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plaintiff's story is false as to her having received so much money and so much rice annually from the defendants. But he says, admitting this to be false, still it is not shown that she ever resigned her share or acquiesced in her exclusion from it. The Judge further seems to think that, though she had no actual enjoyment from the time of her father's death, she had still a right to obtain a share upon the ground that the exclusion was not known to her till within twelve years before suit and that she had never resigned her share.

We suppose that the Judge meant to say that the possession of the defendants had not been adverse to the plaintiff. We think that he ought to have come to some distinct finding upon this matter instead of leaving it to be a matter of conjecture what he thought; and if he thought the long possession of defendants was not adverse to this plaintiff, he should have given reasons for the opinion. Further, the Judge ought to have found before reversing the Munsiff's decree that the property in question was really property to which the plaintiff was entitled by reason of the share claimed having belonged to her father. The Munsiff found against her upon that point, which was the main point in the case so far as the merits are concerned.

It seems to us, therefore, that the decree of the Lower Appellate Court cannot stand, but it must be set aside, and the case must go back to the District Judge for a finding whether the property in question did belong to the plaintiffs, and, if so, whether the plaintiff is still entitled to obtain a share with reference to the law of limitation as contained in Articles 142 and 144.

Costs of the appeal will abide the result.

A. F. M. A. R. *Case remanded.*

Before Mr. Justice Tottenham and Mr. Justice Ghose.

THAKUR MAGUNDEO (DEFENDANT) *v.* THAKUR MAHADEO SINGH AND ANOTHER (PLAINTIFFS).*

1891. *July* 10.

Res judicata—Suit in ejectment—Civil Procedure Code (Act XIV of 1882), section 13.

A, as *ticcadar*, brought a suit to eject *B* from certain lands, which he claimed as *majhes* land, or land which is ordinarily cultivated by the

*Appeal from Appellate decree No. 1058 of 1890 against the decree of F. Cowley, Esquire, Judicial Commissioner of Chota Nagpore, dated the 2nd of June 1890, affirming the decree of Moulvie Ali Ahmed, Munsiff of Hazaribagh, dated the 29th of December 1888.

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landlord himself or by the *ticcadar*. *B* pleaded his right of occupancy. The Court found that the land was *majhes* land, but dismissed the suit on the ground that *A* had failed to prove notice to quit. Afterwards *A* brought a suit against *B* for ejectment from the same land. *B* again pleaded his right of occupancy.

Held, that *B* was not precluded from raising the same plea, inasmuch as the finding in the previous suit upon the issue whether *B* was an occupancy tenant was not conclusive against him; nor could that issue be said to have been 'finally decided' in that suit within the meaning of section 13 of the Civil Procedure Code.

Run Bahadur Singh v. *Lucho Koer* (1) and *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (2) relied on.

THIS was a suit by the plaintiffs as *ticcadars* of Dehat Sadam, which included mouzahs Sawag and Ocho, to recover possession of 5 annas of *majhes* land, or land which is ordinarily cultivated by the landlord himself or by the *ticcadar*, in mouzah Sawag and 6 annas of *majhes* land in mouzah Ocho, and to eject the defendant therefrom.

The plaintiffs alleged that the defendant having refused them khas possession of the said *majhes* land, they brought an action in ejectment against him, and in that suit the defendant denied the claim of the plaintiffs, and alleged that he held 6 annas of ryoti or *jebandari* land in each of the said mouzahs; that the Munsiff, thereupon, found that the land was *majhes* land, but as the defendant was not a trespasser, he was entitled to notice under the law; and that the plaintiffs' suit was therefore, on the 2nd September 1887, dismissed. They further alleged that they had instituted this suit after due service of notice for ejectment upon the defendant.

The defendant raised the same pleas as in the former suit. He contended that the land in question was ryoti or *jebandari* land; that he had acquired a right of occupancy; that the suit was not maintainable without the proprietor being made a party; that the plaintiffs were merely temporary lessees, and that the term of their lease extended only up to the year 1294.

The first Court held that the defendant was precluded under section 13 of the Civil Procedure Code from raising the pleas

(1) I. L. R., 11 Calc., 301.

(2) I. L. R., 13 Calc., 17.

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which he had already raised in the former suit, and it therefore decreed the plaintiff's suit.

The defendant appealed to the Judicial Commissioner of Chota Nagpore, who affirmed the decision of the first Court.

The defendant now preferred a second appeal to the High Court.

Baboo *Koruna Sindhu Mukerji*, for the appellant.

Baboo *Mohendro Nath Bannerji* and Baboo *Nagendro Nath Chatterji*, for the respondents.

