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[749] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Holmwood.

ALIMUNNISSA CHOWDHURANI *v.* SHAMA CHARAN ROY.*

[13th March, 1905.]

Res judicata—Matters in issue—Issue of law erroneously decided—Causes of action.

In a previous suit for rent against a permanent tenure-holder in a permanently settled area:—

Held, following a ruling of the High Court, that the plaintiff could recover interest on the arrears only at the rate of 12 per cent. per annum as s. 67 of the Bengal Tenancy Act controlled s. 179 of the Act and was a bar to his recovering at the high rate mentioned in the *kabuliat*.

The ruling referred to was subsequently overruled by a Full Bench.

In a subsequent suit between the same parties on the same *kabuliat* for rent for a subsequent period :—

Held, that the case must be decided upon the law as it stood when judgment was pronounced, and that the plaintiff could recover the larger sum for interest ; the decision in the previous suit would not be *res judicata*. The subsequent suit having been brought on a fresh cause of action, no question as to the construction of the *kabuliat* had arisen, and the law since the decision of the former suit, had been determined by judicial decision to be otherwise than what it was formerly regarded to be.

A point of law may constitute *res judicata*.

Parthasaradi Ayyangar v. *Chinna Krishna Ayyangar* (1) *Chamanlal* v. *Bapubhai* (2) *Venku* v. *Mahalinga* (3) *Rai Churn Ghose* v. *Kumal Mohon Dutta Chaudhuri* (4), and *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (5) referred to.

Gowri Koer v. *Audh Koer* (6), and *Phundo* v. *Jangi Nath* (7) distinguished.

[**Ref.** 9 O. C. 243; 30 Mad. 461=17 M. L. J. 250 : 44 P. R. 1908 ; **Fol.** 39 Mad. 923.]

SECONDD Appeal by the plaintiff Alimunissa Chowdhurani.

The plaintiff was the *putnidar* of mehal mauza Deoli in the permanently settled district of Murshidabad. Some lands within [750] the said mehal were taken in *durputni* settlement by the defendants Shama Charan Roy and others from the plaintiff on the 18th Aghrayan 1294 at a yearly rent of Rs. 735. The *durputni kabuliat* provided, amongst other matters, that the rent was to be paid in twelve monthly *kists*, and that in the event of making a breach of *kist* the *durputnidars* should continue to pay interest at the rate of Rs. 2 per cent. per month on the amount of the *kist* in arrear. The plaintiff brought the present suit in the Court of the Subordinate Judge on the 14th May 1902 for arrears of *durputni* from Bysack 1306 to Chait 1308 with interest at the rate of Rs. 2 per cent. per month and for cesses.

The defendants pleaded *inter alia* that the question of the rate of interest on arrears of rent demandable by the plaintiff was *res judicata* by virtue of the decision of the District Judge of Berhampore in a previous suit between the parties in respect of arrears of rent due under the *durputni*

* Appeal from Appellate decree No. 98 of 1903, against the decree of J. E. Webster, Officiating District Judge of Murshidabad, dated November 7, 1902, modifying the decree of Jadu Nath Ghose, Subordinate Judge of that district, dated July 25, 1902.

(1) (1882) I. L. R. 5 Mad. 304.
(2) (1897) I. L. R. 22 Bom. 669.
(3) (1888) I. L. R. 11 Mad. 393.
(4) (1897) 1 C. W. N. 687.
(5) (1900) I. L. R. 28 Cal. 318.
(6) (1884) I. L. R. 10 Cal. 1087.
(7) (1893) I. L. R. 15 All. 327.

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kabuliat for a prior period. The plaintiff had brought a suit against these defendants in 1898 in the Court of the Subordinate Judge for arrears of rent due for 1304 and the first part of 1305 in respect of the *durputni* with interest at the rate of Rs. 2 per cent. per month and obtained an *ex parte* decree against which the defendants appealed to the District Judge. The Appellate Court held that the provision in the *kabuliat* as to the rate of interest was in contravention of sections 67 and 178 of the Bengal Tenancy Act, and that interest on the rent could only be claimed at the rate of 12 per cent. per annum and he modified the decree of the Subordinate Judge accordingly. An appplication for review of his judgment was rejected, and the decree of the District Judge became final. The defendants pleaded that the plaintiff was not entitled to interest on the arrears of rent at a higher rate than 12 per cent. per annum.

