

1899  
DEC. 8.  
—  
APPELLATE  
CIVIL.  
—  
28 C. 73.

months, waiving his right to a fresh sale proclamation, but he made no attempt to [77] find out for himself what orders were passed upon his application, and seeing that a postponement was granted for one month, it does not lie in his mouth to turn round and urge that the sale was irregular for the want of a fresh proclamation.

In the second place it does not appear to us that it is necessary that an upset price should be fixed in the sale proclamation.

Thirdly, there is no evidence in this case that the property has been sold for an inadequate price, and furthermore there is no evidence whatever that, if the price realized was inadequate, this was the result of any irregularity in the sale proclamation.

Then, as to there having been no order absolute for sale under the provisions of the Transfer of Property Act, we think that question is concluded by the cases of *Siva Pershad Maitty v. Nundo Lall Kar Mahapatra* (1) and *Tarof Prosad Roy v. Bhubodeb Roy* (2), and these rulings show that an order absolute is not indispensably necessary, and it is sufficient that there is an order for sale passed on the application of the decree-holder, as was done in this case.

Finally, we may say that there is not the slightest reason for supposing that there was any fraud or trickery on the part of the decree-holder. The guardian never attempted to watch the proceedings in the execution case himself. He was apparently indifferent as to whether the postponement for two months was granted on his application or not; and, then, instead of finding out for himself what had been done in the case, he applied to the decree-holder's pleader, who at once told him when the sale had taken place. This information was given in the first week of July; so that if s. 310-A had been applicable to this case, the guardian might easily have paid the money within the thirty days allowed by law. But when he got this information, he did not put the money in within the prescribed period. It is true that the decree-holder's pleader informed him incorrectly as to the date of the sale. But this does not appear to have been done [78] purposely, and was probably a clerical error on the part of the pleader. However this may be, there is no doubt that the provisions of s. 310-A do not apply to mortgage decrees, and that the order by the District Judge is entirely wrong and must be set aside.

We accordingly decree this appeal with costs.

*Appeal decreed.*

28 C. 73.

*Before Mr. Justice Rampini and Mr. Justice Pratt.*

BHUGWANBUTTI CHOWDHANI (*Plaintiff*) v. A. H. FORBES,

EXECUTOR TO THE ESTATE OF THE LATE A. J. FORBES (*Defendant*).<sup>\*</sup>  
[18th and 21st June, 1900].

*Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Competency of Court to try subsequent suit—Pecuniary jurisdiction—Suit of a Small Cause Court nature. Issue decided in a previous suit not subject, to second appeal.*

In order to make a matter *res judicata*, it is not necessary that the two suits must be open to appeal in the same way.

*Rai Charan Ghose v. Kumed Mohan Dutt* (3) followed.

<sup>\*</sup> Appeal from Appellate Decree No. 1080 of 1898, against the decree of D. Cameron, Esq., District Judge of Purnea, dated the 10th of February 1898, affirming the decree of Babu Chakradhar Prasad, Subordinate Judge of that district, dated the 11th of August 1897.

(1) (1890) I. L. R. 18 Cal. 139.

(3) (1897) I. L. R. 25 Cal. 571,

(2) (1895) I. L. R. 22 Cal. 981.

A plaintiff cannot evade the provisions of s. 13 of the Code of Civil Procedure by joining several causes of action against the same defendant in the subsequent suit and instituting it in a Court of superior jurisdiction.

IN a suit instituted by one A. H. Forbes, the present defendant, against one Bhugwanbutti Chowdhrahi, the present plaintiff, it was sought to obtain a refund of Rs. 124 a. 13 being the excess amount of road and public works cesses wrongfully recovered from him in respect of a *putni* taluk which he held under the said Bhugwanbutti Chowdhrahi. The suit was instituted in 1894 in the Court of the Munsif of Purnea. The Munsif decreed the suit, holding that the plaintiff in that suit was not liable to pay road and public works cesses at the enhanced rate claimed. This decision was confirmed on appeal by the District [79] Judge on the 1st February 1896. There was a second appeal to the High Court, which was dismissed on the 4th August, 1897, on the preliminary ground that, as the suit was of a Small Cause Court nature, no second appeal lay.

The present suit was instituted on the 10th April, 1897, in the Court of the Subordinate Judge of Purnea, for the recovery of Rs. 1,138-13-11, on account of arrears of road and public works cesses, embankment and dak cesses, &c. The road and public work cesses were claimed at the rate of Rs. 415-10-0 per annum, but the total amount of arrears of road and public works cesses claimed was less than Rs. 1,000. The defendant, amongst other things, contended that he was liable to pay road and public works cesses at the rate of Rs. 165 annas 15 per annum only, and that the plaintiff's claim at the enhanced rate was barred by s. 12 of the Civil Procedure Code, as the second appeal in the previous suit was then pending in the High Court.

