Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

KAILASH MONDUL (DEFENDANT) *v.* BARODA SUNDARI DASI (PLAINTIFF.)*

1879 *March* 3.

Res judicata—Code of Civil Procedure (Act XIV of 1882), section 13, explanation II—Suit for rent—Whether the question that the plaintiff was a mere benamdar could be raised in a subsequent suit for rent, it not having been raised in a suit previously brought by the same plaintiff against the same defendant.

In a previous suit brought by the plaintiff for rent the defendant denied the relationship of landlord and tenant, but he did not plead that the plaintiff was a mere *benamdar*. The plaintiff obtained a decree. In a subsequent suit by the same plaintiff against the same defendant, for rent for subsequent years, the defendant *inter alia* contended that the plaintiff was a mere *benamdar*. The plaintiff objected that the previous decree was a bar to defendant's contention.

Held, that even if the matter in issue might and ought to have been made a defence in the former suit, yet as it was not finally heard and decided by the Court, within the meaning of section 13 of the Code of Civil Procedure, the defendant was not precluded in this suit from raising the objection that the plaintiff was a mere *benamdar*.

THE facts of the case, and the arguments for the purposes of this report appear sufficiently from the judgments of the High Court.

Dr. *Rash Behari Ghose* and Babu *Kali Kissen Sen* for the appellant.

Babu *Saroda Charan Mitter* and Babu *Surendra Chunder Sen* for the respondent.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follows :—

MACLEAN, C.J.—I think this appeal must succeed. In 1878, or possibly a little anterior to that date, as the judgment to which I refer is dated the 28th February 1878, the present plaintiff brought an action against the present defendant for the recovery of rent. In that suit the defendant pleaded abatement, but did not

* Appeal from Appellate Decree No. 594 of 1895, against the decree of Babu Bulloram Mullick, Subordinate Judge of Khulna, dated the 31st of December 1894, affirming the decree of Babu Sarat Chunder Pal, Munsif of Khulna, dated the 12th of September 1894.

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adduce any evidence to make out his plea. On the 28th February 1878, the Courts decreed the suit in favour of the then plaintiff with costs and interest, that is to say, the Court decreed at that time that the plaintiff was entitled to the particular amount of rent which the plaintiff then claimed. On the 13th April 1894, sixteen years afterwards, the same plaintiff brings another rent suit against the same defendant asking for payment from the defendant of rent accruing due in respect of subsequent years. The defendant puts in a defence raising, as he considers, various defences to that plaint. The case comes before the Munsif and the Subordinate Judge, and they both hold that the decree in the previous suit amounted to *res judicata* as regards the claim in the present suit, and that the defendant consequently was debarred by reason of the decree in the previous suit from putting in certain defences which he regarded, rightly or wrongly, as sufficient and good defences to the present suit. The decree in the former suit is in my opinion no bar to his doing so. A decree in a former suit by a landlord against his tenant for rent then due does not constitute *res judicata* in a subsequent suit for rent subsequently accrued by the same plaintiff against the same defendant. The defendant in the latter suit is entitled to show that the rent is not due; the decree in the former suit in no sense debars him from so doing.

The respondent relies mainly upon the explanation II to section 13 of the of Code of Civil Procedure. But looking first at section 13 itself, can we say that the question of whether any rent is now due was directly and substantially in issue in the former suit, or that it has been heard and finally decided by the Court in the previous suit? The rent for which the plaintiff is now suing had not accrued when the previous suit was brought.

All that the Court previously decided was that a particular amount of rent he claimed was due from the defendant to the plaintiff. Can it be said to follow from that that the rent now claimed is of necessity, by reason of that decision in 1878, equally due from the defendant, or that the defendant is to be debarred from setting up any defences he may have to the present action? In my opinion the present claim was not directly and substantially in issue, and it has not been heard or finally decided. In respect of explanation II, the language of which, to

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my mind, is not very clear, it says that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

We have no materials before us to enable us to say that the matter which the defendant now desires to set up might or ought to have been made ground of defence in the particular action in respect of that particular rent. The matters he now desires to set up may not have been within the knowledge of the defendant in 1878. Can we say then that he is debarred from going into those matters now? I think not. It may be that on looking further into the matter, some particular issue, precisely similar to some particular issue now raised, was then decided. If so, the principle of *res judicata* may apply, possibly, to that particular issue.