The Court of first instance overruled the plea of *res judicata* on the ground that, since the final decision in the previous suit a Full Bench of the Calcutta High Court in the case of *Matangini Debi* v. *Mokrura Bibi* (1) had held that the provisions of sections 67 and 178 of the Bengal Tenancy Act were inapplicable to a permanent mokarari lease granted by the holder of a permanent [751] tenure in a permanently-settled area, and awarded the plaintiff interest on the arrears of rent at the rate claimed.

On appeal by the defendants the learned District Judge held that the matter was *res judicata* notwithstanding the subsequent decision of the Full Bench to the contrary and gave the plaintiff interest at the rate of 12 per cent. per annum.

The plaintiff appealed to the High Court.

Babu *Nalini Ranjan Chatterjee* (Babu *Nagendra Nath Mitter* with him) for the appellant. The question is, does the judgment in the previous suit on the question of the rate of interest claimable operate as *res judicata* in the present suit which is for rent due for a subsequent period. An erroneous decision on a pure point of law cannot operate as *res judicata*; this point was left open in *Rai Churn Ghose* v. *Kumud Mohon Dutta Chaudhuri* (2) where the question was a mixed question of law and fact; see page 690. In the present case the question is a pure question of law, and the decision thereon in the previous suit cannot be *res judicata*; *Chamanlal* v. *Bapubhai* (3), which was distinguished in *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (4), where also the question was a mixed question. Here in the previous case the suit was in the first instance decided *ex-parte* so that there was no issue, and the case did not decide the question of rate of interest payable in future; it cannot therefore be *res judicata* on the question of rate of interest in the present suit, which is for rent for a subsequent period. *Maharaja Jotindra Mohun Tagore* v. *Shumbhu Chunder Bhuttacharjee* (5). The District Judge in the previous case held that section 67 of the Bengal Tenancy Act is applicable to a permanent tenure and disallowed interest at the contract rate. If that is erroneous it cannot be *res judicata*. *Gowri Koer* v. *Audh Koer* (6) and *Phundo* v. *Jangi Nath* (7) are distinguishable, as in them the very point that had been previously decided was sought to be re-opened.

Dr. *Rashbehary Ghose* (Babu *Sarada Prasanna Roy* with him) for the respondent. The question is *res judicata*; *Rai Churn* [752] *Ghose* v.

(1) (1901) I. L. R. 29 Cal. 674.
(2) (1897) 1 C. W. N. 687.
(3) (1897) I. L. R. 22 Bom. 669.
(4) (1900) I. L. R. 28 Cal. 318.
(5) (1897) 4 C. W. N. 43.
(6) (1884) I. L. R. 10 Cal. 1087.
(7) (1893) I. L. R. 15 All. 327.

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Kumud Mohon Dutta Chaudhuri (1), *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (2). In the present case the question is whether the stipulation in the lease as to the rate of interest is valid or not—that was decided in the negative in the previous case. Section 13 of the Code of Civil Procedure is clear on the point ; the particular issue in the present case, *viz.*, whether the stipulation is binding on the lessee or not was in issue in that case. The section makes no difference between issues of fact or of law. The previous decision that interest is payable only at the lower rate is *res judicata* ; *Chandi Prasad* v. *Maharaja Mahendra Mahendra Singh* (3) see page 118. Perpetuating error is an evil, but the rule of *res judicata* is based on the very sound principle that there should be an end to litigation. In *Phundo* v. *Jangi Nath* (4), which dissented from *Parthasaradi Ayyangar* v. *Chinnakrishna Ayyangar* (5), the issue was on a pure question of Hindu law. This last case was a very peculiar case, see at page 310 of the report. The law of *res judicata* is far more comprehensive than estoppels by verdict which not only refer to estoppels at Common Law, but includes also estoppels in Chancery. The last mentioned case was dissented from in *Rai Churn Ghose* v. *Kumud Mohon Dutta Chaudhuri* (1) and *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (2).

