants were, or were not entitled, to the revenue suspended and not in the hands of the appellant. The present question differs in two essential respects, firstly, that it is a question of the amount remitted and not suspended, and secondly, it is a question of a refund of the year 1918-19. For these reasons, I am clearly of opinion that the present claim is not *res judicata* by reason of the findings and orders in the two previous darkhasts.

As regards suspension and remission, the present rules promulgated in 1907 are to be found in Mr. Joglekar's Land Revenue Code. Out of them pages 620 to 625, and rule 5 at page 621, rule 2, clause 3 at page 623 and rule 9 at page 625 have been brought to my notice for the appellant. They merely in effect direct that in case of a total or partial failure of the crops the villages including inam villages are entitled to certain suspension, provided Government are satisfied that the remission reaches the tenants and does not stop with the Inamdar. On the question of revenue remitted, the decree is silent. These rules did not exist in 1895. It is a matter of common knowledge that previous to the Gujerat famine of 1900 and what is called "The Maconochie Inquiry," suspensions and remissions, if at all, were only granted in individual cases. They were not, in my opinion, in the contemplation of either party at the time of the consent decree in 1895; and no reason

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appears and none has been shown, why the appellant merely because he was the eldest and the managing Inamdar should make himself liable to pay his co-sharers an amount which he would never receive from Government. He obtained no profits for the guarantee of payment even in bad years. The present question is really on the merits outside the compromise decree as far as the words of the decree go. The decree was, however, passed merely on the respondents' one-sixth share of the revenue. It is not alleged for the respondents that there is any such custom of the managing Inamdar paying one-sixth revenue remitted or not obtained. The case of the revenue suspended stands on a different footing. From the evidence of the Chitnis, it appears that it is only after three years continuous bad seasons that a remission is given by Government. The claim which the defendants wished to enforce in the suit of 1895 and which was contemplated by the compromise or the consent decree was a sixth share of the actual Inam revenue. That share was to be paid in May, and therefore it is intelligible, that the Courts in considering the question of suspension would have to hold that the definite and ensuring payment in May to the respondents must override the fact of the suspension, that is, delay in payment by the cultivator to Government and by Government to the plaintiff. The definite date May sufficiently explains this view in regard to the revenue suspended. In regard to remissions, however, the case is widely different. The cultivator does not pay Government and Government does not pay the Inamdar. There appears to be no reason why the respondents should claim to retain the amount remitted merely by reason of the date May in the decree though it had been held that suspensions should not delay payment to them. The decree does not refer to the Tharavband. The defendants claimed in the darkhast of 1900 the suspended

revenue. The Court held that the *vasuli rakam* referred to the revenue assessed and not the revenue actually obtained. That construction and the *ratio decidendi* are not necessarily binding in considering the present question of the revenue remitted and therefore irrecoverable by the Inamdar. The learned Subordinate Judge has himself observed that the equities are entirely with the appellant and not with the respondents. In regard, therefore, to the refund, I am of opinion that both the lower Courts were wrong. The question is not *res judicata* and the appellant is in equity entitled to such a refund of the amount remitted. For the same reason, the decree itself being silent, there appears no sufficient reason in this view to refuse him the declaration in regard to the revenue remitted in future years.

I set aside the decree of the lower appellate Court dismissing the suit, and allow the appeal in respect of the refund of the revenue for the year 1918-19 and in respect of a declaration of the revenue remitted in future years but not in regard to the revenue suspended.

The appellant has succeeded in respect of remission but has failed in respect of suspension. Each party will pay its own costs throughout.

Decree varied.

J. G. R.

CRIMINAL APPELLATE.

Before Mr. Justice Patkar and Mr. Justice Wild.

EMPEROR *v.* SANA MATHUR (ACCUSED No. 2) AND EMPEROR *v.* JHAVERI GOKAL (ACCUSED No. 1).*

1929 *October* 4.

Criminal Procedure Code (Act V of 1898), section 188—Indian Penal Code (Act XLV of 1860), sections 379, 411—Offence committed outside British India—Trial in British India—Certificate of Political Agent, necessity of.

The accused were alleged to have stolen a bullock in British India and taken it to a native state where it was sold. On the bullock being traced by the owner the accused were tried and convicted under section 379 and in the alternative

*Criminal Appeal No. 280 of 1929 with Criminal Reference No. 52 of 1929.