APPELLATE CIVIL.

(55)

Before Mr. Justice West and Mr. Justice Pinhey.

1879
April 3.

PUTALI MEHETI, APPLICANT, *v.* TULJA, OPPONENT.*

Res judicata—Civil Procedure Code (X of 1877), Sec. 13—Limitation Act XV of 1877, Sec. 14.

The plaintiff brought in 1876 a suit against the defendant in respect of the same subject-matter and founded on the same cause of action as the present suit Issues of fact arising on the merits were inquired into; but a certificate of the Collcetor under section 6 of the Pensions Act (No. XXIII of 1871), which wa necessary to give jurisdiction to the Court, not having been obtained, the claim was rejected on that ground.

Held that the Court not having legally pronounced on the merits of the former case, the opinions expressed on the issues were not *res judicata* so as to bar the maintenance of the present suit.

The non-production of the Collector's certificate does not necessarily constitute such a want of due diligence on the plaintiff's part as to disentitle him to the deduction of time allowed by action 14 of the Limitation Act XV of 1877.

THIS was an application, in the exercise of the High Court's extraordinary jurisdiction, for the reversal of the order of A. G. Bhave, Subordinate Judge of Nandurbar, rejecting the plaint. A petition of appeal against this order was made to the Judge of Khandesh, but it was rejected by him, as the order was not appealable.

The fact of the case, as well as the opinion of the Subordinate Judge on the points of law arising in it, appear from the following judgment recorded by him:—

"The plaintiff in this case had brought a suit, No. 1348 of 1876, in this Court against the present defendant in respect of the same subject-matter and founded on the same cause of action as in the present suit. The plaintiff's claim in that suit was thrown out with costs by the then Subordinate Judge, Rao Sahéb Dinkar Datar, on the ground that the Civil Court could not take cognizance of it for want of the Collector's certificate under section 6 of Act XXIII of 1871, which ought to have been, but was not presented by the plaintiff with his plaint in that suit. The Court, however, before throwing out the claim on this preliminary and

* Extra-ordinary Application, No. 2 of 1879 under Reg. 2 of 1827, sec. 5.

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technical point of law, did not only require into all the issues of fact arising in the case, but has also recorded its finding, or rather opinion, on every one of them.

"The judgment of the Suborbinate Court was not appealed against, and, therefore, is still in force.

"These being the facts of the case, I am of opinion that the proper course for the plaintiff to adopted was to appeal against the decree of the Subordinate Judge in the previous suit; but instead of doing so he seeks to have a fresh suit registered and tried in respect of the sum matter now presenting with the plaint the required certificate of the Collector, for want of which the previous claim was disallowed.

"It is urged by the pleader for the plaintiff that his former suit should be regarded as being rejected or dismissed before being registered, rather than as being finally decided on the merits, and he further argues that in this view of the judgment of the Subordinate Judge in the previous suit, section 13 of the Civle Procedure Code does not apply to the present claim.

"I am not inclined to accept the view suggested by the pleader, inasmuch as the former suit was, as a matter of fact, tried by the Subordinate Judge on the merits, and the finding recorded on as issues of law as well as facts, although the Subordinate Judge based his final decree on the finding on one of the issues only.

"Under these circumstances I consider that the subject-matter of this plaint was previously heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties litigating under the same title within the meaning of section 13 of the Civil Procedure Code, and that the cause of section is thus *res judicata*.

"With regard te the point of the limitation, it is admitted by the plaintiff's pleader that the present claim will be time-barred, unless, in computing the period of limitation applicable to this suit, the time during which the former suit, No. 1348 of 1876, was pending in the Court is excluded.

"The question, therefore, is, whether in computing the period of limitation this period should be excluded under section 14 of the Limitation Act XV of 1877.

"Under the section quoted, the plaintiff would be entitled to have the time, during which the former suit was pending, excluded from the computation of the period of limitation only, in case it is shown that the former suit was prosecuted by him with due diligence, 'and was dismissed for want of jurisdiction or a like cause.' I think the plaintiff's suit was not dismissed for want of jurisdiction on the part of the Court, but, on the contrary, the Court having jurisdiction was precluded from taking cognizance of it by a statutory provision in consequence of the plaintiff's own neglect or default to produce the required certificate of the Collector. Had this been produced by the plaintiff in the former suit as required by law, he would not have been non-suited, as he was on the preliminary point. In short, if there was at all a want of jurisdiction on the part of the Court to try the plaintiff's particular cause, I should observe, it was of his own creation; or, in other words, it might be said that the Court was divested of its jurisdiction in that particular cause by the plaintiff's own act, or rather omission to do an act which he ought to have done, viz., to produce the Collector's certificate. I may further add that the omission on the part of the plaintiff to produce the Collector's certificate in the former suit is, *per se*, negligence, or want of due diligence on his part.

