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APPELLATE JURISDICTION. (*a*)

Regular Appeal No. 10 *of* 1862.

TIRUMALA RAU SAHIB.....*Appellant.*

PINGALA SANKARA RAU.....*Respondent.*

Where A sued B for moneys alleged to be due under certain documents and B pleaded that the demands had been included in a settlement of accounts, embodied in a document which he set forth in his answer, and the suit was dismissed on the ground that being included in the settlement, the demands no longer existed as causes of action : — *Held* that A's representative was not estopped from disputing the document in a subsequent action brought by him against the representatives of B.

The conclusive effect of *res judicata* defined.

Eastmure v. *Laws* concurred in.

The Law of British India as administered in the Mofussil recognises no distinction between specialties and other document.

THIS was a regular appeal from the decision of C Collett, the Acting Civil Judge of Chittur, in Original Suit No. 3 of 1861. The suit was brought to recover twenty-nine gold and silver jewels, valued at Rupees 14,552, which the plaintiff's father had pledged to the defendant's father. On the 23rd May 1851, an account (marked A) was stated and signed by the latter according to which the balance due by the former was only Rupees 248-10-9. By the same account the defendant's father promised that, within two months from the date thereof, the jewels should be returned to the plaintiff's father, he paying the balance due. The respective fathers of the plaintiff and defendant having both died, the present defendant brought two suits against the present plaintiff for money alleged to be due on certain documents from the plaintiff's father to the defendant's father. The defendant (the present plaintiff) in each case pleaded that the demands had been included in a settlement of accounts and set out the particulars of document (identical with A) alleged to have been executed by the then plaintiff's father. Both suits (*Appeal Suit No.* 137 *of* 1858 in the Civil Court and *Special Appeal No.* 146 *of* 1858 (*b*), were ultimately dismissed on the ground that being included in this settlement the demands sued upon no longer existed as causes of action. The present plaintiff afterwards applied to the defendant to receive the balance and return the jewels ; but the defendant had refused and neglected to do so. When the cause came

(*a*) Present : Frere and Holloway, J. J.

(*b*) M. S. D. 1858, p. 218.

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on to be heard the defendant denied that the account was executed by his father, and the plaintiff alleged that its execution was the basis of the two decrees (to both of which suits the plaintiff and defendant were parties) and that the defendant was therefore estopped from denying the account.

The Civil Judge delivered a judgment from which the following is an extract.

"I am of opinion that this issue of law must be decided in favour of the plaintiff, and that the defendant is now estopped by reason of previous judgments from denying that the document filed in support of the plaint was executed by his father. I think this case falls within the rule laid down in *Eastmure* v. *Laws* (*a*), and I am glad to guide myself by that decision. There the plaintiff brought an action of debt, and the defendant pleaded that he had formerly sued the plaintiff when the plaintiff had pleaded the present demand by way of set-off. The plaintiff replied that no evidence had then been offered in support of the said plea of set-off. But on demurrer it was held that after a precise issue had been found against the plaintiff, he might not bring an action and agitate the whole matter over again, and that an estoppel cannot be set aside on the ground set forth in the replication. The present appears to me a stronger case. In *Appeal Suit No.* 137 *of* 1855 of this Court there was an appeal from a judgment of the sub-court in which the genuineness of the present document was a precise issue in the cause, and that issue was found in favour of the present plaintiff, and that judgment was a final one, a special appeal from it having been rejected. In that suit the present defendant sued the present plaintiff on one of the deeds specified in the document now in question. The present plaintiff then pleaded the settlement of accounts, and put in the present document, and evidence was gone into as to the execution of the document. The sub-court found the issue in favour of the plaintiff (present defendant) but on appeal this Court reversed the judgment of the Lower Court, and, as appears from paragraph 3 of the judgment, because this issue as to the settlement of accounts by the present defendant's father was found in favour of the present plaintiff. A

(*a*) 5 Bing. C. 444 : see 2 Sm. L. C. 666 (5th Ed.)

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special appeal was made to the Sadr, but was rejected. Something was said in the course of argument as to the remarks of the Sadr Court in paragraph 3 of their proceedings. But if those remarks could be made to bear a meaning in conflict with plaintiff's claim, which I do not see how they can, I conceive that they are not entitled to more authority than that of an *obiter dictum* and are not a judicial decision. The identity of the present document with that produced in *No.* 137 *of* 1855 is beyond dispute ; the signature which it bears and a comparison with the authenticated copy retained in the proceedings of that case place the matter beyond question.

" There was also another suit between the same parties on another bond, in which the same document settling the accounts was relied upon in defence. The final decision on special appeal is reported in M. S. D. 1858, p. 218. Evidence was not, it seems, gone into, as to the genuineness of the document in this suit. But the judgment of this Court was pronounced in both suits on the same day, which perhaps accounts for it. Anyhow the judgment in the special appeal was in favour of the issue as to the genuineness of the document.

