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originally merely as a piece of paper, was wrong in using it, as he subsequently did, as establishing the contract between the parties in which, as such, the plaintiff was interested, and which he was, therefore, entitled to have registered.

We must, therefore, reverse the decree, and dismiss the plaint with costs throughout.

Decree reversed.

Attorneys for appellant.—Messrs. *Little, Smith, Frere and Nicholson.*

Attorneys for respondent.—Messrs. *Jefferson, Bhâishankar and Dinshá.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

August 12.

BHOLA'BHA'I (ORIGINAL PLAINTIFF), APPELLANT, *v.* ADESANG, MINOR BY THE COLLECTOR OF KAIRA, AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Res judicata—Issue decided in a suit not subject to appeal—Same issue raised in a subsequent suit subject to appeal—Small Cause Court suit—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Sec. 13—Meaning of the words "competent to try such subsequent suit".

In 1879 the plaintiff brought a suit against the defendants to recover Rs. 119, which he alleged had been wrongfully exacted from him by the defendants as enhanced rent of certain land in his occupation. He claimed to be owner of the land subject to a quit-rent payable to the defendants. The defendants denied his ownership, and asserted their right to levy the enhanced rent. The lower Court held that the defendants were entitled to the enhanced rent, and dismissed the plaintiff's claim, and the decree was confirmed, in appeal, by the District Court. The plaintiff appealed to the High Court, which held that the plaintiff's claim, being for an amount less than Rs. 500 and within the cognizance of a Court of Small Causes, no second appeal lay.

In 1883 the plaintiff brought the present suit in the District Court to recover from the defendants the sum of Rs. 689 alleged to have been wrongfully exacted from him by the defendants as enhanced rent of the land in question. He made the same allegations as in the former suit. The District Judge dismissed the suit, holding it to be *res judicata*. The plaintiff appealed to the High Court.

Held, that, although the material question in both suits was the same, *viz.*, as to the defendants' right to enhance the plaintiff's rent, yet the decision of the District

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Court upon that point in the previous suit was not *res judicata* so as to prevent the question being again raised between the parties. From the decision in the former suit there was no appeal by reason of the suit being one for an amount less than Rs. 500. Had that suit been for a larger amount, the decision of the District Court would have been subject to an appeal to the High Court. It could not have been intended by the Legislature that a decision should acquire a conclusive importance from the fact of its being made in a suit for a small amount which it could not have had if the amount was larger. The former decision could not be appealed against to the High Court, and thus though the District Court, which gave that decision, was in one sense "competent to try" the second suit, and did try it, yet it was not competent to try the second suit with final effect, as it had tried the earlier one. In section 13 of the Civil Procedure Code (Act XIV of 1882) the words "competent to try such subsequent suit or issue" must mean "competent to try the suit or issue with conclusive effect." The District Court could not in the present suit have tried with conclusive effect, and disposed of the issue tried in the first suit, and hence the prior decision was not *res judicata*.

THIS was an appeal from the decision of S. H. Phillpotts, District Judge of Ahmedabad. The present suit was brought in 1883 by the plaintiff to recover from the defendants the sum of Rs. 689. The plaintiff alleged that the said sum had been wrongfully exacted from him by the defendants as enhanced rent.

In 1879 the plaintiff had brought a suit against the defendants to recover from them Rs. 119, which had been levied from him by the defendants. In that suit the plaintiff alleged that he was in possession and enjoyment as owner of a field situated within the limits of Dábhári, a village in the Kaira District, subject only to a quit-rent, originally of Rs. 78 and, after survey, of Rs. 112 payable to the defendants. He complained that recently a notice of enhancement had been illegally served upon him, and a further payment of Rs. 119 had been demanded and exacted from him. The plaintiff, therefore, sued to recover that amount.

The defendants, the Collector of Kaira and the Tálukdári Settlement Officer, denied that the plaintiff was the owner of the land, and alleged that the minor defendant was the owner; that the Civil Court had made over the management of the estate to the Collector, when it was discovered that the plaintiff had taken possession of the land; that a notice had been served upon him to the effect that he should give up the land, or pay the full assess-

ment under section 34 of Act I of 1865 and section 15 of Act XX of 1864.

