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ESHAN CHUNDER ROY v. MONMOHINI DASSI.

As the plaintiff and the defendants have both failed in this Court, we think there should be no order for costs in this special appeal (1).

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, and Mr. Justice Pontifex.

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Feb. 5.

BUSSUN LALL SHOOKUL (DEFENDANT) *v.* CHUNDEE DASS AND OTHERS (PLAINTIFFS).*

Res Judicata—Suit for Arrears of Rent.

A brought a suit against *B* for arrears of rent. *B* admitted the sum claimed, but contended that the rent was due for a larger area of land than that specified in the plaint. An issue was framed on such contention, and decided against *B*. In a subsequent suit by *B* to have it declared that a sum of money, equal in amount to the sum paid on admission in the former suit, comprised the rent due on all the lands held by him under *A*. *Held* (on appeal under the Letters Patent, reversing the decision of the Court below), that such suit was barred as being *res judicata*.

THIS was a suit for a declaration of the plaintiffs' right to a mourasi taluk comprising 8 drones, 7 kanis, and 2 gundas of land bearing a rental of Rs. 105-9-16½. The plaint alleged that the defendant, landlord, had in the year 1874 brought a suit for arrears of rent against the present plaintiffs, alleging that the said sum of Rs. 105-9-16½ represented the rental of only 4 drones, 7 kanis, 19 gundas of the whole of the lands, the subject of the present suit; that the Court in that suit framed an issue regarding the actual area of the taluk, but, on the 29th June 1874, gave the then plaintiff, the present defendant, a decree for the rent claimed; that this decree having thrown

(1) See the case of *Gaur Mohan Chowdhry* v. *Madan Mohan Chowdhry* 6 B. L. R., 352, decided under the Limitation Act XIV of 1859, in which it was held that the right to a turn of worship of an idol was not a recurring cause of action, but was governed by s. 1, cl. 16, of that Act.

* Appeal No. 2 of 1878, under s. 15 of the Letters Patent, against the judgment of Mr. Justice Romesh Chunder Mitter, and Mr. Justice Maclean, dated the 9th July 1878, in Special Appeal, No. 309 of 1877.

a cloud over the present plaintiffs' right to hold the whole of the taluk under the rent specified, the present suit had been instituted to remove such impediment to the plaintiffs' rights.

The defendant in his written statement contended, that the plaintiffs had no cause of action, and that it had been previously decided in suits between his predecessors in title and himself on the one side, and the plaintiffs on the other, that Rs. 105-9 was the rent for 4 drones, 7 kanis, 19 gundas of land; and that the plaintiffs were, therefore, estopped from bringing the present suit by the plea of *res judicata*. The defendant further alleged that he had already instituted proceedings by serving notice on the plaintiffs for assessment of rent on the excess lands held by them. The Court of first instance held, that the plaintiffs had established their right to hold the whole of the lands specified in the suit at the rate of rent mentioned. It overruled the defendant's objection as to *res judicata*, and gave the plaintiffs a decree.

The lower Appellate Court upheld the decision of the Court of first instance for substantially the same reasons as those given by that Court.

The defendant appealed to the High Court.

The learned Judges (Mitter and Maclean, JJ.), who heard the appeal, differed in opinion on the question whether the suit was barred under the plea of *res judicata*. On this point the decision of Mitter, J., the senior Judge, was as follows:—"I do not think that the decision of the 29th June 1874 concludes the plaintiffs from raising the question whether the lands in suit appertain to Taluk Moyaram Oketram. That was a suit for arrears of rent, and the plaintiffs in that suit, and the defendant in this, alleged that the present plaintiffs' share of the aforesaid taluk consisting of 4 drones, 7 kanis, 19 gundas of land bore a certain rent. The tenants did not dispute the amount of the rent as the correct amount, but denied the accuracy of the statement in the plaint regarding the quantity of land. It is quite clear that this question, *viz.*, which of the statements of the contending parties, as to the quantity of the land in the taluk, is correct, is wholly immaterial. Whether it was decided one way or the other, it would not have in the least affected the

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plaintiff's claim in that case. It is true that the Court in that case most unnecessarily framed an issue upon that point, and decided it in favour of the special appellant. But the question being wholly foreign to the matter then in dispute, any decision upon it would not be binding between the parties." Maclean, J., on the same point, decided as follows:—"It certainly appears to me that the decision of the 29th June 1874 is final on the question of the area of land on which the Rs. 105-9 is payable as rent. Granting that it was unnecessary in the former suit that this question should be raised and disposed of, the fact remains that it was raised and at plaintiffs' instance. They adduced such evidence, oral and written, as was at their disposal, and they did not appeal against the decision which was unfavourable to them. They are not entitled, I think, to raise it again." On the further question, whether supposing the plaintiffs were not estopped from bringing their suit by the plea of *res judicata*, they were entitled to the declaratory decree sought, both the learned Judges concurred in thinking that they were. The decision of Mitter, J., the senior Judge, prevailing on the question of *res judicata*, the appeal was dismissed with costs.

The defendant then appealed under s. 15 of the Letters Patent against that decision.

Mr. *R. E. Twidale* and Baboo *Aukhil Chunder Sen* for the appellant.

Baboo *Sreenath Banerjee* for the respondents.