"For these reasons I do not consider that the plaintiff is entitled to the benefit of the provisions of section 14 of the Limitation Act, and must, therefore, come to the conclusion that the present claim is barred by limitation."

Nanabhai Haridas, Government Pleader, for the applicant.—The Court not having jurisdiction in regard to the first suit in consequence of the absence of the Collector's certificate, there were no judicial findings and no judicial determination of the issues constituting a bar to the present suit. There was no laches on the plaintiff's part in obtaining the decree which she was endeavouring to obtain; she is, therefore, entitled to a deduction of the time spent in prosecuting her first suit.

Shantaram Narayan, contra.—The points in dispute between the parties have, in fact, been decided, and it was the plaintiff's own fault that she did not produce the document which alone

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could enable the Court to take cognizance of her suit. She failed in her duty, and there was, therefore, want of due diligence on her part.

WEST, J.—The Subordinate Judge having found in the former suit that his cognizance of the case was barred by the absence of a certificate from the Collector under Act XXIII of 1871, the opinion he expressed on the merits of the contraversy between the parties must be regarded as not in any way *res judicata* between them. The cause had not, therefore, been heard and determined when the present suit was brought. "*Res judicata*" means by its very words a thing upon which the Court has exercised its judicial mind—*Jenkins* v. *Robertson*.(1) When a suit failed through a formal defect, and the merits have not been so pronounced on as to constitute a legal relation resting on the act of the Court, another suit is not, by the English law, barred This rule is consonant to justice, and agrees with the law as set forth in the Code of Civil Procedure.

The other ground taken below is that the present suit was barred by limitation on acconnt of the prescribed time having elapsed and of the plaintiff's not being entitled to any deduction for the pendency of the former suit. Should such a deduction be made, it is, for the purposes of the present adjudication, conceded, the present suit would not, *primâ facie*, be barred ; but the Subordinate Judge has held that non-production of the Collector's certificate constituted in itself such a want of diligence in the prosecution of the earlier suit as prevented the plaintiff from gaining the benefit of section 14 of Act XV of 1877. We do not concur in the view. The suit was filed in July 1876, and it was not till it had reached its latest stage that in November 1877 the objection to the Court's cognizance of the suit was raised by the defendant. The Subordinate Judge then rejected an application of the plaintiff for an adjournment to enable him to get the requisite certificate, and proceeded within a few days to judgment. The case appears to have been one of an error committed is good faith, and not one of want of due diligence. The plaintiff wanted a decree, and took the steps apparently necessary to obtain it.

(1) L. R. 1 Sc. Ap. 117. See page 122.

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His suit failed through a defect of jurisdiction of the Court which had not really judicial cognizance of the cause until the preliminary condition, overlooked for so long, had been satisfied.

The judgment of the Subordinate Judge must, accordingly, be set aside, and the case be heard and disposed of an its merits.

Costs of the application to be borne by the opponent.

PINHEY, J.—I concur in the judgment just delivered by may brother West, except as to the order in respect of costs. I am of opinion that costs of this application should be costs in the cause, because if plaintiff's claim eventually fails on the merits, it seems to me improper that the defendant should have to pay any costs of litigation, whether in respect of this application or otherwise. It is not, however, worth referring so minute a point to a third Judge for decision, and I will, therefore, say that I defer as to costs and concur as to the rest of the judgment.

Order reversed with costs.

ORIGINAL CIVIL.

(56)

Before Sir C. Sargent, Justice.

MAHOMEDSHUFFLI, PLAINTIFF, *v.* LALDIN ABDULA, DEFENDANT.*

1878

July 30.

Practice—Security for costs—Residence—Civil Procdure Code (Act X) of 1877, *Section* 380.

The meaning to be given to the word "residence" in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used. The '*residence*' intended in section 380 of the Civil Procedure Code (Act) X of 1877 is residence under such circumstances as will afford a reasonable probablity that the plaintiff will be forthcoming when the suit is decided.

THE plaint in this case described the plaintiff as "of Cabul, Mahomedan inhabitant, but now residing and carrying on business in Bombay as a general merchant." The defendant issued a Judge's summons calling upon the plaintiff, under section 380 of the Civil Procedure Code (Act X) of 1877, to show cause why he should not give security for the defendant's costs in the suit, and in support of the summons he filed an affidavit, alleging that the

*Suit No. 241 of 1878.