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this inconvenience, and, consequently, in enacting section 472 of the Code, it gave jurisdiction to the Court of Session to try all cases of contempt committed before it in which the offence is triable exclusively by the Court of Session. It would be difficult to suppose that the Legislature had any other intention in regard to offences of the same kind committed before the Judge of the Court of Session in his civil capacity, and certainly section 473 is not so worded as to oblige us to hold that there was any other intention.

The learned Judge then went into the merits of the case, and said no reasons existed to disturb either the conviction or the sentence, which were confirmed.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

April 27.

RUNGRAV RAVJI, PLAINTIFF, v. SIDHI MAHOMED EBRAHIM AND
 EBRAHIM HOOSEIN KHAN, DEFENDANTS.*

Res judicata—Objection by a plaintiff that the matter alleged in defence is res judicata—Effect of dismissal of suit under section 381 of Civil Procedure Code (Act X of 1877) for default of plaintiff to give security for costs—Defendant precluded from pleading matter which is res judicata—Civil Procedure Code (Act X of 1877), Sections 13, 102, 103, 381.

The plaintiff sued the defendants on a promissory note. The defendants filed a written statement, alleging that the note had been obtained by the plaintiff by fraud and false representation. Previously to the filing of the present suit by the plaintiff the defendants had brought a suit against the plaintiff in which they prayed that the said promissory note might be delivered up to be cancelled. Their plaint in that suit contained allegations of fraud and want of consideration identical with those contained in their written statement in the present suit. The plaintiffs in the former suit (the present defendants) having failed to give security for costs, the suit was dismissed under section 381 of the Civil Procedure Code (Act X of 1877). It was now contended that the defendants were estopped from pleading as a defence to the present suit, the fraud and want of consideration, which had been alleged by them as plaintiffs in the former suit which had been dismissed.

Held that the defence might be pleaded, and that the question of fraud and want of consideration was not *res judicata* within the meaning of section 13 of the Civil Procedure Code. The previous suit had been dismissed by reason of the

* Suit No. 492 of 1881.

plaintiffs' (the present defendants') failure to give security for costs; and a Court cannot be said to "hear and decide" a matter which it is relieved from hearing and deciding by the plaintiff's default.

Under section 13 of the Civil Procedure Code (Act X of 1877) a defendant may be precluded from pleading as a defence matter which is *res judicata*.

Quere—Whether a plaintiff, whose suit has been dismissed under section 381, can again litigate the subject-matter of the dismissed suit.

THE plaintiff in this suit sought to recover the sum of Rs. 4,000 on a promissory note passed to him by the defendants, dated the 28th November, 1879. The second defendant was sued only as a surety.

The first defendant filed a written statement denying his indebtedness to the plaintiff, and alleging that he had received no consideration for the said promissory note. He also alleged that the said note had been obtained from him by the plaintiff by false and fraudulent representation, and he set forth in detail the circumstances under which the plaintiff had induced him to execute the note. The defendants had previously brought a suit (No. 459 of 1880) against the present plaintiff, in which they had (*inter alia*) charged him with having obtained this note for Rs. 4,000 and divers sums of money from the defendant Sidhi Mahomed Ebrahim by means of false and fraudulent misrepresentations, and prayed (*inter alia*) that the said note might be delivered up to be cancelled. In that suit (No. 459 of 1880) the plaintiffs, being resident out of the jurisdiction, had been ordered on the 23rd April, 1881, to give security for costs, which they failed to do, and the suit was accordingly dismissed on the 17th June, 1881, under section 381 of the Civil Procedure Code (Act X of 1877).

The present suit had been accepted as a short cause; but, before it came on for hearing, the first defendant filed his written statement, alleging (as above stated) fraud and misrepresentation on the part of the plaintiff and want of consideration for the said note—the circumstances set forth being those which had been stated in the plaint in Suit No. 459 of 1880. The present suit being on the list for hearing as a short cause:—

Jardine, for the defendants, moved that it should be transferred to the long-cause list, and come on for hearing as a long cause.

