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been satisfied *pro tanto* the decree-holder is not entitled to proceed for the satisfaction of the balance of his decree against the other properties of the judgment-debtor, and in equity it would be impossible to give effect to such a contention. The suit which is brought upon a mortgage is brought not only upon the lien but also upon the personal covenant. It is on the basis of the personal covenant that a decree is made under s. 90 of the Transfer of Property Act, that is, with regard to any portion of the claim that might remain unsatisfied out of the sale proceeds of the mortgaged premises. The learned pleader for the appellant in support of the construction of s. 167 contended for by him relied upon the case of *Goluk Chunder Das* v. *Ram Sunker Dutt* (1). In that case no one appeared in this Court for the respondent and the question which has been raised here under s. 101 of the Transfer of Property Act, and the other matters to which we have referred were not in issue, and we do not think that we are bound by it.

Having regard to all the circumstances we are of opinion that the view taken by the Subordinate Judge is correct, and that this appeal ought to be dismissed with costs.

Appeal dismissed.

M. N. R.

Before Mr. Justice Ameer Ali and Mr. Justice Brett.

WOOMESH CHANDRA MAITRA (DEFENDANT) *v.* BARADA DAS MAITRA AND OTHERS (PLAINTIFFS).*

1900 *May* 18, 25.

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13, Explanation II—Suit for rent—Landlord and tenant—Illegal cess not objected to in former suit—Bengal Tenancy Act (VIII of 1885), s. 74.

Where in a suit for rent, the rent claimed expressly includes an item which is objected to as an illegal cess, the mere fact that, in a previous rent suit between the same parties regarding the same tenure, the defendant did not raise the same plea, although he could have done so, would not, in the absence of a judicial determination of the point in the previous suit, preclude him from raising the plea in the subsequent suit.

* Appeal from Appellate Decree No. 2058 of 1898, against the decree of Alfred F. Steinberg, Esq., District Judge of Rajshahi, dated the 24th of June, 1898, affirming the decree of Babu Upendra Chandra Ghose, Munsif of Nattore, dated the 11th of August 1897.

(1) (1899) 4 C. W. N., 268

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Kailash Mondul v. *Baroda Sundari Dasi* (1) followed. *Radha Prosad Singh* v. *Bal Kowar Koeri* (2) referred to.

THE plantiffs brought a suit against the defendants for arrears of *putni* rent and cesses with interests for the period from Kartic 1299 B. S. to Falgoon 1302 B. S. (October 1892 to February 1895.) The amount of the annual *jama* was claimed to be Rs. 186 15as. for rent and Rs. 3 7as. 6pies for Iswar Bhawanipur's *mamuli*, making together the consolidated rental of Rs. 190 6as. 6pies payable in ten instalments, in accordance with the terms of a *kabulyat* said to have been executed by a predecessor in interest of the defendants.

The defendants contended amongst other things that the *mamuli* claimed was an *abwab* and not recoverable, and that they were not bound by the *kabulyat*. They also referred to the immediately previous rent suit between the parties relating to the same *jama*, instituted in 1893, in support of their objection that the plaintiffs could not recover rent for the entire period stated in the plaint.

One of the issues framed by the Munsif was the following:—

"Whether the plaintiffs would be entitled to the *mamuli* rate of Rs. 3 7as. 6pies yearly in respect of Iswar Bhawanipur?"

As to this issue, the Munsif referred to the decrees and judgments of the Lower and Appellate Courts in the previous rent suit, in which the plaintiffs claimed and obtained a decree at the consolidated rate of Rs. 190 6as. 6pies, and to which amount the defendants did not make any objection. There was accordingly no issue on that point, on which both the former judgments were silent. The Munsif held that it was, in the circumstances, not open to the defendants to object to the amount of the rental in the present suit, and that their objection was barred by *res judicata*. On reference to the same decrees and judgments, which had decided that the defendants were not bound by the *kabulyat* relied on by the plaintiffs, the Munsif further held that, it having been decided in the previous suit that the plaintiffs were entitled to rent in four equal quarterly instalments only, and not in ten instalments, the interest due on failure of the said ten instalments

(1) (1897) I. L. R., 24 Calc., 711.
(2) (1890) I. L. R., 17 Calc., 726.

could not be recovered in the present suit. The suit was accordingly decreed in a modified form.

Thereupon the defendant No. 1 appealed to the District Judge and the plaintiffs preferred a cross-appeal on the ground that the *kabulyat* was binding on the defendants.

The District Judge held that the Munsif was right in excluding the *kabulyat*, as the issue as to whether it was binding on the defendants was barred by *res judicata*. As regards the *mamuli* claimed, he held that, although the question was not raised in the previous litigation and was not mentioned in the judgments, still it was no longer an open question, the defendants not having contested the amount of the annual rent in the previous litigation. Reference was made to explanations I and II of s. 13 of Act XIV of 1882, and both the appeal and cross-appeal were dismissed.

The defendant No. 1 appealed to the High Court, and the plaintiffs took objection to the decree appealed against under s. 561 of the Civil Procedure Code.

1900, MAY 18. Babu *Mohini Mohan Chakravarti*, for the appellant.

Babus *Nilmadhav Bose* and *Jogesh Chandra Dey* for the respondents.

Cur. adv. vult.

