APPELLATE CIVIL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Ryves.

JAMADAR SINGH

v.

SERAZUDDIN AHAMAD CHAUDHURI.*

1908 June 17.

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13, Expl. II—Rent, suit for—Previous rent-suit—Decree ex parte.

The limitation that for explanation II of section 13 of the Code of Civil Procedure to have any application, the subject-matters of the two suits must be the same is not to be found in section 13 itself.

Rajendra Nath Ghose v. *Tarangini Dasi* (1) explained.

The words "the matter directly and substantially at issue has been directly and substantially in issue in a former suit" cannot and do not lay down that both the issues and the subject-matters of the two suits must be the same before explanation II can be applied.

Sarkum Abu Torab Abdul Waheb v. *Rahaman Buksh* (2), *Kailash Mondul* v. *Baroda Sundari Dasi* (3), *Woomesh Chandra Maitra* v. *Barada Das Maitra* (4) and *Surjiram Marwari* v. *Barhamdeo Persad* (5) referred to.

It is not required for explanation II to be applicable to a case that the matter, which might and ought to have been raised in the former suit, but was not so raised, must have been heard and finally decided in the previous suit.

Sri Gopal v. *Pirthi Singh* (6) followed.

SECOND APPEAL by the defendant.

The suit was based on an *ijara-kabuliyat*, stipulating for payment of Rs. 200 quarterly. It was instituted on the 3rd April 1903 for the rent of five quarters, the last of 1308 and the four quarters of 1309. The defendant pleaded that he had made payments in previous years, which had not been credited. The *ijara* took effect from the beginning of 1306. On the 12th June

* Appeal from Appellate Decree, No. 1080 of 1906, against the decree of H. Walmsley, Officiating District Judge of Dacca, dated 31st March 1906, modifying the decree of Khettra Nath Datta, Subordinate Judge of Dacca, dated 31st of August, 1905.

(1) (1904) 1 C. L. J. 248.
(2) (1896) I. L. R. 24 Calc. 83.
(3) (1897) I. L. R. 24 Calc. 711.
(4) (1900) I. L. R. 28 Calc. 17.
(5) (1905) 1 C. L. J. 337.
(6) (1897) I. L. R. 20 All. 110.

1908

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHAUDHURI.

1902, the plaintiffs had obtained an *ex parte* decree for rent due from Pous 1306 to Pous 1308, that is up to the end of the quarter immediately preceding the period for which the present suit was brought. That decree was executed in 1903. In the present suit, the defendant alleged that, prior to the institution of the previous suit, he had made payments to the plaintiffs, amounting to Rs. 1,400-8, but that the plaintiffs gave him credit for Rs. 842 only in that suit. The defendant therefore claimed in the present suit to have the difference of Rs. 548-8 treated as a set-off to the plaintiff's claim. The Subordinate Judge allowed the claim. The District Judge reversed that decision, holding that it did not matter that the previous rent decree was *ex parte*, and that the claim of set-off was barred by the principle of *res judicata*.

Dr. Priya Nath Sen for the appellant. The decision in the previous rent-suit cannot operate as *res judicata*, and debar the defendant from seeking to have the plaintiff's claim reduced by the sum for which no credit was given in the previous suit for two grounds: (1) the suits do not involve the same issue, or in other words, the issue, which has arisen in the present suit, did not arise in the previous suit; and (2) the subject-matters of the two suits being different, the principle of constructive *res judicata* does not apply. On the first ground, it is to be observed that the plaintiffs do not deny the payments, which the defendants desire to set-off against the plaintiffs' claim, but they say they have appropriated them towards the discharge of certain other dues in connection with mutation fees. The question is—was the defendant entitled to do so? This could not possibly have been an issue in the previous suit. A payment, which may not be a valid defence in one suit, may be a valid defence in another, so that the omission to plead a particular payment as a defence to one suit does not by itself debar the same payment from being pleaded as a defence in another. Of course, it might have been different, if in the previous suit the defendant had pleaded the particular payment, and it had been decided adversely to him, for instance, if in the previous suit the Court had found that no payment had been made, then the defendant could not have relied