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He read the written statement, and contended that the trial of the issues raised by it would require a considerable time.

Lang, for the plaintiff, resisted the motion, and contended that the defendants could not be permitted now to put forward, as a defence, the matters set forth in the written statement, inasmuch as they had been the matters in issue between the parties in Suit No. 459 of 1880 which had been dismissed. They were, therefore, *res judicata*. There was under those circumstances no defence to the present suit, which might be heard as a short cause.

LATHAM, J.—It has been agreed by counsel on both sides that the allegations of fraud and want of consideration, which are contained in the written statement in this suit, are practically identical with the allegations of fraud and want of consideration contained in the plaint in Suit No. 459 of 1880, in which the present defendants were the plaintiffs and the present plaintiff was the defendant. It is further agreed that in that suit an order was made on April 23rd, 1881, that the plaintiffs therein should give security for the defendants' costs, as they resided out of British India; and that, the plaintiffs having failed to comply with this order, the suit was on June 17th, 1881, dismissed by order of this Court under section 331 of the Civil Procedure Code (Act X of 1877).

The question is, whether under these circumstances the fraud and want of consideration here alleged, and being 'the matter directly and substantially in issue' in the present suit, have been 'directly and substantially in issue' in Suit No. 459 of 1880, and have been heard and finally decided in that suit. If this question be answered in the affirmative, the present defendants will be prevented from setting up the same matter in defence in the present suit by the provisions of section 13 of the Civil Procedure Code (X of 1877), or, to use the well-known phrase by reason of this matter of defence being *res judicata*.

As might be expected, there is little precedent as the case of a defendant being met with the answer of *res judicata* to his defence, the common case being that of a plaintiff against whom is set up the plea of *res judicata* in a former suit in which also he was plaintiff. I can, however, feel no doubt that, under the

words of section 13 of the Civil Procedure Code (X of 1877) "suit or issue", the answer is admissible to estop a defendant from defence as well as a plaintiff from attack, and in England the case of *Outram v. Morewood* (1) is directly in point.

The next question is, can it be said that these allegations of fraud and want of consideration were "heard and finally decided" in Suit No. 459 of 1880, in which the merits were not gone into, the suit having been dismissed, under section 381 of the Civil Procedure Code, by reason of the plaintiffs therein not having complied with the Court's order] that they should give security for costs? In England it would appear that, apart from recent orders made under statutory authority, there is no *res judicata*, unless there has been a decision directly on the point. In the above-cited case of *Outram v. Morewood* (1) it is said by Lord Ellenborough of the verdict in a case there referred to: "It could only be conclusive upon the right if it could have been used and were actually used in pleading by way of estoppel, which it could not be in that case, because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel in the second action." So in the judgment of De Grey, C.J., in the *Duchess of Kingston's Case* (2) he says the "judgment of a Court of concurrent jurisdiction directly on the point is as a plea a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another suit." And in *Hall v. Hall* (3) Sir James Hannen says that it is well known that neither a non-suit at common law before the rules made under the Judicature Act nor the dismissal of a bill before the hearing in chancery before the order of 1845 was a bar to further proceedings, and he applies the rule to the Matrimonial Court.

In India there is little authority. The case of *Shokhee Bewah v. Mehdee Mundul* (4), decided by Seton-Karr and Mitter, JJ., is an express decision that, when a case had not been tried on its merits, the cause of action had not been tried and decided within the meaning of section 2 of the Civil Procedure Code (Act VIII) of 1859. The other cases cited do not apply. In the case of

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(1) 3 East. 346 at p. 365.

(3) 27 W. R. 664.

(2) Sm. L. C. (7th ed.), 761.

(4) 9 Calc. W. R. 327 (Civ. Rul.)

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Luckhee v. Joyshukur (1) there seems to have been no decision at all, and that at *Baban Mayacha v. Nagu Shravucha* (2) is beside the mark, as there the former suit was not before a Court of competent jurisdiction—a necessary element in a *res judicata*. Still there is no contrary decision, and the case of *Shokhee Bewah v. Mehdee Mundul* (3) is cited in the most recent text books.

