

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Ranade.

KAOHU (ORIGINAL PLAINTIFF), APPELLANT, v. LAKSHMANSING
GULABSING PARDESHI (ORIGINAL DEFENDANT), RESPONDENT.*

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July 24.

Res judicata—Civil Procedure Code (Act XIV of 1882), Sec. 13, Explanations II and III—Redemption suit—Decree in such suit making no order as to mesne profits—Subsequent suit by plaintiff for surplus mesne profits accrued due prior to former suit.

In a redemption suit brought in 1894 the plaintiff prayed for possession of the mortgaged property and for payment of such sum as should be found due to him on account of surplus profits received by the defendant. The Court held that the whole mortgage-debt had been paid off in 1883, and awarded possession to the plaintiff, but made no order as to surplus profits. The defendant appealed. The plaintiff did not appeal, nor did he file objections to the decree, which was confirmed by the Appellate Court. In 1897 the plaintiff having obtained possession of the land filed this suit in which (*inter alia*) he claimed to recover mesne profits which had accrued due prior to the former suit:

Held, that the claim was *res judicata* and was barred.

SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, amending the decree of Ráo Sáheb G. R. Gokhale, Subordinate Judge of Pimpalgaon.

Suit for mesne profits.

The land in question had been mortgaged with possession to the defendant in 1870. Under the mortgage-deed he was to hold it for eight years and then return it to the mortgagor, provided he had received profits at the rate of Rs. 60 a year. Any sum by which the annual profits should fall short of Rs. 50 was to bear interest at the rate of 24 per cent.

On the 16th April, 1894, the plaintiff bought the equity of redemption from the heir of the mortgagor, and on the 8th June, 1894, he sued the defendant (Suit No. 431 of 1894) for possession of the land, for an account, and for payment of such sum as should be found due to him as excess profits received by the defendant.

The defendant alleged that, on accounts being taken, Rs. 825 would be found due to him.

* Second Appeal, No. 229 of 1900.

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The first Court found that the whole mortgage-debt had been paid off by the end of 1883 and that the defendant had been overpaid. It decreed possession, but passed no order as to the excess profits received by the defendant.

The defendant appealed, and the decree was confirmed.

In execution the plaintiff was put into possession on 17th March, 1897.

He then filed this suit claiming the excess profits received by the defendant for sixteen years prior to the date of the former suit and for two years subsequent to it.

The defendant pleaded that as the plaintiff had claimed mesne profits in the former suit, and they had not been awarded by the decree, the matter was *res judicata*.

The Subordinate Judge allowed the plaintiff's claim, holding that it was not barred by sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

On appeal the Judge held that as to the plaintiff's claim for the years prior to the institution of the former suit (8th June, 1894) the matter was *res judicata*, but he allowed the claim for the subsequent years and up to March, 1897, and varied the decree accordingly.

The plaintiff appealed to the High Court.

Ratanji R. Desai, for the appellant (plaintiff).—The main relief which we sought in the former suit was redemption. There was no doubt a prayer in the plaint in that suit that surplus profits, if any, received by the defendant should be awarded to us, but no issue was framed on that point and there was no inquiry into it. The bar of *res judicata*, therefore, cannot arise with respect to our claim for mesne profits which accrued prior to that suit. We may claim them now in a suit specially brought for that relief. In the former suit the amount of mesne profits was not definitely ascertained, and the decree merely contained a declaration in our favour that the defendant had received mesne profits in excess of the debt due to him. We are, therefore, entitled to bring the present suit—*Becharji v. Pujaji*⁽¹⁾; *Samatsang v.*

(1) (1889) 14 Bom., 31.

Bawaji⁽¹⁾. Article 105, Schedule II of the Limitation Act, 1877, contemplates a suit like the present. As we were not then in possession, we were not in a position, when we filed the former suit, to know whether anything was due. It was when the Court made a declaration that the mortgage-debt had been paid off long before we filed that suit, that we ascertained that a large sum was due to us. There was no issue with respect to mesne profits in that suit. We claim a different relief now : therefore, section 13, Explanation III, of the Civil Procedure Code does not apply—*Bakshiram v. Darku*⁽²⁾. Our cause of action arose after we got possession in 1897.