upon the allegation of the same payment in the present suit, but as it is, there has been no such adjudication, and it cannot be said that the previous *ex parte* decision necessarily involved such an adjudication as would negative the plea raised in the present suit. On the second ground, I contend that there is no identity of subject-matter. I do not impugn the previous rent-decree, nor do I wish to go behind it. I only want to get credit for a payment, which I have made in the present suit, which relates to arrears for a different period. Constructive *res judicata* does not apply here: *Sarkum Abu Torab Abaul Waheb* v. *Rahaman Buksh* (1); *Kailash Mondul* v. *Baroda Sundari* (2); *Rajendra Nath Ghose* v. *Tarangini Dasi* (3); *Surjiram Marwari* v. *Barhamdeo Persad* (4); *Woomesh Chandra Maitra* v. *Barada Das Maitra*(5) See also cases cited at page 87 of Hukum Chand on *Res Judicata*.

Babu Surendra Nath Guha for the respondents. The question, whether an *ex parte* rent-decree should operate as *res judicata* or not was left undecided in *Modhusuden Shaha Mundul* v. *Brae*(6). I rely on Sir Richard Garth's judgment in *Birchunder Manickya* v. *Hurrish Chunder Dass*(7).

Dr. Priya Nath Sen in reply. No question of *res judicata* was decided in the case of *Birchunder Manickya* v. *Hurrish Chunder Dass* (7). All that was decided in that case was that an *ex parte* decree for rent was admissible in evidence in a subsequent suit, for what it was worth.

Cur. adv. vult

RAMPINI, A. C. J. The defendant is the appellant before us. The facts of the case are fully set forth in the judgment of the District Judge.

The only question we have to decide is, whether the District Judge is right in holding that the *ex parte* decree for rent due from Pous 1306 to Pous 1308 had the effect of *res judicata* and of deciding that all accounts between the parties up to Pous 1308

(1) (1896) I. L. R. 24 Calc. 83.
(2) (1897) I. L. R. 24 Calc. 711.
(3) (1904) 1 C. L. J. 246.
(4) (1905) 1 C. L. J. 337.
(5) (1900) I. L. R. 28 Calc. 17.
(6) (1889) I. L. R. 16 Calc. 300.
(7) (1878) I. L. R. 3 Calc. 383.

1908

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHAUDHURI.

RAMPINI A. C. J.

were finally settled. There is no question as to the payments made during the period, for which rent was sued in the previous suit. The defendant paid Rs. 1,400-8-0 and the plaintiff in the previous suit credited him with Rs. 842 only, deducting Rs. 548-8-0 on account, it is said, of half mutation fees alleged by him to have been realized by the defendant from the raiyats. It is to be noted that the decree in the previous suit was duly executed. The first Court finds that the plaintiff has not satisfactorily established that the defendant realized these fees, and the District Judge has not displaced this finding. If the *ex parte* decree has not the effect, as the Judge holds it has, of settling all accounts between the parties and starting them with a clean slate from the last quarter of 1308, then the question of set-off claimed by the defendant in this suit should have been enquired into.

Now the decree was no doubt an *ex parte* one and decided no other question than that the defendant owed the plaintiff the sum of Rs. 842 for rent, after deducting Rs. 548-8-0 credited to another account. But this latter sum is the very sum which the defendant claims to set off in this suit. It was held in the previous suit to be due from the defendant, because the plaintiff had deducted that amount from the payments proved on account of other debts due from the defendant. If the defendant did not agree to that deduction, he should have raised in the previous suit the defence he raises in the present one, and, as he did not do so, under explanation II to section 13 of the Civil Procedure Code, I consider that he cannot raise it now.

The learned pleader for the appellant, however, contends that this is not so, for two reasons, (1) that the question at issue in the previous suit was different from that at issue in the present suit, and (2) that explanation II to section 13 cannot be relied on, as the subject-matters of the two suits are not the same.

