APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Brett.

1901
Jan. 9, 10, 16.

BISHNU PRIYA CHOWDHURANI AND OTHERS (DEFENDANTS) *v.* BHABA SUNDARI DEBYA (PLAINTIFF).*

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Court of competent jurisdiction—Whether a decision of a previous suit for compensation was one of a Court of competent jurisdiction to bar a subsequent claim for compensation in a suit for arrears of rent, as well as for compensation —Mixed question of law and fact.

A suit for compensation was brought in the Court of Munsif at Goas in 1868 by the plaintiff (*putnidar*) against the defendant's predecessors (*durputnidars*) upon the basis of a *durputni kabuliyat*, which stipulated that the *durputnidars* would deliver certain articles to the plaintiff's landlord, or in default they would compensate the plaintiff for any damage she might sustain. The Court (which had no jurisdiction to try suits for rent) gave a decree to the plaintiff for damages which she had sustained for the *durputnidars'* default. In a subsequent suit brought by the same plaintiff against the same defendants in the Court of Munsif at Moorshidabad for arrears of rent, as well as for compensation for breach of the aforesaid contract, it was contended on behalf of the defendants that the decision in the previous suit, so far as compensation was concerned, could not operate as *res judicata*.

Held, that although the Court of Munsif at Goas was not competent in 1868 to entertain a suit for arrears of rent, it was competent to entertain a suit for compensation for breach of contract, and, as the previous suit was not a suit for arrears of rent, nor was the claim in the subsequent suit, so far as it related to the amount of compensation under the stipulation, a claim for arrears of rent, so the decision in the previous suit was a decision of a competent Court, and it would operate as *res judicata*.

Held also, that on the previous suit a particular stipulation contained in a particular *kabuliat* having been held to be valid as between the parties, it was not open to the Court subsequently to try the issue, whether that particular stipulation was valid or not, the question being a mixed question of law and fact.

* Appeal from Appellate Decree No. 51 of 1899, against the decree of W. Teunon, Esq., District Judge of Murshidabad, dated the 25th of November 1898, reversing the decree of Babu Jogendra Nath Ghose, Munsif of Berhampore, dated the 21st of May 1898.

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A decision in a previous suit on a question of law, even if erroneous, would operate as *res judicata* in a subsequent suit.

Parthasaradi Ayyangar v. *Chinna Krishna Ayyangar* (1) dissented from.

THE facts of the case are shortly these :—The plaintiff took a *putni* lease of Mehal Bishnupore from one Nawab Joynal Abdin in the year 1855, and the formal documents were executed between the parties. Simultaneously with the said documents an *ekrar* was executed by the plaintiff by which she undertook to supply to the zemindar a specified quantity of straw, a specified number of goats, and other articles described as *mamuli* or customary. On the 1st October 1859 the plaintiff granted a *durputni* lease of the tenure to the defendant's predecessors, who executed in her favor a *kabuliat*. By this *kabuliat* the *durputnidars* covenanted to pay a certain sum of money year by year, and they further agreed to supply to the superior landlord the goats and the straw due from the *putnidar* under the *ekrar*. The stipulation ran thus : "The articles, *viz.*, goats and straw which you supplied to the zemindar without payment from these *mehals*, those we will supply. If we do not supply, we will be liable to pay the sum payable by you as the price thereof." The zemindar brought a suit in 1866 in the Court of the Sudder Amin of Murshidabad against the present plaintiff, the *putnidar* for the goats and straw due under the *ekrar* or value thereof. On appeal to the High Court it was held that the suit was one for breach of the agreement contained in the *ekrar*, and therefore it was cognizable by the Small Cause Court. The case having been returned to the Sudder Amin he valued the yearly supplies at Rs. 100 12as. and passed a decree in favor of the zemindar for Rs. 604 8as. Then the *putnidar* (plaintiff) brought a suit on the basis of the *durputni kabuliat* in the Court of the Munsif at Goas in 1868 to recover from the *durputnidars* this sum of money, which he had to pay to the zemindar. This Court had no jurisdiction to try suits for rent. Plaintiff obtained a decree, thereafter the *durputnidars* continued to pay the cash rent and to render the yearly supplies agreed upon up to the year 1895. In that year the *putnidar* sued to recover from the *durputnidars* the sum of Rs. 836 4 as. as the balance due on

(1) (1882) I. L. R., 5 Mad., 304.