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Daji A. Khare, for the respondent (defendant) :—The plaint in the former suit contained a prayer for mesne profits, but the decree made no order with respect to them. Therefore, the prayer in the plaint must be deemed to have been refused. Explanation II of section 13 of the Civil Procedure Code bars the present suit—*Fatmabai v. Aishabai*⁽³⁾; *Mahabir Pershad v. Macnaghten*⁽⁴⁾. The relief which is sought in the present suit was part of the cause of action in the previous suit. It cannot be said that the plaintiff's cause of action for the present suit arose after he got possession in execution of the former decree—*Balaji v. Tamangouda*⁽⁵⁾. The ruling in *Bakshiram v. Darku*⁽⁶⁾ is not applicable because that decision was passed before Explanation III, section 13, of the Civil Procedure Code, 1882, was enacted. The mesne profits which accrued after the passing of the decree in the former suit can be awarded, but the claim for those that accrued before that decree is barred.

JENKINS, C. J. :—This suit is brought to recover Rs. 1,100 on account of eighteen years' mesne profits of a parcel of land alleged to have been received by the defendant.

On the 11th of November, 1870, the land was mortgaged with possession to the defendant by a predecessor-in-title of the plaintiff; and in 1894 the plaintiff instituted a suit, No. 431 of that year, for redemption and recovery of the land. In that suit the plaintiff

(1) P. J. for 1882, p. 404.

(4) (1889) L. R., 16 I. A., 107; 16 Cal.,

(2) (1873) 10 Bom. H. C. R., A. C. J., 369.

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(3) (1888) 13 Bom., 242.

(5) (1869) 6 Bom. H. C. R., A. C. J., 97.

(6) (1873) 10 Bom. H. C. R., A. C. J., 369.

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iff alleged that the mortgage-debt had been fully satisfied and prayed, not only for possession of the land, but also for payment of such sum as should be found due from the defendant on account of excess profits received by him. The Subordinate Judge, by whom Suit No. 431 was heard, held that the whole mortgage-debt was paid off in 1883, and awarded possession: he, however, passed no decree as to surplus profits, though obviously on his finding there must have been such.

The defendant appealed to the District Judge, but the plaintiff did not by cross appeal or otherwise seek to have the omission as to excess profits rectified. The decree was on appeal affirmed.

These excess profits form part of the sum the plaintiff seeks to recover in this suit. In the first Court they were awarded to him, but this part of the decree was reversed on appeal by the District Judge of Násik, who has fully discussed the whole question in the course of his very careful judgment. From his decision the present appeal is preferred.

Now it is perfectly clear, not only that the plaintiff expressly prayed for payment of the excess profits, but also that he could have obtained that relief in Suit No. 431 of 1890. It was a relief that naturally flowed from the taking of the accounts, and the state of those accounts was a matter directly and substantially in issue in that suit. Section 13 of the Civil Procedure Code provides

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

“Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.”

Explanation III must be read together with the rest of the section, and when so treated it no doubt calls for the qualification that the relief to which it relates is one that could be granted in the suit. That condition, however, I have shown is satisfied in the present case; for the surplus profits could have been recov-

ered in Suit No. 431 of 1890. This being so, it appears to me that the facts, with which we have to deal, fall precisely within the exact words of the section; so that the relief must be taken to have been refused and the question to have been heard and finally decided. As the case, in my opinion, falls within the terms of Explanation III, it is unnecessary to consider whether Explanation II is not also applicable.

Having, then, come to the conclusion that, apart from the cases, the words of section 13 are sufficiently comprehensive to embrace the facts of this case, it only remains to be seen whether there is any decision which calls on us to withhold the application of the section. It has, no doubt, been laid down that the plea of *res judicata* has no place where the omissions of the earlier suit are directly attributable to the intentional intervention of the Court. That doctrine, however, whatever its merit, is beside the question here, as there is no assertion of any such conduct on the part of the Court in Suit No. 431. Apart from this I can find nothing in the cited authorities to aid the present appellant, unless it be the case of *Bakshiram v. Darku* ⁽¹⁾. Now as to this decision it has, in the first place, to be noticed, that the distinction between it and that pronounced in the earlier case of *Baloji v. Tamangouda* ⁽²⁾ is not strikingly apparent. Still it must have appeared to the learned Judges to be distinguishable; for *Baloji's* case was pointedly brought to their notice in the course of the argument, and I cannot suppose they intended to overrule, without comment, the earlier decision of Sir Richard Couch and Newton, J. But, apart altogether from this, *Bakshiram's* case in no way assists us; for when it was decided, the provision of Explanation III had not been enacted. *Baloji's* case, however, is practically undistinguishable from the present: certainly it presents no distinction favourable to the appellant. It is identical in its circumstances with the present case save that the plaint there did not seek to recover the overpayments; that is to say, that case would not have fallen, as this does, within the precise terms of Explanation III. Yet it was held that the second suit would not lie.