I am, however, of opinion that the question, which the defendant raises in this suit, is the very question, which was at issue in the previous suit, viz., what was the amount of rent due from the defendant for the period—Pous 1306 to Pous 1308. The plaintiff in that suit alleged that it was Rs. 842. The defendant did not traverse this allegation, which he should have done, if he

contended that he had paid more than Rs. 842. The defence, which the defendant raises in this suit, is the very same as that which he should have raised in the previous suit, viz., that he did not owe so much as Rs. 842 for that period and that the plaintiff had improperly failed to credit him with the sum of Rs. 548-8. In support of his second plea, the learned pleader for the appellant has cited the following cases, viz., *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh*(1), *Kailash Mundul* v. *Baroda Sundari Dasi*(2), *Woomesh Chandra Maitra* v. *Barada Das Maitra*(3), *Rajendra Nath Ghose* v. *Tarangini Dasi*(4), and *Surjiram Marwari* v. *Barhamdeo Persad*(5). I do not think it necessary to discuss all these cases at length. It is sufficient to say that, although in some of these cases there are expressions, which support the plea of the learned pleader for the appellant, I think all that is meant is that, as held by Banerjee, J. in *Rajendra Nath Ghose* v. *Tarangini Dasi*(4), "the explanation would have meaning and effect, where the subject-matter is the same in the two suits, *or* where the subject-matter of the second suit is the same as that of the issue tried in the first suit, notwithstanding that any ground of attack or defence was not expressly raised." The limitation that for explanation II of section 13 to have any application, the subject-matters of the two suits must be the same, is not to be found in section 13 itself. If this view were strictly applied, then in suits for arrears of rent there could be no *res judicata* at all, for the subject-matters of successive suits for arrears of rent are necessarily different. But what the rulings cited by the learned pleader for the appellant must mean is, as laid down by section 13, that the matter directly and substantially at issue must have been directly and substantially at issue in the previous suit. They cannot and do not, in my opinion, lay down that both the issues *and* the subject matters of the two suits must be the same, before explanation II can be applied. Now, I have already pointed out that the question as to the amount of rent due by the defendant from 1306 to 1308 was the question at issue in the previous rent suit against the defendant and is at issue in the

(1) (1896) I. L. R. 24 Calc. 83.
(2) (1897) I. L. R. 24 Calc. 711.
(3) (1900) I. L. R. 28 Calc. 17.
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(5) (1905) 1 C. L. J. 337.

1908

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHAUDHURI.

RAMPINI A. C. J.

present one. It is, therefore, in my opinion, not necessary that the subject matters of the two suits should be the same.

Another point as to the application of explanation II to section 13, on which there is some conflict, is as to whether the matter which might and ought to have been raised in the former suit, but was not so raised, must have been heard and finally decided in the previous suit. As pointed out in the Full Bench case of *Sri Gopal* v. *Pirthi Singh* (1), this would not seem to be required. Seeing that the decree in the previous rent-suit against the defendant has been duly executed, it is clear that the matter of the set-off the defendant now claims has been at least finally decided in the previous suit.

I would, therefore, dismiss this appeal with costs.

RYVES J. The facts of this case are as follows:—The plaintiffs (respondents) the zemindars leased an *ijara mahal* to defendant (appellant) by a registered lease on 19th Bhadra 1306 (*i.e.* 4th September 1899) for a period of seven years at an annual rental of Rs. 800, payable by quarterly instalments of Rs. 200, with a stipulation that any sum not paid on due date should carry interest at 2 per cent. per mensem. In 1902 the plaintiffs brought a suit in the Court of the Subordinate Judge of Dacca against the defendant to recover arrears of rent and interest due under the lease up to the instalment of Pous in the year 1308 (January 1902).

In the plaint of that suit, the plaintiffs stated that, out of the whole amount of rent, which had become due, they had received from the defendant sums aggregating Rs. 852 towards the rent; and, giving him credit for that amount, prayed to recover the balance. Notice of the suit was served on the defendant, who is a resident of the District of Muzufferpur. He, however, did not appear; the suit was decreed *ex parte*. The defendant made no attempts to challenge that decree and allowed execution to be taken out against him for the full amount decreed.

