

however, was inadvertently filed in the District Court of Rungpore, where, no doubt, it can more conveniently be tried. But we can, under s. 25 of the Code of Civil Procedure, direct the transfer of an appeal only from a Court having jurisdiction to receive and try it. We have no power to authorize any Court to assume jurisdiction to receive and hear an appeal contrary to the usual course prescribed by the Code. We, therefore, leave the appellant to take the necessary steps to place his appeal in the Pubna Court, and he can then renew his application to us, which is otherwise unobjectionable.

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Rule discharged.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

HAZIR GAZI (ONE OF THE DEFENDANTS)* v. SONAMONEE DASSEE AND OTHERS (PLAINTIFFS).*

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Res Judicata—Judgment against one Co-Sharer, effect of, on Interest of other Co-Sharers—Code of Civil Procedure (Act X of 1877), s. 13, expl. 5—Repeal, Effect of.

Explanation 5 to s. 13 of the Code of Civil Procedure would not make a judgment obtained in a suit against one co-sharer binding on another co-sharer no party to such suit, in respect of the rights enjoyed in common by such co-sharers in their common property. Nor could such explanation be applied to a case instituted, or the judgment delivered in such case, during the time when the old Code of Civil Procedure was in force.

THIS was a suit to declare the plaintiffs' jamai rights to certain lands.

The plaint stated, *inter alia*, that one Dwarkanath Sirkar, son of the plaintiff Sonamonee Dassee, obtained a maurasi lease, dated the 6th May 1859, of twelve and-a-half bigas of land, from one Jarip Gazi and his brother Bonomali Gazi; that the right, title, and interest of these brothers in their lands, together

* Appeal from Appellate Decree, No. 1944 of 1879, against the decree of Alex. T. Maclean, Esq., Judge of the 24-Pargannas, dated the 29th May 1879, reversing the decree of Baboo Romesh Chunder Lahiri, First Munsif of Busirhaut, dated the 12th February 1879.

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with other lands, were purchased by the defendants at an auction-sale; that the plaintiffs thereupon paid the defendants the rent of the lands in their possession; that the defendant, Nadir Gazi, forcibly dispossessed the plaintiffs of two bigas of the lands held by them; that Kedarnath and his mother, plaintiffs in the present case, thereupon instituted a suit in the year 1873, against Nadir Gazi only, to recover the said two bigas of land, and obtained a decree in the Court of first instance, but that the said decree was set aside by the lower Appellate Court; that, pending the time between the remand order made by the High Court in that suit, and the subsequent confirmation of the original decree, both the defendants seized the rest of the lands of the plaintiffs; that Kedarnath died in November 1877; and that the plaintiffs in the present suit became entitled to the lands in dispute.

The defendant Hazir Gazi, in his written statement, alleged that the purchase at the auction-sale mentioned in the plaint was made by both the defendants in the name of the first defendant from joint funds; that the patta relied upon by the plaintiffs was fraudulent, and fabricated by the plaintiffs in collusion with Jarip and Bonomali Gazi, the former owners of the property; that he had not been made a party to the former suit, and that his present contention in respect of the genuineness of the plaintiffs' patta could not be considered as *res judicata* as against him.

The defendant Nadir Gazi did not defend the suit.

The Munsif dismissed the plaintiffs' suit, on the ground that they had failed to prove their possession and subsequent dispossession as alleged by them; and he found that the suit was a fraudulent one; and that the patta, and most of the other documents filed by them, were forgeries. The lower Appellate Court was of opinion, that although the defendant Hazir Gazi had not been made a party to the previous suit, yet, he being the brother of the defendant in that suit, and according to his own admission having acquired the superior title to the lands in dispute by purchase with joint funds in that brother's name, was estopped by the provisions of s. 13, expl. 5, from contesting, in the present case, the validity of the patta set up by the plaintiffs, which had already been proved in the former suit, and for this reason reversed the decision of the Court below.

The defendant Hazir Gazi appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the appellant.

Baboo *Nil Madhab Bose* for the respondents.

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The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J.—There must be a remand in this case. The Judge has given to the judgment previously obtained against Nadir Gazi an effect as regards the brother and co-sharer Hazir, which, in our opinion, s. 13 of the Code of Civil Procedure does not warrant. That section provides :—“No Court shall try any suit or issue in which the matter directly and substantially in issue having been directly and substantially in issue in a former suit in a Court of competent jurisdiction, between the same parties, or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court;” and expl. 5, which is referred to, says,—“where persons litigate *bond fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.” Now, we are not prepared to say that the explanation has this meaning, that a judgment obtained against a co-sharer in the property is binding against another co-sharer in the property, and clearly it would not be so where the first suit did not purport to have been litigated *bond fide* in respect of a right claimed in common by two persons. In addition to that, the judgment relied upon in the present case was obtained long before the enactment of the present Code, and we are not at all prepared to say that expl. 5 of s. 13 would apply to a judgment under the Code now repealed. These considerations very seriously affect the judgment of the lower Appellate Court upon the facts. We think, therefore, that the case must go back for a new trial. The costs will follow the result.

Case remanded.