" I hold to the doctrine and adopt the language stated in 2 Sm. L. C. 5th ed. 669—that it is not necessary that the point on which it is sought to estop should have been *the only one in issue* on the previous occasion. It it enough if it be one which *must* have been decided (*a*). Nor need the form of action be the same in each case (*b*). Or, to adopt the words of Best on Evidence, pp. 702,703,2d.ed.[p.774 3d. ed.] judgments are conclusive when given in a matter in which the person against whom they are offered in evidence has, either really or constructively, had an opportunity of being heard and disputing the case of the other side.

" It has been stated to me that the present matter was discussed and disposed of by my predecessor Mr. Harris. If so there is nothing to show it. I find that Mr. Harris, adhering to the old practice, gave points, but did not settle issues. Now with every respect for his opinion, I take leave to say that this is not what the law requires. If points are given, and the Court finds that one party is estopped from disputing a deed, no doubt it would be needless to give any

(*a*) *Rex* v. *St. Pancras*, Peake, 219.

(*b*) *Cleve* v. *Powel*, 1 M. and Rob. 228 : *Hitchin* v. *Campbell*, 2 Bla. 830 ; and see *Supra*, p. 245.

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point as to proof of the deed. But there is a wide distinction between giving points and settling issues, and if the parties dispute, as in the present case they do, whether or not there is an estoppel in respect to a deed, the foundation of the whole suit, I do not comprehend how the Court can avoid recording and disposing of such issue. Having decided the issue of law in favour of the plaintiff, the issues upon which evidence will have to be given will be in substance the same as the points given by Mr. Harris; but should be stated in the form of issues thus:

"Whether the jewels sued for, and specified in the document exhibit B, and the list annexed to the plaint are of the value stated in the plaint, or of what other value.

"Whether any, and which of the said jewels have been returned by the defendant to the plaintiff, subsequently to the date of the said document.

"As to the burden of proof on these issues, it may be convenient and expedient to point out that it is for the plaintiff in the first instance to prove the value, the defendant being of course at liberty to rebut this evidence by other evidence. But as the document in question is not a mere list or account, but an instrument duly signed by the defendant's father, and attested by witnesses: it is in its nature as high and deliberate a writing as an ordinary deed, and I therefore hold that it is not competent for the defendant to impugn any particular recital therein on any other ground or by any other means than it would be competent for him to do in the case of an ordinary deed."

Sadagopacharlu, for the appellant, the defendant, rested his appeal on these, amongst other grounds, that the judgments in *Appeal Suit No.* 137 *of* 1855 and on *Special Appeal No.* 146 could not estop the defendant from disputing the authenticity of A., and that costs had been taxed on Rupees 5,003-8-0 instead of Rupees 4,704-13-3, the sum actually awarded to the plaintiff.

The following judgment was delivered by

HOLLOWAY, J.:—This was a suit for the recovery of certain jewels pledged to the defendant's father for a demand of which all but Rupees 248-10-9 had been discharged. An

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account stated between the fathers of the defendant and the plaintiff was alleged.

The defendant denied the account stated, and further alleged that the jewels had been returned.

The Civil Judge considered that the defendant was, on the principle of *Eastmure* v. *Laws*, estopped by the decree in *Appeal Suit No.* 137 *of* 1855 from disputing the document embodying the account stated. The Civil Judge further held the document to be of the same effect as a deed, and declared the defendant barred from disputing any particular recital therein on any other than such ground as would justify him in impugning a recital in a deed, but without saying what such grounds are. The defendant then went into evidence as to the return of the jewels, and disputed their value. The Civil Judge discredited the evidence as to the return of the jewels, and in his valuation for reasons stated adopted the sum of Rupees 4,754-4-3.

As to so much of the appeal as touches the question of proportionate costs, the application for the amendment of what would be merely a clerical error should have been made in the Court below, and no order therefore should be made upon it.

As was stated at the hearing we see no reason whatever for dissenting from the conclusion at which the Civil Judge has arrived as to the non-return of the jewels. The valuation of the jewels as also been made in a manner by no means unfavourable to the defendant, who being a wrongdoer perhaps ought on the findings of the Court below to have been charged a larger alternative sum than that awarded in case of non-return.

The real question in this case is, whether the doctrine of the Civil Judge, first, as to the estoppel by decree, and secondly, as to the estoppel by deed is well founded, and its real and only difficulty, and the only doubt which I have ever entertained, is whether if wrong, in the state of the case developed by the allegations on both sides and the proofs adduced, the error has produced such miscarriage upon the merits as to justify us in remanding the case. For with the whole matter before us in appeal, we are bound not for

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mere technical correctness to protract litigation if satisfied that further enquiry cannot and should not produce any substantial change in the judgment delivered.

The pleadings in the two suits from the decree in which the supposed estoppel by judgment has emanated were not before us at the hearing, and some delay has necessarily arisen from that circumstance.