On the 1st April 1903 the plaintiffs brought the present suit, out of which this appeal arises, in the same Court against the defendant for arrears of rent due under the same lease, for five

(1) (1897) I. L. R. 20 All. 110.

instalments from Chaitra, 1308. The defendant contested the suit, and the main defence was that, for the period covered by the previous suit, he had in fact paid sums amounting to Rs. 1,400-8 annas *as rent*, whereas the plaintiff had given him credit for Rs. 852 only. In the written statement it is stated, "in the said suit (*i.e.* the previous suit) the plaintiff did not give credit for the total amount of Rs. 548-8, paid by the defendant on different dates on account of the rent of the *mahal* under claim . . . . . The defendant is entitled to get credit for the said amount and a set-off against the present claim; and the defendant accordingly prays for the same. As the plaintiffs have brought the present suit by artfully omitting to credit the same amount, they cannot get any relief. All the documents that are with the defendant showing that the aforesaid amount has been paid, are filed herewith."

In the first Court, it was contended on behalf of the plaintiffs that this plea of "set off" was barred by the rule of *res judicata*.

This plea was overruled by the Court of first instance, which held that Rs. 548-8 had in fact been paid by the defendant towards the rent for the period covered by the former suit and had wrongly been credited by plaintiffs to another account, and, deducting this amount, gave plaintiffs a decree for the balance claimed. This decree was reversed on appeal by the District Judge.

The defendant has appealed to this Court. The only ground pressed in appeal is that the rule of *res judicata* does not apply. It was argued that that rule does not apply, *firstly*, because the subject-matter of the two suits was not identical, being sums of money due as rent for different years, and *secondly*, that the issue in this case, whether Rs. 548-8 had been paid by defendant to plaintiff as rent in the years covered by the former suit, had not been "heard and finally decided" in that suit and that consequently that decision did not bar the hearing of the issue in this suit. A number of authorities were relied on in support of these arguments and I will refer to them later.

The fundamental principles, on which the rule of *res judicata* is based, are well known and are common to all modern jurisprudence.

1908

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHAUDHURI.

RYVES J.

It has been said "Justice requires that every cause should be once fairly tried and public tranquillity demands that having been tried once, all litigation about that cause should be concluded for ever between those parties."

Reading section 13 of the Code of Civil Procedure together with explanation II, the meaning of the rule, it seems to me, would run: "No Court shall try any suit or issue, in which the matter directly and substantially in issue has been directly and substantially in issue, or which might and ought to have been directly and substantially in issue in a former suit between the same parties, etc."

If this reading is correct, then it seems to be clear that the fact, whether this sum of Rs. 548-8 now claimed, had or had not been paid by the defendant might and ought to have been made an issue in the former suit and cannot be reopened. In effect the decision of the first Court is equivalent to a denial by the Court that this sum had been paid and not credited as now alleged by the defendant, because it found that the amount due for rent for the period of the suit was as stated by the plaintiff. From this finding, it follows that the Court held on the materials before it that the statement of the plaintiff that Rs. 852 only had been paid by the defendants was correct. Two decisions of the Privy Council seem to me conclusive in this view. They are *Kameswar Pershad* v. *Raj Kumari Ruttan*(1) and *Sri Gopal* v. *Pirthi Singh*(2). I need not refer to other authorities.

The rulings relied on by the learned pleader for the appellants are the following: The first case was *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh*(3). According to the head note to that case, it was there decided "the relief claimed in the second suit was not *res judicata*, the subject-matters of the two suits being distinct". In the body of the judgment, however, it appears that the Court held the second suit was quite different from the first. Thus, at p. 90 the judgment runs: "In the suit of 1881 the question of the title of the plaintiffs as *Khadims* was not raised either directly or indirectly. They sued them as strangers to the

(1) (1892) I. L. R. 20 Calc. 79; L. R. 19 I. A. 234.
(2) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.
(3) (1896) I. L. R. 24 Calc. 83.

office and failed in their suit in consequence of having put their claim exclusively upon that footing". That being so, it was held that the second suit, based on a totally different title, was not barred. It is significant, too, that after examining a number of authorities quoted in support of the opposite view, their Lordships held, immediately before the sentence above quoted, "these cases go to show that when a question has necessarily been decided in effect, though not in express terms, between the parties to a suit, it cannot be raised again, although in a different form, between the same parties in another suit."