1900, MAY 25. The judgment of the High Court (AMEER ALI and BRETT, JJ.) was as follows —

This second appeal arises out of a suit brought by the plaintiffs under the following circumstances:—The defendant holds a *putni* under the plaintiffs, who sue him for arrears of rent upon the basis of a *kabulyat*, at the rate of Rs. 190 6as. 6pies. including Iswar Bhawanipur's *mamuli*, Rs. 3 7as. 6pies, and claim payment by ten instalments. The defendant alleges that the *kabulyat* is not binding upon him, and pleads that the *mamuli* included in the claim as rent is an illegal cess. It appears that previously there was another suit between the parties in which the plaintiffs had claimed rent and had obtained a decree for Rs. 190 6as. 6 pies payable in four instalments. In that suit the *kabulyat* was declared to be not binding on the defendant.

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The Munsif in the present case held that the question relating to the *kabulyat* and the instalments was *res judicata*, and overruling the objection of the defendant that the *mamuli* was an illegal *abwab*, made a decree in favour of the plaintiffs for Rs. 190 6as. 6pies payable by four instalments as decreed in the previous litigation. He held further that it had already been found that the *kabulyat* was not binding on the defendant, and that the plaintiffs were estopped from re-opening the question. He held also that, as the defendant had not objected in the former suit to any portion of the rent being an illegal cess, he was barred from raising that plea in the present action.

Both parties appealed and the District Judge dismissed the defendant's appeal as well as the cross-appeal of the plaintiffs, and affirmed the judgment and decree of the First Court.

The defendants prefer this second appeal on the ground that the decision of the Lower Appellate Court regarding the illegal cess is erroneous, because no issue was raised on that point, nor any decision arrived at in the first suit; and that even if any decision had been arrived at, it would not preclude him from raising the question again in the present suit. The respondents object to the decision of the Lower Appellate Court on the ground that that Court was wrong in holding the *kabulyat* was not binding on the defendant.

As regards the cross-objection we may dispose of it in a few words. We have read the judgments in the previous suit, and we find that the question relating to the binding nature of the *kabulyat*, and the number of *kists* was distinctly raised on that occasion and was decided in favour of the defendant. The plaintiffs are not in a position to re-open that question of fact.

As regards the contention of the defendant, it is admitted that in the previous suit there was no question raised or decided concerning the defendants' non-liability for any portion of the rent on the ground of its being an illegal *abwab*. The written statement in that case is not before us, nor do we know exactly the frame of the former suit, and it is, therefore, difficult for us to say whether the defendant was or was not bound to put forward in that suit his allegation about the illegal *abwab*. In the present case, however, the plaintiffs sue distinctly for rent on the ground

that the defendant is liable to pay at the rate of Rs.190 6as. 6pies, which, according to their own statements, includes Iswar Bhawanipur's *mamuli* Rs.3 7as. 6pies. S. 74 of the Bengal Tenancy Act provides: "All impositions upon tenants under the denominations of *abwab*, *mahtut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void." It has been pointed out in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (1), that if any portion of the sum claimed from the tenants is an illegal cess which has never been consolidated with the rent, it is not recoverable even if it has been decreed at any previous stage by a judicial decision. The learned Judge in the Court below has referred to explanation II of s. 13 of the Civil Procedure Code, for the purpose of showing that inasmuch as the defendant could have in the previous litigation raised this very plea and did not do so, the question must be regarded as settled between the parties. The decision, however, in *Kailash Mondul* v. *Baroda Sundari Dasi* (2), shows that, although upon a literal interpretation of the words of explanation II, s. 13 of the Civil Procedure Code it might be contended that a point not raised and not decided in a previous litigation might still be taken as conclusive in a subsequent suit between the parties, yet upon a proper construction of the section the question ought not and cannot be treated as *res judicata* unless there is a judicial determination express or implied on the matter not put directly in issue. Mr. Justice Banerjee's words are very clear on the subject. He says: "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 s. 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 when the

(1) (1890) I. L. R., 17 Calc., 726.

(2) (1897) I. L. R., 24 Calc., 711.

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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 s. 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 s. 13, be deemed to have been not only matter directly and substantially in issue, but matter which has been heard and finally decided." It is with reference to the latter observation of Mr. Justice Banerjee that we mentioned at the outset that in the case before us we do not know what the nature of the former suit was, as the pleadings are not before us.

But, apart from that case, it is argued before us that in a suit brought merely for rent, if the defendant does not raise any plea as to any portion of the rent claimed being an illegal *abwab*, it precludes him from raising the question afterwards. We are aware of no authority in support of this contention excepting the bare words of explanation II of s. 13, which in our opinion do not bear it out.

As regards the cases cited by the learned pleader for the respondents, they only go to show what an illegal *abwab* is and what is not. In our opinion this matter requires to be dealt with upon the facts.

We think that the case must go back to the District Judge to find on the evidence before him, whether the sum which is claimed by the plaintiffs as included in the rent of this *putni taluk* as Iswar Bhawanipur's *mamuli*, Rs.3 7as 6pies, is an illegal cess or rent. We accordingly set aside the judgment of the learned District Judge and send the case back to be tried in view of the observations we have made. If he finds that the sum claimed as Iswar Bhawanipur's *mamuli* is an illegal cess, then it will follow that it cannot be recovered. If it is not an illegal cess, the judgment of the Lower Court will be upheld.

The costs of this appeal will abide the result.

The cross objections are disallowed without costs.

M. N. R. *Appeal allowed; case remanded.*