Those two suits were brought by the present defendant against the present plaintiff for money alleged to be due on certain documents from the father of the plaintiff to the father of the defendant. The defendant in each case pleaded that the demands had been included in a settlement of accounts, and according to the practice of that period proceeded to set out the particulars of a document alleged to have been executed by the plaintiff's father. That document is the one which the execution and contents of which the Civil Judge has not allowed the defendant to dispute. The Subordinate Court disbelieved, and the Civil Court believed its execution, and the result was that both these suits were dismissed for the reason given by the Sadr Court, that being included in this settlement,the demands sued upon no longer existed as causes of action.

Eastmure v. *Laws* is undoubtedly a case of the highest authority proceeding upon the most intelligible principles. The defendant being permitted by statute to set off his cross demand pleaded it, but failed to prove it, and, judgment being given for the plaintiff, sought to recover the amount pleaded in set-off in a separate action. It would have been wholly contrary to principle if he had been permitted to do so, for looking at the common-law before the statute, he was to all intents and purposes in the position of a plaintiff who had sued for a sum of money and had a verdict against him. When properly limited to cases of the nature of *Eastmure* v. *Laws*, the doctrine quoted from Mr. Smith's note to the *Duchess of Kingston's Case* appears to me unobjectionable. But I am clearly of opinion that there is a fallacy in its application to the present case. Whether there was a settlement and an account stated was a precise issue in the cause, but the document was merely evidence upon that issue, and that issue might well have been found for the defendant there, whether the document was true or false.

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I adopt the language of Mr. Best which expresses with exactness the rule as to the conclusive effect of *res judicata*," and I feel a strong confidence that no case will be found at variance with it. "Moreover the conclusive effect is limited to the actual point decided—It does not extend to any matter which came collaterally in question, though within the jurisdiction of the Court; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument unless *perhaps by necessary inference from the judgment*." (*a*) Nothing, too, is clearer than the proposition that for the purposes of such inference it is not permissible to examine the proceedings of a trial and to infer that because particular evidence was adduced and the judgment or verdict was in opposition to the evidence, that the evidence is therefore trustworthy or untrustworthy as the case may be.

This is not only not a necessary, but it is not a permissible inference. The consequences of such a doctrine are almost sufficient to shew it wholly untenable, and it is plain that it is in opposition to all the authorities. I am quite clear therefore that the doctrine of *Eastmure* v. *Laws* is wholly inapplicable to this matter, and for the simple reason that the precise issue was not whether this document was true, but whether the plaintiffs demand was included in an account stated. The truth or falsehood of this document was, in the only sense in which the word is applicable to the present subject-matter, not an issue at all.

I am quite clear therefore that the defendant should not have been considered estopped from disputing the execution of this document. I am also clearly of opinion that in treating this document, even if executed, as possessing all the mysterious properties attaching to a deed, there has been further a more serious error. Happily for the administration of justice we know nothing of specialties, and in the contrary of their origin this would not be one. The indispensable sealing has not been gone through. It is at the utmost a

(*a*) Best on Evidence, 2nd ed. p. 697. The corresponding passage in the third edition (1860) of *Best on Evidence* is: "Moreover the conclusive effect is confined to the point actually decided; and does not extend to any matter which came collaterally in question. It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself though not then directly the point at issue." *Reg.* v. *Hartington Middle Quarter*, 4 E. & Bl. 780, 794 per Coleridge, J.

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document not under seal evidencing an account stated, and it is quite clear that such an account is not conclusive evidence of a debt due, for it is clearly open to the defendant, ever under the general issue, to show a gross error or mistake in the accounts ; or that he made it under a misapprehension of facts, and for the reason satisfactorily given by Alderson B. in *Thomas v. Hawkes* (*a*): "It cannot be contended that from the mere statement of an account a debt arises. The averment of the declaration is not merely that an account was stated, but that the defendants were indebted upon it. They the (defendants) were entitled therefore, under the general issue to show that the account did not shew them to be indebted because it was not correct." Even if, therefore, as to the statement and rendering of this account the defendant was estopped, he would by no means have been estopped from disputing its items.

If therefore any substantial alteration in the decision could result, I think that we should be bound to send this case for further enquiry, for the Civil Judge seems to me clearly wrong as to both points on the issue of law. I find, however, that in this case the defendant has alleged that he has actually returned the jewels as the disputed document requires him to do. It is quite clear that no Court could believe any amount of oral evidence which he could adduce as against his own conduct, and being satisfied of the result at which with such allegations before it the Court below and this Court must come as to the execution of this document, I would dismiss the appeal, but make no order as to costs.

FRERE, J. :—I concur in the opinion that the conclusion at which the Civil Judge has arrived with respect to the execution of the account B must be pronounced substantially correct. I would accordingly affirm his decision, but would charge the parties with their respective costs in the appeal, as proposed by my brother Holloway.

Appeal dismissed.

(*a*) 8 M. & W. 140, and see *Perry* v. *Attwood*, 6 E. & B. 691.