Gowri Koer v. *Audh Koer* (6) was a case of a pure question of law. The case would no doubt have been different, if the Legislature had passed a new enactment in the meanwhile. When the Legislature passes a new enactment the law is altered and the rights of parties are changed. But the Full Bench did not lay down any new law, it only construed the existing law. Suppose a particular decision is arrived at relying on a ruling of the High Court; next year another Division Bench gives the opposite decision. Can the parties in a later suit re-agitate the question relying on the later decision. The word used in section 13 of the Civil Procedure Code is " issue "; under the Code issues are of two kinds, of fact and of law; the contention of the **[753]** other side means that you must read into the Act words that are not there. *Chamanlal* v. *Bapubhai* (7) is clearly distinguishable; there no question of right was concerned ; it only decided what particular article of the Limitation Act applied. *David* v. *Grish Chunder Guha* (8) related to a pure question of law, namely, whether jalkar was immoveable property. The fact that the rent in this suit is for a subsequent period makes no difference, it not being suggested that the rights of parties have since been altered by act of parties or by the Legislature. Recurring rights and obligations are as much, perhaps more so, within the operation of the rule of *res judicata*, as any other rights and obligations. *Nubo Doorga Dosse* v. *Fyz Buksh Chowdhry* (9). Take the case of construction of a will or any other document.

Babu *Nalini Ranjan Chatterji* in reply. In *David* v. *Grish Chunder Guha* (8) the question now under discussion was not raised.

Cur. adv. vult.

MACLEAN C. J. This is a suit for rent. The defendants are permanent tenure-holders in permanently-settled area. Under their *kabuliat* they contracted to pay interest on arrears at the rate of twenty-four per cent. per annum. The only question on the appeal is whether they can recover

(1) (1897) 1 C. W. N. 687.
(2) (1900) I. L. R. 28 Cal. 318.
(3) (1901) I. L. R. 24 All. 112.
(4) (1884) I. L. R. 15 All. 327.
(5) (1882) I. L. R. 5 Mad. 304.
(6) (1884) I. L. R. 10 Cal. 1087.
(7) (1897) I. L. R. 22 Bom. 669.
(8) (1882) I. L. R. 9 Cal. 188.
(9) (1875) 24 W. R. 403.

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interest at that rate or only at the rate of twelve per cent. per annum. Under a recent Full Bench decision of this Court, *Matangini Debi* v. *Mukrura Bibi* (1) it has been held that section 67 of the Bengal Tenancy Act does not control section 179, and that a contract for the larger sum is enforceable. *Prima facie* then the plaintiffs can recover the larger sum for interest. It is, however, contended that they cannot do so, as the matter is *res judicata*. It appears that, in a previous rent suit, between the same parties, a decree was ultimately made in favour of the plaintiffs, but with interest on the arrears at the rate of twelve per cent. per annum. That decision was based on the case of *Basanta Kumar Roy Chowdhry* v. *Promotha Nath Bhuttacharjee* (2), which was overruled by the above Full Bench case.

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[754] It is said that this decision bars the plaintiffs from now recovering the larger amount of interest, which, on the terms of the *kabuliat*, is clearly payable. I am unable to take this view: to do so would mean that the plaintiffs are for ever debarred from recovering that which the law, as it now stands, and as it stood when the present case was decided, says they are entitled to recover. I should hesitate before coming to such a conclusion. Cases must be decided upon the law as it stands when judgment is pronounced, and not upon what it was at the date of a previous suit, the law having been altered meantime. It has been conceded that, if the law had been altered meanwhile by Statute, the objection could not prevail: it is difficult to see why it should prevail, because the law has been since determined to be otherwise by judicial decision. The cases of (1) *Partha Saradi Ayyangar* v. *Chinna Krishna Ayyangar* (3) and *Chamanlal* v. *Bapubhai* (4) and *Venku* v. *Mahadinga* (5) are distinctly against the defendants, whilst the observations of the Judges in the cases of *Rai Churn Ghose* v. *Kumud Mohon Dutta Chaudhuri* (6) and *Bishun Priya Chowdhurani* v. *Bhuba Sundari Debya* (7) point in the same direction. The case of *Gowri Koer* v. *Audh Koer* (8) is distinguishable. There, in the second suit between the same parties and relating to the same property the plaintiff was suing upon the same cause of action as in the previous suit, in which it had been held, upon the construction of a certain deed of sale,—purely a question of law,—that a certain property had not passed. The second suit was based upon the same deed of sale and to recover precisely the same property, and it was held that, although a Full Bench in another case had subsequently disapproved of the previous decision, the question as between the same parties, based upon the same cause of action and relating to the same property, could not be re-opened, and the matter was *res judicata*. Again in *Phundo* v. *Jangi Nath* (9) the question in both suits was as to the validity of the same adoption. But in the case before us the suit is brought upon a fresh cause of action, no question as to the **[755]** construction of the *kabuliat* arises, the terms are clear enough and the only question is whether section 67 of the Bengal Tenancy Act is a bar to the present claim for interest. The law, as it now stands, says it is not, and I think we are bound to give effect to that law: when the previous case was decided the law was then regarded as different. To hold otherwise would be to hold that there is one law for the parties in the