Now, as I have said above, the decision of the first Court in effect was that Rs. 852 only had been paid by the defendant as rent for the years covered by that suit. This case therefore, on examination does not seem to help the appellant. The next case was *Kailash Mondul* v. *Baroda Sundari Dasi*(1). At first sight that case and certain observations of Banerjee, J., in particular, do appear to support his argument. The learned Chief Justice said: "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 that the rent now claimed is of necessity, by reason of that decision, 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?"

He goes on to say with reference to explanation II: "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 a ground of defence in the particular action in respect of that particular rent."

This is enough to distinguish this case. It is true that in that case Banerjee J. observed at page 714, and his observations have been embodied in the head-note, 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". It is very difficult to see how a matter, which *ex hypothesi* was not before the former Court, could

(1) (1897) I. L. R. 24 Calc. 711.

1908

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHAUDHURI.

REVES J.

possibly have been heard and finally decided by it; and it seems to me that, if this were necessary, the whole of explanation II would be rendered meaningless. In *Womesh Chandra Maitra* v. *Barada Das Maitra*(1), Ameer Ali and Brett JJ. quoted with approval the dictum of Banerjee J. in the last mentioned case, but as they add: "We do not know what the nature of the former suit was as the pleadings are not before us," it may be that, on the materials available in the present litigation, they would have arrived at a different conclusion. In *Rajendra Nath Ghose* v. *Tarangini Dasi*(2), Banerjee J. followed his dictum in *Kailash Mondul* v. *Baroda Sundari Dasi*(3), and went further, holding apparently that the explanation II to section 13 applies not only when the matter, which ought to have been made a defence in the former suit, has been finally determined in the former suit, but also only when the subject matter of the two suits is identical. If this is so, the rule can never apply to rent-suits or to suits in which claims are made on a periodically recurring liability. This would very materially restrict the usefulness and policy of the rule, although there is no apparent reason,—but rather the contrary—why it should not apply in all its fulness to litigation naturally constantly recurring and arising out of one and the same transaction.

The only other case referred to us in this connection was *Surjiram Marwari* v. *Barhamdeo Persad*(4), in which Mookerjee J. adopted the dicta of Banerjee J. in the last mentioned case. In discussing the Privy Council decision *Sri Gopal* v. *Pirthi Singh*(5), however, that learned Judge says on page 250: "The true test is, as Sir Ford North puts it in *Sri Gopal* v. *Pirthi Singh*(5), "could the first mortgagee, if he had set up his earlier security, obtain in the previous suit, what he asks now and thus avoid the necessity for the subsequent suit." Applying this test to the present suit, I certainly think the rule of *res judicata* operates as a bar to raising the issue of set-off.

With reference to all these latter cases it is open to consideration how far they are affected by the decision of the Privy

(1) (1900) I. L. R. 28 Calc. 17.
(2) (1904) 1 C. L. J. 248.
(3) (1897) I. L. R. 24 Calc. 711.
(4) (1905) 1 C. L. J. 337.
(5) (1902) I. L. R. 24 All 429; L. R. 29 I. A. 118.

Council in *Sri Gopal* v. *Pirthi Singh*(1). In that case when before the Full Bench of the Allahabad High Court (2) the case of *Kailash Mondul* v. *Baroda Sundari*, (3) on which these latter decisions are largely based, was discussed, the Full Bench held in the clearest terms, contrary to that decision, "it is quite certain that in order to make section 13 of the Code of Civil Procedure applicable, it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one, to which explanation II applies." The Privy Council, in upholding the decision of the Full Bench, would seem at least inferentially to have agreed in the reasons for that decision If so, the authority of these later decisions, so far as they are inconsistent with *Sri Gopal* v. *Pirthi Singh*(1) would seem to have been shaken.

For the above reasons I would dismiss the appeal with costs.

Appeal dismissed.

S. M.

(1) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.

(2) (1897) I. L. R. 20 All. 110.

(3) (1897) I. L. R. 24 Calc. 711.