The Assistant Judge, who tried the suit, held the defendants entitled to demand the enhanced rent, and dismissed the claim of the plaintiff.

The plaintiff appealed, and the District Judge confirmed the decree of the lower Court. Thereupon the plaintiff appealed to the High Court, which held on 23rd August, 1882, in Special Appeal 662 of 1881, that the claim, being for an amount less than Rs. 500, was one within the cognizance of a Court of Small Causes, and that, therefore, no second appeal lay to the High Court.

The plaintiff subsequently brought this second suit in the District Court at Ahmedabad to recover from the defendants Rs. 689, and made the same allegations as in the previous suit. He contended that the matter was not *res judicata*, inasmuch as the former suit, being for a sum below Rs. 500, was unappealable. The District Judge, however, held the suit to be *res judicata*, and dismissed the plaintiff's claim. The plaintiff appealed to the High Court.

Gokuldás Káhándás for the appellant.—When the former suit came before the High Court it held that the suit was one in nature of a Small Cause Court suit. That decision would not bar the present suit, as it disposed of the suit on other grounds than were urged before it—*Nilvaru* v. *Nilvaru*[1]. The decision therein would not conclude the appellant's right to bring a suit of the same nature. The circumstances of the present case are similar to those in the case of *Musa Miya* v. *Sayad Gulám*[2].

The primary question in the former suit was whether the appellant was owner or not. The question of the defendants' right to an enhanced rent was merely incidental in the former suit, and could not estop the appellant in the present suit—*Ináyat Khán* v. *Rahmat Bibi*[3]. As regards the effect of decisions of suits found to be cognizable by Small Couse Courts, see *Muhammud Jáfar* v. *Wali Muhammud*[4]; *Gopál* v. *Uchábal*[5]; *Sukhdaik Misr*

(1) I. L. R., 6 Bom., 110.
(2) I. L. R., 7 Bom., 100.
(3) I. L. R., 2 All., 97.
(4) I. L. R., 3 All., 81.
(5) *Ibid.*, p. 51.

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v. *Karim Chaudhri*[1]; *Emamooddeen* v. *Shaikh Futtesh Ali*[2]; *Chunder Coomar v. Nunnee Khanum*[3]. The present suit, therefore, is not *res judicata*.

Ráv Sáheb V. *N. Mandlik* for the respondents.—In the previous suit the question was whether the plaintiff was owner of the land, and the Court held that he was not the owner. The matter of the present suit, having been "directly and substantially in issue in the former suit," could not be a ground for the present suit—section 13, Civil Procedure Code (Act XIV of 1882); see also *Prabhákarbhat* v. *Vishwámbhar Pandit*[4]. In the former suit the plaintiff set himself up as owner of the land; and the Court, having found that he was not the owner, the rest followed, so as to leave nothing more to be determined. The former Court was a Court of concurrent jurisdiction with the one before which the present suit was brought. The cases of *Misir Raghobardial* v. *Rájáh Sheo Baksh Singh*[5] and *Prabhákarbhat* v. *Vishwambar*[5] show that the present suit is *res judicata*. The essential issues having been decided by a competent Court in the former suit, there was left nothing new to be decided in the present one.

Gokuldás Káhandás in reply.—The former decision did not touch the merits of the case, and the matter could be re-opened. The Court, which decided the former suit, was not of concurrent jurisdiction, for it had no power to determine what was not cognizable by it. Section 13 ought to be construed in the same way as it has been by the Privy Council in the case of *Misir Raghobardial* v. *Rajáh Sheo Baksh Singh*[5].