The suit came on for final disposal on the 11th August, 1897, after the dismissal of the second appeal by the High Court in the previous suit. The suit was dismissed, the Subordinate Judge holding, in regard to the claim for the road and public works cesses, that it was barred by s. 13 of the Code of Civil Procedure. That decision was confirmed on appeal by the District Judge.

The plaintiff appealed to the High Court.

1900, JUNE 18. *Mr. Hill* (with him *Mr. Gregory*) for the appellant, contended that as the previous suit was of a Small Cause Court nature and was instituted in the Court of a Munsif, and as the Munsif's Court was not competent to decide the present suit, its value being over Rs. 1,000, the provisions of s. 13 of the Code of Civil Procedure did not apply. Besides, the two suits were not open to appeal in the same way, and therefore the decision in the former suit could not operate as *res judicata*. See the cases of *Bholabhai v. Adseang* (1), *Govind v. Dhondberav* (2), *Vithilinga Padayachi v. Vithilinga Mudali* (3) and *Misir Radhobardial v. Sheo Baksh Singh* (4).

[80] *Mr. Bonnerjee* (with him *Babu Umakali Mukerjee*), for the respondent, submitted that the cases cited were not of this Court. This Court took a different view of the question; see the case of *Rai Charan Ghose v. Kumud Mohan Dutt* (5). Besides, as to the pecuniary jurisdiction, the plaintiff herself joined several claims in one suit, each of which was triable by the Munsif.

*Cur. adv. vult.*

(1) (1884) I. L. R. 9 Bom. 75.

(2) (1890) I. L. R. 15 Bom. 104.

(3) (1891) I. L. R. 15 Mad. 111

(4) (1882) I. L. R. 9 Cal. 439; 12 C.

L. R. 520; L. R. 9 I. A. 197.

(5) (1897) I. L. R. 25 Cal. 571.

1900  
JUNE 18  
& 21.

APPELLATE  
CIVIL.

28 C. 78.

1900  
JUNE 18  
& 21.  
—  
APPELLATE  
CIVIL  
—  
28 C. 78.

1900, JUNE 21. The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

The suit out of which this appeal arises is one in which the plaintiff sought to recover the sum of Rs. 1,138-13-11, on account of cesses, etc., from the defendant, who is the holder of a *putni* lease under her. The defendant does not dispute his liability. He only contests the rate at which he is sued.

The point, with regard to which the parties are at issue in this second appeal, is as to the rate at which the defendant is to pay road cess and public works cess. The plaintiff (second appellant before us) contends that the defendant is liable to pay these cesses at the rate of Rs. 415-10 per annum. The defendant maintains that it has already been decided in a previous litigation between the parties that he is not bound to pay on this account more than Rs. 165-15 per annum.

The District Judge found in favour of the defendant, hence this second appeal.

Mr. Hill, on behalf of the plaintiff, contends (1) that the suit in which the question of the defendant's liability to pay road cess, etc., was previously decided was one of a Small Cause Court nature, and that this Court accordingly held that no second appeal lay to it. Hence the Court in which that suit was originally decided was not a Court competent to decide the present one. (2) He points out that the former suit was instituted in the Court of a Munsif, who would have been incompetent to decide the present suit, in which the claim was for an amount in excess of the pecuniary jurisdiction of a Munsif, and which was, therefore, instituted in the Court of a Subordinate Judge. Mr. Hill, in support of his first [81] contention, has cited the cases of *Bholabhai v. Adesang* (1), *Govind v. Dhondbrav* (2), *Vithilinga Padayachi v. Vithilinga Mudali* (3) and *Misir Raghobardial v. Sheo Baksh Singh* (4) which, it is said, lay down that to make a matter *res judicata* the two suits must be open to appeal in the same way. Mr. Bonnerjee on other hand, has called our attention to the case of *Rai Charan Ghose v. Kumud Mohan Dutt* (5) which is a decision of this Court and in which the contrary view has been held. We agree with the views expressed in this last mentioned case and must, therefore, follow it.

As to the objection on the ground of the incompetency of the Munsif, who decided the former suit, to decide a suit of the value of the present suit, it appears that the claim on account of road-cess and public works cess was below Rs. 1,000, and was therefore within the competency of a Munsif to try. The plaintiff in this suit joined several causes of action against the same defendant together, and hence instituted her suit in the Subordinate Judge's Court. She therefore joined together several suits. She cannot be allowed to evade the provisions of s. 13 in this way. It would have been perfectly competent for a Munsif to try the plaintiff's present suit for road cess and public works cess.

The appeal, therefore, fails. We dismiss it with costs.

*Appeal dismissed.*

(1) (1897) I. L. R. 25 Cal. 571.

(2) (1884) I. L. R. 9 Bom. 75.

(3) (1890) I. L. R. 15 Bom. 104.

(4) (1891) I. L. R. 15 Mad. 111.

(5) (1882) I. L. R. 9 Cal. 489; 12 C. L. R. 520; L. R. 9 I. A. 197.