Baboo *Koruna Sindhu Mukerji*—The Court below was wrong in holding that the defendant was precluded from raising the objections which he raised on the ground of *res judicata*. The former suit was simply dismissed, and as no finding upon the issue as to the occupancy right was embodied in the decree, the defendant had no right of appeal—*Shama Soonduree Debia* v. *Digamburee Debia* (1). The Court below has relied on the case of *Niamut Khan* v. *Phadu Buldia* (2), but the principle therein laid down has not been followed by the Privy Council—*Run Bahadur Singh* v. *Lucho Koer* (3). That case should be taken to have been impliedly overruled—See *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (4). The decree in the former case was only a dismissal for want of notice—See also *Devarakonda Narasamma* v. *Devarakonda Kanaya* (5), *Mullukumarappa Reddi* v. *Arumja Pillai* (6), *Anusuyahai* v. *Sakharam Pandurang* (7), *Jamaitunnissa* v. *Lutfunnissa* (8).

Baboo *Mohendro Nath Bannerji*, for the respondents, argued that the question as to whether the land was *maghes* land or not being directly and substantially in issue in the previous suit, had been heard and finally decided in favour of the plaintiffs, and it was therefore *res judicata*. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at—*Kali Krishna Tagore* v. *The Secretary of State for India in Council* (9). The Full Bench case of *Niamut Khan*

(1) 13 W. R., 1.
(2) I. L. R., 6 Calc., 319.
(3) I. L. R., 11 Calc., 301.
(4) I. L. R., 13 Calc., 17.
(5) I. L. R., 4 Mad., 134.
(6) I. L. R., 7 Mad., 145.
(7) I. L. R., 7 Bom., 464.
(8) I. L. R., 7 All., 606.
(9) I. L. R., 16 Calc., 173.

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v. *Phadu Buldia* (1) was conclusive on the point. The opinion of their Lordships in the case of *Run Bahadur Singh* v. *Lucho Koer* (2) was an *obiter dictum*.

Baboo *Koruna Sindhu Mukerji* in reply.

The judgment of the Court (Tottenham and Ghose, JJ.) was as follows :—

This appeal is by the defendant in the original suit; and the suit was to eject him from land claimed by the plaintiffs, who were the ticcadars, as *majhes* land, by which we understand land ordinarily cultivated by the landlord himself or by the ticcadar. The defendant pleaded that he had a right of occupancy in this land as a raiyat, and could not be turned out of it.

The Courts below have both held that this matter is *res judicata*, and the defendant is no longer entitled to be heard in respect of it, upon the ground that in a previous suit brought by the plaintiffs to eject the defendant, the same objection was taken, and the Munsiff decided it in favour of the plaintiffs, but dismissed the plaintiffs' suit, because they had not given the defendant a proper notice to quit. The Courts below held that the finding on this point in that suit was a bar to its being raised and tried in the present suit; and the Courts relied upon the Full Bench decision of this Court in the case of *Niamut Khan* v. *Phadu Buldia* (1).

No doubt that decision is directly in favour of the Lower Court's decision; but we observe that that decision has not been followed in this Court, and the Privy Council in a more recent case have expressed an opinion which is in opposition to the judgment of the Full Bench. The case of *Run Bahadur Singh* v. *Lucho Koer* (2) was brought to the notice of the Lower Appellate Court, but that Court thought it was not an authority in the present case, because the decree in that case did not turn upon the particular opinion expressed, and on which reliance was put by the defendants' pleaders. In that case before their Lordships of the Privy Council the appellant had appealed against the decree of the High Court. The respondent preferred a cross-appeal against

(1) I. L. R., 6 Calc., 319.
(2) I. L. R., 11 Calc., 301.

certain findings recorded in the judgment of the High Court. Their Lordships observed:—"It was unnecessary for her to do so, inasmuch as those findings could not be subsequently held to be conclusive against her, because the decree of the Court below was not based upon any such finding, but in spite of it." This observation applies to the present case. The decree by which the plaintiff's suit was dismissed on the previous occasion was made in spite of the finding in their favour that the land in question was *majhes* land; and in the case *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (1), a Division Bench relying upon this observation of the Privy Council in the case of *Run Bahadur Singh* v. *Lucho Koer* (2) held that the findings of the Lower Court in favour of the party appealing were not to be used as *res judicata* in a subsequent suit.

In the present case the respondent's vakil relies upon the terms of section 13 of the Code, the law regarding *res judicata*; and points out that courts are prohibited from trying any issue between the parties which has been heard and finally decided by such courts in a former suit.

It appears to us that the last element is wanting, namely, "finally decided." We think that the finding of the Court in the previous suit was not final, inasmuch as the decree was not based upon it, and there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded.

Upon the whole we think that the appellant is entitled to have the same question tried which he raised in this suit. We accordingly set aside the decrees of the Courts below, and send this case back to be tried upon the merits.

Costs of this appeal will abide the result.

Case remanded.

A. F. M. A. R.

(1) I. L. R., 13 Calc., 17.

(2) I. L. R., 11 Calc., 301.