WEST, J.—In the present case the material question between the parties was undoubtedly raised in the previous suit between them. That question is, whether the tenancy held by the plaintiff under the Thákurs is or is not subject to enhancement of the rent paid by him. In the former suit it was ruled that the right to enhance by the Thákurs, and by the Government officers representing the Thákurs, existed. This would ordinarily be an adjudication on the question of right or jural relation

(1) I. L. R., 3 All., p. 521.
(2) 3 Cal. Rep., 547.
(3) 11 Beng. L. R., 434.
(4) Printed Judgments for 1884. p. 23.
(5) L. R., 9 Ind. Ap., at p. 203. S.C. I. L. R., 9 Cal., 439.

between the parties which would bind them in any future litigation within the scope of the decision—*Mohima Chunder Mojoomdar* v. *Asradha Dossia* (1); *Nubo Doorga Dossee* v. *Fyz Buksh Chowdhry* (2); *Krishna Behari Roy* v. *Brojeswari Chowdranee* (3).

But in this instance the earlier decision was in a cause of less than Rs. 500 in amount, and for this reason a special or second appeal made by the plaintiff was dismissed as not cognizable by this Court. The present suit is for more than Rs. 500, and the contention is, that the previous decision on the right to enhance, having been merely incidental, is not binding in this or any subsequent litigation. On the other hand, it is urged that the former decision on the right to enhance having been given by a Court competent to try the present suit (by the same Court, in fact, that has tried the present suit) and on a point directly and substantially in issue, binds the parties and the Court and every Court as to the legal relation thus established in all future cases between the same litigants. The District Court was, no doubt, competent to deal with the "subsequent suit" in this instance, but it could not give a final unappealable decision in the suit. This is implied in the present appeal. The District Court could not, therefore, try the second suit with the same jurisdiction as the first—*Chunder Coomar Mundul* v. *Namni Khanum* (4). In the earlier suit it could, and did, give a decision not subject to appeal; and, therefore, the two decisions would not stand on the same footing, the earlier being conclusive and the later one not so. But, from the point of view suggested for the respondent, the decision in the first suit of a particular point would, in the second suit, be binding on the parties in this Court, though had it been decided in the second suit itself it would not be binding. Consequently, the determination of the point in the suit of smaller value would, on account of its very smallness, acquire a conclusive importance that it would not have had if the amount had been larger. In the latter case the High Court must have entertained the second appeal against the earlier decision. The insignificance of the amount prevented this; and now it is said that the decision, which was statutably

(1) 21 Cal. W. R., 207, C.R.
(2) 24 Cal. W. R., 403, C.R.
(3) L. R., 2 I. A., 283.
(4) See 19 Cal. W. R. at p. 322, Civ. Rul.

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beneath the cognizance of the High Court, binds the High Court in a more important case. Such a result is manifestly opposed to reason, and cannot, we think, have been intended by the Legislature—*Run Bahádur Singh* v. *Luchokooer* (1). But, if the prior judgment in a case too petty for appeal is not to bind the High Court, neither can it bind the subordinate Courts whose judgments are subject to appeal to the High Court. And this must be so equally in a case which on account of its small valuation is not subject to appeal as in one subject to appeal to the High Court, since it is impossible that the prior decision should or should not be *res judicata* for the lower Courts merely according to the admissibility, or not, of a further appeal to the High Court. If it were so, we should sometimes have contradictory decisions, each *res judicata* on the same point of jural contention.

In the continental countries of Europe—in which, as in India, an appeal is generally admitted as a part of the regular civil procedure—the rule is that no matter decided by a lower Court, in which an appeal is excluded, can be *res judicata* for any other case, either in the same or in any other Court(2). That which has been decided incidentally, but for its purpose finally, is regarded merely as an exceptional element of the judgment in such a case, not as the establishment of a principle which may extend to other cases and other Courts. The decision, in fact, is construed, in relation to future cases, as an exceptional law or section is construed,—that is, as not admitting of any extension by inference on account of its admittedly special and singular character. A complete recognition of the same principle in the Indian Courts would afford a ready solution of many difficulties; but, though it has been glanced at on many occasions—*Jánia valad Gaba* v. *Hulia valad Waru*(3); *Mussamut Edun* v. *Mussamut Bechun*(4); *Misir Raghobardial* v. *Rájáh Sheo Baksh Singh*(5)—it has never thus far been precisely formulated either by the Legislature or by the Courts.

(1) I. L.R., 6 Cal., 406, compd. with Sec. 13, Civ. P. Code as amended by Act XIV of 1882.