I see there is a decision in the case of *Konerrav* v. *Gurrav* (1) upon this explanation which certainly has some bearing upon the present case. The head note there is this: "In a previous suit between the plaintiff and the defendant the plaintiff alleged that there had been a partition of the family property into two parcels, and, under a deed of partition drawn up at the time, claimed one of these parcels. The deed being held invalid the suit was rejected, with liberty to plaintiff to sue for a general partition. In the second suit the plaintiff prayed for a general partition as a member of an undivided Hindu family. *Held*, that the second suit was not *res judicata*, for although the plaintiff *might* in the first suit have made an alternative case and prayed for a general partition in case he failed to establish the previous partition which he alleged, yet it could not be said that he ought to have done so."

That case has some bearing upon the present, so far as explanation II to section 13 is concerned.

The appeal in my opinion must succeed, and the case must be remanded to the Court of first instance for retrial. Costs will be dealt with by the Court retrying the case.

BANERJEE, J.—I am of the same opinion. The plea of *res judicata* in this case is based upon the terms of explanation II to

(1) I. L. R., 5 Bom., 589 (594).

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section 13 of the Code of Civil Procedure. It is contended that as the defendant could have urged in defence to the former action the defence now raised by him, namely, that the plaintiff is a mere *benamdar*, that is a sufficient reason why he should be precluded from raising that defence now. No doubt explanation II is very comprehensive in its terms; but the question is, whether it would include a case like the present. Granting that the matter now in issue might and ought to have been *made a* ground of defence in the former suit, the question still remains whether it "has been heard and finally decided" by the Court within the meaning of section 13. All that explanation II says is that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit;" but it does not go on to say, "and it shall be deemed to have been heard and finally decided," notwithstanding that the question was never considered by the Court, and notwithstanding that the subject-matter of the subsequent suit is different from that of the former suit. It is only where the subject-matter of the two suits is the same that the matter can be said to have been heard and finally decided within the meaning of section 13 of the Code, even though the matter was never raised in issue; but it is very difficult to hold that a matter which was never raised in issue actually in the former suit, and which is raised in defence in a subsequent suit in which the subject-matter is different from that of the former suit, shall, nevertheless, by virtue of explanation II of section 13, be deemed to have been, not only matter directly and substantially in issue, but matter which has been heard and finally decided. That being so, I think that the second explanation does not help the respondent. The view I take is fully supported by a recent decision of this Court in the case of *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh* (1). I think I may add that to a case like the present may be fully applied the well-known observations of Vice-Chancellor Knight Bruce in *Barrs* v. *Jackson* (2), which, notwithstanding the reversal of the judgment, have been ever since recognised and acted upon. See *The Queen* v. *Hutchings* (3) and *Tekait Doorga Persad Singh* v. *Tekaitni*

(1) I. L. R., 24 Calc., 83. (2) 2 Sm., L. C. (10th ed.), 757.
(3) L. R., 6 Q. B. D., 300.

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Doorga Konwari (1). The observations to which I refer are these: "It is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object."

For these reasons I think the case ought to go back for retrial.

S. C. G. *Appeal allowed. Case remanded.*

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

HARI MOHAN SHAHA (PLAINTIFF) *vs.* BABURALI (DEFENDANT.)*

1897 *March* 16.

Limitation Act (XV of 1877), Schedule II, Article 144—Suit for possession of land by an auction-purchaser, who obtained symbolical possession—Code of Civil Procedure (Act XIV of 1882), sections 318 and 319—Limitation Act, article 138.

In a suit for possession of land by an auction-purchaser who had obtained symbolical possession, the defendant objected that the suit was barred by limitation, it not having been brought within twelve years from the date of the auction purchase.

Held, that article 144, schedule II of the Limitation Act (XV of 1877) applied to the case, and that as the suit was brought within twelve years from the date when the auction-purchaser obtained symbolical possession it was not barred by limitation.

THIS appeal arose out of an action for declaration of title to, and for possession of, a piece of land. The plaintiff's allegation

* Appeal from Appellate Decree No. 773 of 1895, against the decree of Baboo Gopal Chandra Chaki, Subordinate Judge of Dacca, dated 23rd of January 1895, affirming the decree of Babu Romesh Chundra Bose, Munsif of Dacca, dated the 23rd of April 1894.

(1) L. R., 5 I. A., 149 (158): I. L. R., 4 Calc., 190 (200).