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account of *durputni* rent and cesses for the years 1300 to 1302 B. S. and on account of the price of goats and straw not supplied in the year 1300 and 1301 B. S. Damages were also claimed in the suit. The plaintiff remitted the damages and the defendants consented to a decree against them for rents and cesses, &c. In 1896 the *putnidar* had again to bring a suit for rent as also for the price of the supplies due, but not rendered in the year 1302 B. S. The Subordinate Judge disallowed the claim for the supplies, holding it to be an *abwab*. An appeal to the District Judge was also dismissed. Cesses and interest for 1303 B. S. and the value of the goats for that year not having been paid by the *putnidar*, the zemindar proceeded under Regulation VIII of 1819 to bring the *putni talug* to sale. The *putnidar* paid the amount claimed and thus saved the *putni talug* from being sold. The present suit was brought by her (the *putnidar*) to recover from the *durputnidars* (1) arrears of rent, cesses and interest; (2) the cesses and interest recovered from her by the proceedings under the *putni* regulation; (3) Rs. 100 12as. (as the value of goats and straw of which delivery should have been made in 1303 B.S.) similarly realized from her; and (4) the costs incurred by the zemindar in the abovementioned proceedings and levied from her.

The learned Munsif dismissed the claim for Rs. 100 12as. holding this sum to be an *abwab*, but allowed the other claims of the plaintiff. The plaintiff preferred an appeal as regards the claim disallowed, and the defendant filed a cross appeal as regards the costs in the *putni* Regulation proceedings. The learned District Judge of Murshidabad, Mr. Teunon, held that the *durputni kabuliat* contained no agreement to pay an *abwab* and that the plaintiff appellant was entitled to recover from the defendants respondents the sum of Rs. 100 12as. which was taken as the value of the goats and straw of which delivery should have been made in 1303 B. S. He further held that the question, whether the plaintiff was entitled to recover the abovenamed sum from the defendants or not was already heard and finally determined between the parties in the previous suit brought in the Court of the Munsif at Goas in 1868, therefore the decision in that suit operated as *res judicata*. Upon these findings he allowed the

appeal, and dismissed the cross appeal. Against this decision the defendants appealed to the High Court.

1901, JANUARY 9, 10. Mr. *W. C. Bonnerjee* (with him Babu *Taruck Nath Chuckerbutty*) for the appellant.

Babu *Saroda Churn Mitter* (with him Babu *Soroshi Churn Mitter*) for the respondent.

1901. JANUARY 16. The judgment of the High Court (BANERJEE and BRETT, JJ.) was as follows :—

Two questions have been raised in this appeal : *First*, whether the Lower Appellate Court was right in holding that the stipulation in the *kabuliat* relied upon by the plaintiff for the delivery of certain articles to the plaintiff's landlord by the defendants, or in default for compensating the plaintiff for any damage she might sustain, was not in the nature of a stipulation for paying an *abwab ;* and *second*, whether the Court of Appeal below was right in holding that the issue whether the aforesaid stipulation was legally enforceable or not was *res judicata*, and concluded in favour of the plaintiff by the decision in a previous suit, namely, suit No. 492 of 1868 of the Court of the Munsiff of Goas.

If the second question is answered in the affirmative, the first question will not arise, as it will not be open to the Court to consider it. We shall, therefore, deal with the second question first.

It is not disputed that the former suit was one between the same parties, and the question now arising for determination was directly in issue, and was expressly determined in favour of the plaintiff in the former suit. But the learned counsel for the defendant-appellants contends that notwithstanding that circumstance, the decision in the former suit cannot operate as *res judicata* for three reasons : *First*, because the Court of the Munsif of Goas was not competent in 1868, when the former suit was brought, to entertain a suit for rent like the present, and the decision of that Court was not a decision of a Court of competent jurisdiction ; *secondly*, because the question raised is a question of law, and no previous decision on such a question could operate as *res judicata ;* and *thirdly*, because there has been

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a change in the law since the decision in the previous suit by the enactment of ss. 23 and 24 of the Indian Contract Act. We shall examine these three reasons separately.

It is true that under the law as it stood in 1868, the Court of the Munsif of Goas had no jurisdiction to try a suit for arrears of rent, but the claim in the previous suit was not one for arrears of rent, nor is the claim in the present suit, so far as it relates to the amount of compensation under the stipulation in question, a claim for arrears of rent. The *kabuliat* specifies the amount of rent separately, and the stipulation in question is quite distinct from that for the payment of rent. It is a stipulation by which the *durputnidar* undertakes to deliver to the *putnidar's* landlord, the zemindar, certain articles, and covenants further that if the articles are not delivered as agreed upon, the *durputnidar* shall become liable to pay to the *putnidar* the sum which she may have to pay to the zemindar in consequence of the *durputnidar's* default. The liability of the defendants, therefore, to pay to the plaintiff the money in question does not arise merely upon their default to deliver the articles to the plaintiff's landlord. It arises only upon the plaintiff being made liable to render compensation to her landlord the zemindar, in consequence of the defendants' default. The stipulation, therefore, is clearly one for compensating the plaintiff for breach of contract by the defendants, and the Court of the Munsif of Goas was the Court competent to entertain a suit for compensation for such a breach of contract. The decision of the Munsif of Goas in the previous suit was, therefore, in our opinion a decision of a competent Court, and the first ground upon which we are asked to hold that it cannot operate as *res judicata* is not a good ground.