(2) Sav. Syst., sec. 293.

(3) Printed Judgments for 1873, p. 170.

(4) 8 Cal. W. R., 175.

(5) I. R., 9 I. A., 197. Comp. *The Queen* v. *Machen*, 14 Q. B. 80. S. C, 18 L. J. M. C., 213. *The Queen* v. *Gaunt*, I. R., 2 Q. B., 466.

In the case before us the former decision could not be appealed against to the High Court, and thus, though the Court, which gave that decision, was in one sense competent to try the subsequent suit, and did try it, yet it was not competent to try the subsequent suit with final effect as it had tried the earlier one. Though the Court was the same physically, yet it had not on the two occasions an identical jurisdiction. Moreover, for the purpose of establishing a prior decision as *res judicata*, we must look to the whole series of possible proceedings up to the highest available ordinary tribunal; otherwise, as we have seen, the anomaly must arise of the highest Court in an important case being bound by a prior decision in the lowest Court in a case too paltry for an appeal. Section 13 of the Code of Civil Procedure cannot be applied quite literally; if it could, then the Court trying a second suit would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant for that case, though not formally set aside—*Nilvaru* v. *Nilvaru*[1]. We must construe the section, if possible, so as to avoid an anomalous result, and this end is attained by saying that the words "competent to try such subsequent suit" in the section mean competent to try the suit or issue on account of its nature with conclusive effect, since otherwise the higher jurisdiction provided by the Code would be excluded by the lower. Here the District Court could not in the second suit have tried and disposed of the issue tried in the first with conclusive effect. It could have tried it; but, looking to the whole course of procedure, it could not have finally disposed of it, except through the option of the parties.

For these reasons we think the previous judgment, delivered by the District Court in a small cause between the same parties, cannot, for the purposes of the present suit, be deemed *res judicata* between them. The litigation, as it may be carried and has been carried in this second case up to the highest Court, is of a kind in which the decision of a lower Court could not be final, save through the accidental circumstance of the amount at stake being insignificant, and the unappealable decision arrived at in

(1) I. L. R., 6 Bom., 110.

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such a petty case is final in the requisite sense only as to the precise point of liability distinctly adjudicated. In ordinary cases the authority of *res judicata* extends back to the several elements of fact and law of which an adjudication is composed(1); but in the case of a Court of summary jurisdiction a different principle operates. Such a Court, for the purpose of deciding a question within its final cognizance, may have to form an opinion on a point not within its cognizance or not within its final cognizance. The opinion it forms on such a point is to be regarded rather as ancillary or subjective than as an objective conclusion on a matter incidentally, not directly and substantively, cognizable—*Khugowleesing* v. *Hossein Bux Khán*(2), and it is only in the latter character that the conclusion can create a permanent and unquestionable jural relation(3). The jurisdiction of the District Court trying a small cause is to be regarded as summary in comparison with the jurisdiction exercised by it in ordinary cases as part of a more elaborate and deliberate procedure.

We, therefore, reverse the decree of the District Court, and direct that the case be re-tried on the merits, with reference to the foregoing observations. Costs to be costs in the cause.

Decree reversed.

(1) See *per* Mellish, L. J., L. R., 9 Ch. A., at p. 25.

(2) See *per* Judicial Committee, 7 Beng. L. R., at p. 679.

(3) See *per* Lord Selborne in *R.* v. *Hutchings*, L. R., 6 Q. B. D, 300.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

September 15. DAGDUSA TILAKCHAND (ORIGINAL DEFENDANT), APPLICANT, *v.* BHUKAN GOVIND SHET (ORIGINAL PLAINTIFF), OPPONENT.*

Award—Power of arbitrators to deal with question of costs—Excess in award—Order to file award—Extraordinary jurisdiction of High Court—Civil Procedure Code Act (XIV of 1882), *Sec.* 622.

The parties to a suit having referred the matters in dispute between them to arbitration, the arbitrators, without being specially authorized to decide the question of costs, included in the award a direction that the defendant should pay

* Civil Application, No. 76 of 1884.