Mr. *Twidale* for the appellant.—Mitter, J., in his judgment, says that the question as to the actual area of the land liable to pay a rent of Rs. 105 was in the former suit immaterial. It is submitted, however, that it was one necessary to the right decision in that case. The present defendant in the former suit asked for arrears of rent due on a certain quantity of land. The present respondents, the defendants in that case, did not dispute the amount of money sued for, but contended that the moneys so claimed were payable for a larger area of land than

that mentioned in the plaint. On this the Court raised an issue, and decided it in favour of the then plaintiff, the present appellant. Such issue was, therefore, material to the case, and the decision once given is conclusive between the parties.

Baboo *Sreenath Banerjee* for the respondents.—The issue raised in the former suit was immaterial. There was no question of title. The law as it stood when that case was decided was, that no question of title decided in a rent suit was binding between the parties, and probably this was the reason why the defendants in that suit did not appeal. [JACKSON, J.—The defendants in that case might have avoided any decision on the question of area of the land. The suit was for arrears of rent involving a sum not in dispute. They might have submitted to a decree in those terms, refusing to contest any issue as to the area of the land. They, however, did not do this.] It was not the object of the parties to have the question of the area of land settled in the suit. If that had been the real intention of the then defendants, they would not have admitted their liability in respect of the sum sued for by the then plaintiff. If the defendants had appealed, they stood the chance of being told that, having admitted the sum claimed as due, they were prevented from appealing on a point not material to the decision. The issue must be necessary and material—*Krishna Behari Roy* v. *Bunwari Lall Roy* (1).

The following judgments were delivered :—

GARTH, C. J.—The Judges of the Division Bench having differed in opinion, and the judgment of the senior Judge having prevailed, this case comes before us on appeal from his decision.

The suit was brought by the plaintiffs to obtain a decree declaring that certain lands, which they hold as tenants to the defendant at a rent of Rs. 105, comprised an area of 8 drones, 7 kanis, and 2 gundas.

The Division Bench were agreed that, upon the facts proved, the plaintiffs were entitled to the relief which they prayed. But the objection made by the defendant, upon which the learned Judges differed in opinion, was, that in a suit, No. 308

(1) 25 W. R., 1.

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of 1874, which was brought by the present defendant against the present plaintiffs for arrears of rent, an issue was distinctly raised between the parties, whether the land held by the plaintiffs at the rent of Rs. 105 was 4 drones, 7 kanis, and 19 gundas, as the then plaintiff contended, or 8 drones, 7 kanis, and 2 gundas, as the then defendants contended; and that upon this issue, evidence being given on either side, the Court decided, that the area of the land in question was 4 drones, 7 kanis, and 19 gundas only.

Both the learned Judges of the Division Bench appear to have considered, that the issue thus raised was immaterial for the purposes of that suit, because whichever way it was decided, the plaintiffs would have been entitled to the rent which they claimed.

But I confess I am unable to adopt that view. It seems to me that it was a very material question in that case, and certainly it was one to which the parties themselves attached great importance, whether the rent, which the then defendants admitted to be due, was payable in respect of the larger or the smaller area.

The then plaintiff advisedly claimed it in his plaint as payable for the smaller area only. The defendants as distinctly alleged, that it was due in respect of the larger area. The issue raised upon these counter-statements was in fact the only question in the cause, and I cannot doubt that if the defendants had so pleased, they might have made the decision upon that issue the subject of appeal. But they did not choose to take that course. They accepted the adverse judgment of the Court without appealing from it; and now the question arises in the present case, whether that judgment is not conclusive? I am of opinion that it is.

This suit is confessedly brought for the express purpose of raising again the very same question that was raised and decided against the present plaintiffs in the former suit; and it would appear that the occasion which has given rise to this suit, is that the present defendant is seeking to charge the plaintiffs with additional rent for the excess quantity of land which they hold over and above the 4 drones, 7 kanis, and 19 gundas.

The plaintiffs, therefore, to relieve themselves of this threatened obligation, are asking the Court for a declaration directly at variance with what was decided in the former suit. I consider that they cannot do this, and that the decision in the former suit is conclusive between the parties, and as my learned colleagues agree with me, the result is, that the special appeal will be allowed, and the plaintiffs' suit dismissed with costs in all the Courts.

JACKSON, J.—I am of the same opinion. Mr. Justice Mitter observes that the question relating to the area of this taluk was wholly foreign to the matter in dispute. Now the matter in dispute was that upon which the parties were at issue, and the only point on which the parties were in issue was, as to what was the area of the holding. The defendants then, the now plaintiffs, might have avoided any finding upon that point, and might have desired the Court to abstain from coming to such a finding. They chose, however, to raise it, and it was material they should raise it, as otherwise they might be bound in after proceedings by the finding that they were to pay Rs. 105 for 4 drones.

Now the plaintiffs evidently had a consciousness that they would be so bound, and therefore they did not wait for what they knew was to come after, that is to say, the claim of the landlord to enhance in respect of the remaining 4 drones, but they imagined they could forestall him by bringing a suit for a declaration. It was under the impression that findings of a Court in rent suits could be questioned in the Civil Courts that proceedings of this sort commonly originated, but that view has been dissipated by the decision of the Full Bench.

I think, therefore, that the present plaintiffs are bound by the decision which they invoked, and with which they rested content by not disputing it by a regular appeal.

PONTIFEX, J.—I concur.

Appeal allowed.