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INDRA CHANDRA MUKHERJEE v. SRISH CHANDRA BANERJEE.

The plaintiff began, no doubt, by seeking to recover not only the actual amount illegally realised from him, but also damages assessed by him at Rs. 17. Before trial, however, he altered his plaint by striking out the claim for damages, which he said he desired to abandon. We cannot accept the ingenious contention that the suit remained, nevertheless, a suit for compensation, the measure of the injury to be compensated being the precise amount illegally recovered, and we agree with the learned District Judge in holding that it was a suit triable exclusively by the Small Cause Court.

The result is that the Rule is made absolute, the order of the District Judge set aside, and the decree of the Munsif restored. In this connection also we make no order as to costs.

S. C. G. *Appeal dismissed. Rule absolute.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

SRISH CHANDRA PAL CHOWDHRY

v.

TRIGUNA PRASAD PAL CHOWDHRY.*

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Jan. 30.

Review, application for—Suit—Res judicata—Compromise decree.

An application for review is not a suit within the meaning of s. 13 of the Code of Civil Procedure, 1882, and a decision of a question arising in an application for review cannot operate as constructive *res judicata*.

* Appeal from Appellate Decree, No 2114 of 1909, against the decree of H. E. Ransom, District Judge of Nadia, dated Aug. 20, 1909, affirming the decree of Pramatha Nath Chatterjee, Subordinate Judge of Nadia, dated Feb. 27, 1909.

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SRISH CHANDRA PAL CHOWDHRY v. TRIGUNA PRASAD PAL CHOWDHRY.

Gulab Koer v. *Badshah Bahadur* (1) referred to,

Ram Gopal Majumdar v. *Prasanna Kumar Samad* (2) distinguished.

SECOND APPEAL by Srish Chandra Pal Chowdhry, the plaintiff.

One, Sreenath Pal Chowdhry of Hatsila, brought a suit in the Court of the Subordinate Judge of Nadia against the plaintiff appellant and others for partition of certain ancestral *ijmali* properties between him and his co-sharers in proportion to their respective shares. The suit ended in a compromise, and a decree for partition was passed in accordance with it.

The suit, out of which this appeal arose, was a suit for declaration that certain properties in the partition suit were by mistake allotted to defendants Nos. 1 and 2 which were really intended to be kept as joint property and that, therefore, the deed of compromise should accordingly be rectified. Defendants Nos. 1 and 2 pleaded *res judicata* and denied that any mistake was made in the deed of compromise.

The learned Subordinate Judge dismissed the case. The plaintiff, thereupon, appealed to the District Judge of Nadia, who dismissed the appeal on the ground of *res judicata*. Against that decision the plaintiff preferred this second appeal to the High Court.

Babu Baidyanath Dutt and *Babu Manomohan Dutt*, for the appellant.

Babu Braja Lal Chuckerbutty, for the respondent.

Cur. adv. vult.

HOLMWOOD AND CHAPMAN JJ. The plaintiff appeals. He had been one of the defendants in a suit for partition. The suit had terminated in a compromise and the decree for partition had been in accordance with it. The present suit was for a declaration that in one

(1) (1909) 10 C. L. J. 420. (2) (1905) 2 C. L. J. 508.

respect the compromise deed had not expressed the intention of the parties. The appellant's case was that it had been the intention to preserve a certain tank and the appurtenances thereto as joint property, but that by mistake these items had been allotted to certain persons who were made defendants in the present suit. The prayer was that the deed of compromise should be rectified accordingly.

The appellant's suit was dismissed upon two grounds. The first ground is that the suit was barred by *res judicata*. The appellant had made an application for review of the judgment in the previous suit, upon the same ground as that put forward in the present suit. That application for review had been unsuccessful. The District Judge appears to have held that, the matter in issue between the parties having been heard and decided in the course of the proceedings in review, the present suit could not be entertained. It is contended that the learned District Judge here fell into error. The contention must in our opinion prevail. It is true that the parties to the present suit were also parties to the application for review. But an application for review is not a suit within the meaning of section 13 of the Code of Civil Procedure, and neither that section nor any doctrine of constructive *res judicata* can rightly be applied to cases of the present kind. The matter has been very fully discussed in the case of *Gulab Koer* v. *Badshah Bahadur* (1). We are in entire accordance with the views there expressed, and are of opinion that the previous case of *Ram Gopal Majumdar* v. *Prasanna Kumar Samad* (2) can rightly be distinguished upon the grounds there stated. The present suit was not, in our opinion, barred by reason of the decision in the previous application for review.

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The second ground upon which the appellant's suit was held to be incompetent was that, the compromise having merged in a decree, it was not open to the appellant to sue merely for the rectification of the compromise. He should have prayed for the rectification of the decree. This is, in our opinion, a mere technicality. The decree merely recited that the suit was decreed in terms of the compromise. The rectification of the decree must necessarily follow any rectification of the compromise, and if the plaintiff could make out a case for the rectification of the compromise he should in our opinion be given the relief to which the facts proved would entitle him, that is, a decree for the rectification of the decree based on the compromise. The technical omission in the plaint to ask for relief in this particular form should not be allowed to stand in the way.

The two preliminary grounds upon which the appellant's suit was dismissed were erroneous. We, therefore, set aside the judgment and decree of the learned District Judge and remand the case for disposal by him on the merits, in accordance with the above remarks. Costs will abide the result.

S. K. B. *Appeal allowed; case remanded.*