[APPELLATE CIVIL JURISDICTION.]

Jan. 24. 1876.

Regular Appeal No. 67 *of* 1871.

DEVRA'V KRISHNA (ORIGINAL PLAINTIFF, APPELLANT) *v.* HA'LAMBHA'I AND ANOTHER (ORIGINAL DEFENDANTS, RESPONDENTS).

Res judicata—Section 2 *of Act VIII. of* 1859*—First suit against defendants as principal—Second as agents.*

A previous suit in which the plaintiff elected to sue the defendants as principals bars a second suit on the same contract in which the same defendants are charged as responsible agents under a trade usage.

THIS was an appeal from the decision of Mukundráya Maniráya, First Class Subordinate Judge of Surat, holding the plaintiff's claims barred by Section 2 of Act VIII. of 1859.

The appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Shántárám Náráyan for the appellant, the original plaintiff.

There was no appearance for the respondents.

The facts and arguments of the pleader, in so far as they are material for the purposes of this report, appear fully from the following judgment of the Court delivered by

WEST, J.—In the former suit between the same parties who are now before the Court, the plaintiff alleged that the defendants had engaged to furnish him with a quantity of firewood to be procured from other persons, and sued for damages for its non-delivery. The defendants answered that they had acted merely as the plaintiff's agents in making a contract with a third party, and were not responsible for the fulfilment of the contract. The material issue raised by the Court of first instance was, whether the defendants had themselves contracted to deliver the wood, and the decision was that they had not. After the case had been heard, the plaintiff sought to have another issue raised on the question of whether the defendants, as agents, were, by usage, liable for the non-fulfilment of the contract, but this was refused by the Subordinate Judge on the ground that it would essentially change the nature of the suit. In this the Subordinate Judge was quite right, as may be seen by reference to the observations of Lord Cairns in *Browne* v. *McClintock* (1).

(1) L. R. 6 Eng. and Ir. Ap. 434. See p. 453.

1876.

DEVRA'V KRISHNA v. HA'LAMBHA'I.

In regular appeal the plaintiff complained of this refusal. The District Judge held that evidence of a liability of the defendants analogous to that of a *del credere* agent could have been given under the first issue, that of whether the defendants had contracted to deliver the wood. He, therefore, upheld the decision of the Court below.

In special appeal it was objected that the District Judge had been wrong in holding that, on the "vague" issue raised by the Court of first instance, the plaintiff could and, therefore, ought to have brought forward any evidence that he had tending to establish the defendants' liability by trade usage as agents. It was also urged that the most material issue had not been raised and dealt with, namely, that of the responsibility of the defendants in their character of agents.

The High Court affirmed the judgment of the District Court, and, as no judgment was recorded in special appeal, we must gather the grounds of the decision by inference. What first suggests itself is, that the learned Judges adopted, in its full extent, the judgment of the District Court holding that the plaintiff might have established a liability against the defendants as guaranteeing agents on the issue laid down by the Subordinate Judge. In that case it is clear that no second suit could be brought on the same transaction to make the defendants liable as agents. The cause of action against them in that capacity would have been conclusively determined to have been involved and dealt with in the former suit.

Mr. Shántárám, however, contends that the decision of this Court amounts to no more than a conclusive assertion that the plaintiff could not recover on the issue actually raised by the Court of first instance according to the proper construction of that issue. This construction, he maintains, limits the question, and was treated by the Subordinate Judge as limiting it, to whether the defendants contracted for delivery by themselves or not. The judgment, therefore, he argues, is not an estoppel to a fresh suit based on a liability of the defendants as agents: the issue formerly pressed for on this point may have been refused as inconsistent with the plaint in that case. On this we observe

that if this Court did not adopt the grounds taken by the District Judge on any particular point, it would probably have said so. But, even if we hypothetically rest the judgment on the proposed basis, what comes out is this. The plaintiff, on his contract with the defendants, sued them as principals. They answered that they had been mere agents. The plaintiff then had the option either of admitting the agency, but adding "yet by trade usage you are responsible like principals," and asking for an issue on that point, or of not admitting the agency as likely to militate against his interests suing on the particular contract upon which he rested. He chose the latter course; the issue was framed on the question of whether the defendants were liable as principals. By accepting this, and not in due time asking for another issue based on an assertion of a *del credere* agency or one similar to it, the plaintiff, we think, conclusively elected to treat the contract as one binding the defendants as principals. Whether he then succeeded on the issue or not, could make no difference for the purposes of a second suit. The cases are common in which a plaintiff having the choice of an action of tort or on contract is barred, once his selection is made, from a second action, whatever may be the event of the first. Still less is it allowable, we think, when a plaintiff has chosen to treat a transaction as creating a contract of one description, to sue a second time upon it as creating one of a different description producing a different kind of liability. The choice in this instance was, it is true, of a negative or passive character. The Subordinate Judge raised the issue; the plaintiff merely did not object to it. But by not objecting he accepted it; accepted it with the defendants' plea of agency plainly set out before him, and with a full opportunity, if he desired it, of having such issues raised as should be requisite for trying the question really at issue between the parties. Under these circumstances he has, we think, no more claim to sue on the contract as admitting of another interpretation, raising a different issue, than in the *Katama Nachiar case* (1) the appellant, after having allowed a case to proceed to judgment on his election to treat a document as non-testamentary, had to sue afterwards on the same document as a will.

(1) *Katama Nachiar* v. *Raja of Shivagungah*, 2 Calc. W. R. 31 P. C.; S. C. 9 Moore, I, A. 539.

1876.

DEVRA'V KRISHNA v. HA'LAMBHA'I.

Mr. Shántárám has contended that a second suit was competent to the plaintiff in this case, because it would have to be supported by different evidence from that required to sustain the claim he formerly advanced, and this test of a difference in the evidence is generally applicable as explained in *Anapurnábái's case*, R. A. 55 of 1873, decided by us on September 30th, 1874, but subject always to the observations made in that case and in the case of *Shridhar* v. *Náráyan and another* (1). In the present instance the origin of the litigation was identical for the two suits, and the essential facts would have to be established by the same evidence. *Kashee Kishore* v. *Kristo Chunder* (2). The difference is merely one partly of the construction of the contract which is not a matter of evidence, partly of usage having the effect of annexing to the contract certain incidents not expressed and not expressly excluded. Such a usage, if submission to it was optional, would not have the operation sought to be ascribed to it; if binding, it would operate as a local law. This, if it had already been ascertained, it would be the Judge's duty to apply, apart from any evidence adduced in the case; if not, he would, of course, receive evidence of its existence and acceptance as a law; but taking evidence of this kind would not make the case a different one in the sense necessary to exclude the operation of the estoppel. It would not be different evidence as to the facts of the case; as to these the same witnesses would have to be called to depose to the same particulars, but additional information supplied to the Judge as to a part of the law, and which he might equally well obtain from books, decisions, or any other authentic sources of instruction. Applied, therefore, in the intended sense, the proposed test is fatal to the plaintiff's right to prosecute the present suit. We must, therefore, confirm the decree of the Subordinate Judge.

Decree confirmed.

(1) 11 Bom. H. C. Rep. 224. (2) 22 Calc. W. R. 464 Civ. Rul.