Then in support of the second argument, namely, that the previous decision cannot operate as *res judicata*, because it is a decision upon a question of law, reliance is placed on the cases of *Parthasavadi Ayyangar* v. *Chinna Krishna Ayyangar* (2) and *Chamanlal* v. *Bapubhai* (3). The last mentioned case is, in our opinion, clearly distinguishable from the present. There what was held was this, that a previous decision, in a suit between

(2) (1882) I. L. R., 5 Mad., 304.
(3) (1897) I. L. R., 22 Bom., 669.

the same parties, that arrears for twelve years could be awarded, could not operate as *res judicata* in the sense that the Court is bound for ever to decide that a claim for arrears of rent for twelve years is good. That may be so. In fact to hold that a matter is *res judicata* upon a question like that, would be to hold that a decision between any two parties will have the effect of altering the law of the land in regard to a certain class of suits between those parties. That, however, is not the case here. The question before us is not a pure question of law. It is a mixed question of law and fact. The question is not the general question whether a stipulation for the payment of *abwab* between the parties to the present suit is rendered valid by reason of a previous decision between the same parties; but the question is whether a particular stipulation contained in a particular *kabuliat* having been held to be valid as between the parties, it is open to the Court subsequently to try the issue, whether that particular stipulation is valid or not; and to that question we think the answer ought to be in the negative. The view we take is in accordance with the decision in the case of *Rai Churn Ghose* v. *Kumud Mohon Dutta Chaudhuri* (4). It is also supported by the cases of *Gowri Keor* v. *Audh Koer* (5) and *Phundo* v. *Janginath* (6); as for the case of *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar* (7), if it goes further than the case of *Chamanlal* v. *Bapubhai* (8), with all respect for the learned Judges who decided it, we must dissent from the view therein expressed, and follow the decision of our own Court to which reference has already been made.

As to the third reason, it is enough to say, that there has been no change in the law on the point under consideration by the enactment of the Indian Contract Act; the law on the point having always been what is laid down in ss. 23 and 24 of that Act.

The reasons then upon which it is sought to be shewn that the previous decision ought not to operate as *res judicata* are, in our

(4) (1897) 1 C. W. N., 687.
(5) (1884) I. L. R., 10 Calc., 1087.
(6) (1893) I. L. R., 15 All., 327.
(7) (1882) I. L. R., 5 Mad., 304.
(8) (1897) I. L. R., 22 Bom., 669.

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opinion, unsound; and the decision in the previous case must, therefore, be held to operate *res judicata* and to conclude the question in favour of the plaintiff-respondent. That being so, it is not necessary for us, nor is it open to the Court, to go into the first question raised in this appeal.

The decree of the Lower Appellate Court must therefore be affirmed and this appeal dismissed with costs.

S. C. G. *Appeal dismissed.*

Before Mr. Justice Banerjee and Mr. Justice Brett.

MOHESH CHANDRA DASS (PLAINTIFF) *v.* JAMIRUDDIN MOLLAH AND OTHERS (DEFENDANTS).*

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Jan. 17, 18.

Civil Procedure Code (Act XIV of 1882), ss. 562, 566, 578, 588—Jurisdiction, meaning of the term—Remand order in contravention of s. 564—Whether the remand and the subsequent proceedings null and void—Whether legality of the remand order could be questioned on an appeal from the final decree.

The term jurisdiction in s. 578 of the Civil Procedure Code is used in the sense of pecuniary or local jurisdiction, or jurisdiction relating to the subject matter of a suit. It does not mean the legal authority of a Court to do certain things.

A suit having been decided by the Court of First Instance not upon a preliminary point, but upon the merits, the Lower Appellate Court reversed the decision of the First Court and remanded the case under s. 562 of the Civil Procedure Code. On remand a partial decree was passed by the Court in favour of the plaintiff. On appeal the decree was modified by the Lower Appellate Court.

On a second appeal by the plaintiff to the High Court:—

Held, that having regard to the provisions of s. 578 of the Civil Procedure Code, the remand order and the subsequent proceedings were not null and void, as by the remand there was no error affecting the jurisdiction of the Court or the merits of the case.

Rameshur Singh v. *Sheodin Singh* (1) dissented from.

Held also, that the legality of a remand order and the subsequent proceedings could be questioned on second appeal from the final decree,

* Appeal from Appellate Decree No. 1205 of 1898, against the decree of Babu Behary Lall Mullick, Subordinate Judge of Faridpore, dated the 30th of March 1898, modifying the decree of Babu Mohim Chunder Chakravarti, Munsiff of that District, dated the 31st of July 1897.

(1) (1889) I. L. R., 12 All., 510.