(1) (1901) I. L. R. 29 Cal 674.
(2) (1898) I. L. R. 26 Cal. 130.
(3) (1882) I. L. R. 5 Mad. 304.
(4) (1897) I. L. R. 22 Bom. 669.
(5) (1888) I. L. R. 11 Mad. 393.
(6) (1897) 1 C. W. N. 687.
(7) (1900) I. L. R. 28 Cal. 318.
(8) (1884) I. L. R. 10 Cal. 1087.
(9) (1893) I. L. R. 15 All. 327.

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Full Bench case, and another law for the parties in the present case. That does not seem to me to be right. If the defendant's contention be sound, the Court must, for all time, perpetuate an injustice, by saying the section is a bar, when the law says it is not a bar. I do not desire to be understood as saying that a point of law can never constitute *res judicata*.

The decision of the District Judge must be reversed and that of the Subordinate Judge restored with costs.

HOLMWOOD J. I concur.

Appeal allowed.

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32 C. 756 (=2 C. L. J. 105=9 C. W. N. 911=2 Cr. L. J. 459.)

[756] CRIMINAL REFERENCE.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

HAIDAR ALI *v.* ABRU MIA.*

[17th May, 1905.]

Defamation—Voluntary statement by witness—Privilege of witness—Malice—False Evidence—Penal Code (Act XLV of 1860), s. 500—Evidence Act (I of 1872), s. 132.

A witness, who being actuated by malicious motives makes a voluntary and irrelevant statement not elicited by any question put to him while under examination to injure the reputation of another, commits an offence punishable under s. 500 of the Penal Code.

Moher Sheikh v. *Queen-Empress* (1) followed.

Woolfun Bibi v. *Jesarat Sheikh* (2) discussed.

[Dist. 14 Cr. L. J. 100=18 I. C. 660=17 C. W. N. 297. Ref. 40 Cal 433; 36 Mad. 216; 7 I. C. 803=15 C. W. N. 995=14 C. L. J. 31; 59 I. C. 143=32 C. L. J. 94 =24 C. W. N. 982=22 Cr. L. J. 31.]

REFERENCE under s. 438 of the Code of Criminal Procedure.

In a criminal case instituted against one Haidar Ali for being in possession of false weights, Abru Mia, the complainant, was examined as a witness, and, while under cross-examination he voluntarily made a statement to the effect that 'Haidar had been beaten by one Kanu with a wooden shoe.' For this objectionable statement Haidar subsequently brought a charge of defamation against Abru.

The Extra Assistant Commissioner, who tried the case, found that Abru had voluntarily made that statement to injure the reputation of Haidar and that the statement was deliberately false; and he accordingly convicted Abru under s. 500 of the Penal Code and sentenced him to pay a fine of Rs. 50, in default to undergo simple imprisonment for one month.

The Officiating Deputy Commissioner of Cachar, on an application by Abru, made a report under s. 438 of the Code of [757] Criminal Procedure for the orders of the High Court, with a recommendation that the aforesaid conviction and sentence might be set aside on the grounds, which he stated as follows:

"That in my opinion the alleged statement made by the applicant was privileged under section 132 of the Evidence Act, and that it was made in answer to a question put to the witnesses in the course of a judicial proceeding The recent ruling of

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* Criminal Reference No. 97 of 1905, by W. M. Kennedy, Officiating Deputy Commissioner of Cachar, dated April 26, 1905.

(1) (1893) I. L. R. 21 Cal. 392. (2) (1899) I. L. R. 27 Cal. 262.