I am not aware of any decision on the words of section 13 of the Civil Procedure Code (Act X of 1877), and must form my opinion on the language of the Act and with the guidance furnished by the earlier cases. I have come to the conclusion that a matter cannot be said to be 'heard and finally decided' by a Court which does not try that matter. No doubt the Court decides *the suit* in the pleadings of which such matter is alleged and denied, when it dismisses that suit for default on the plaintiff's part, whether the default be non-appearance or failure to furnish security; but I do not think that the Court can properly be said to hear and decide the matter which it is relieved from hearing and deciding by the plaintiff's default. I think it clear that the Civil Procedure Code (Act X of 1877) does not contemplate the dismissal of a suit by default under section 102 as preventing the plaintiff, by section 13, from again litigating the same matter, as, if so, the first sentence of section 103 would be superfluous; but, no doubt, this may be explained on the ground that the decision under section 102 is not a final one within explanation 4 to section 13. It is hard to conceive that the Legislature should have intentionally visited a plaintiff with a heavier penalty for failing to give security for costs than for failing to appear. Still the dismissal under section 381 does appear to be final within the meaning of section 13; and I, therefore, rest my decision on the matter not having been 'heard and decided' in the former suit. I give no opinion as to the result if a plaintiff, whose suit had been dismissed under section 381, should attempt again to litigate the subject-matter of the dismissed suit. Possibly the reference to section 373 may be found sufficient to preclude him from so doing.

As I hold the defendants to be at liberty to raise the issues of fraud and want of consideration, and as I understand the plaintiff's

(1) 7 Calc. W. R. 236 (Civ. Rul.)

(2) I. L. R. 2 Bom. 19.

(3) 9 Calc. W. R. 327.

counsel to admit that, if the defendants do raise these issues, the case cannot be tried within the limits proper to a short cause, I direct the case to be transferred to the long-cause list; costs to be costs in the cause.

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Case transferred.

Attorneys for the plaintiff.—Messrs. *Balcrishna and Bhagwandas*.
Attorney for the defendants.—Mr. *Mirza Hoosein Khan*.

MATRIMONIAL JURISDICTION.

Before Mr. Justice West.

HARRIETTE A. KING, PETITIONER, v. J. S. KING, RESPONDENT.*

June 12.

Divorce—Husband and wife—Appeal by a wife from order made in suit for divorce—Wife's costs—Security for costs—Memorandum of appeal admitted without requiring security—Limitation Act XV of 1877, Section 5—Period of limitation expiring during vacation—Power of Prothonotary to receive and file memorandum of appeal presented on the day the Court re-opens.

In a suit for divorce brought by a wife against her husband, the wife obtained a decree *nisi* which ordered the respondent to pay a monthly sum by way of alimony to the wife, and also ordered him to pay the wife's costs of suit. Under this decree a sum of Rs. 3,369 was due to the wife on the 26th May 1882. The wife appealed from an order made in the suit, and the Court, under the circumstances, admitted the appeal without requiring from the appellant the usual security for costs.

Where the period of limitation for the filing of an appeal has expired during vacation, a party to a suit has a right, under the provisions of the Limitation Act (XV of 1877), to have his appeal admitted on the day the Court re-opens, and the Prothonotary of the High Court has power to receive and file a memorandum of appeal on that day.

APPLICATION that a memorandum of appeal against the order made by Bayley, J., in this case on the 4th May, 1882, should be received and filed; that the said appeal should be admitted without requiring security for costs from the appellant, or, if such security should be required, then that the same should be taken by staying (to the amount of the security required) execution of the decree for alimony and costs already passed against the respondent.

In this case a decree *nisi* was made, on the 26th July, 1881, for the dissolution of the marriage between the petitioner and the respondent, and by that decree it was ordered that the respondent

*Sait No. 195 of 1881.