(1) (1873) 10 Bom. H. C. R. (A. C. J.), 369.

(2) (1869) 6 Bom. H. C. R. (A. C. J.), 97.

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Reference was made to the recent decision of the Allahabad High Court in *Ram Dayal v. Madan Mohan Lal* ⁽¹⁾, but that is clearly irrelevant to the point, as it simply dealt with a suit for profits that had accrued since the decree in the first suit.

The appellant's pleader relied on no other case before us, while the cases of *Ramabhadra v. Jagannatha* ⁽²⁾ and *Mahabir Pershad Singh v. Macnaghten* ⁽³⁾, to which attention was drawn in the course of the argument, certainly support the view that the plea of *res judicata* affords an answer in this case.

In my opinion, therefore, there is nothing in the decided cases to interfere with the plain words of section 13 of the Civil Procedure Code, so far as it is applicable to this case, so that, for the reasons I have already stated, I think the plea is a good answer to the suit. The appeal, therefore, must be dismissed, and the decree of the District Judge affirmed with costs.

RANADE, J.:—In this case the appellant-plaintiff, as purchaser from the mortgagor's son, sued the respondent-mortgagee for redemption in 1894. The mortgage was effected in 1870, and the bond provided that the debt should be liquidated in eight years by annual payments of Rs. 60 out of the profits of the land. The plaintiff in that suit claimed for an account and for possession of the land together with such excess profits as defendant might be shown to have received. Accounts were accordingly taken, and it was found that the debt had been paid off in eight years. No order about excess profits was made, but the mortgage-debt was declared to be satisfied and possession of the land was ordered to be restored to the plaintiff. The decree was confirmed in appeal. After plaintiff obtained possession under this decree, he secured an assignment of the claim for mesne profits (for sixteen years previous to the old suit and two subsequent years, up to the date of possession) from the original mortgagor's son in 1897, and on the strength of his new title he brought his present suit for eighteen years' excess profits. The defence was that the suit was barred under sections 13 and 43, Civil Procedure Code.

(1) (1899) 21 All., 425.

(2) (1890) 14 Mad., 323.

(3) (1889) L. R., 16 I. A., 107; 16 Cal., 682.

The Court of first instance held that the suit was maintainable, and awarded plaintiff's claim for thirteen years, from 1883 to 1896, at the rate of Rs. 43-7-0 per year. In appeal the District Judge held that the claim for the profits prior to the old suit was not maintainable and that only three years' profits subsequent to the date of the old suit might be allowed. He accordingly amended the decree of the Court below.

In second appeal the principal question argued before us relates to the point of law, whether, under the circumstances of this case, the claim for past profits was maintainable, or whether it was barred under section 13 or 43 of the Civil Procedure Code. The Court of first instance in its lengthy judgment notes the fact that the rulings of the different High Courts in India are conflicting on this point. They are, however, in accord in holding that where the Court which tried the first suit has advisedly refused to adjudicate on a portion of the claim made, or relief asked, or suggested to the plaintiff that he should bring a fresh suit, the right to bring the subsequent suit might be considered as expressly reserved. Where no such reservation or suggestion is made, the High Courts are not in agreement, and the only rule which can be drawn, especially from the Bombay authorities—*Thakore Becharji v. Thakore Pujaji*⁽¹⁾; *Kakaji Ranaji v. Bapuji Madhavrao*⁽²⁾—is, according to the Subordinate Judge, that a second suit will not be barred where the inquiry and the judgment in the former suit impliedly suggest the remedy of a fresh suit. He holds that this implied suggestion was made in the present case, because while both the Courts decided in the former suit that the defendant was accountable, they did not determine the actual surplus due by him and, therefore, the present suit was maintainable. The District Court in appeal was of opinion that there was no such implied suggestion. The question of excess profits was inquired into and the whole of the evidence was given in respect of them, so much so that no further evidence was found necessary in the present case. It came to the conclusion that if the first Court did not determine the profits in the former suit, plaintiff's remedy was by way of appeal, and that the words of section 13, Explanation III, were quite clear, and justified the rejection of plaintiff's claim for past profits.

(1) (1889) 14 Bom., 31.

(2) (1871) 8 Bom. H. C. R., 205.

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This summary of the reasons given by the Courts below will serve to bring out the real point in issue. I agree with the District Judge in thinking that, under the terms of section 13, the claim for past profits now made by plaintiff must be held to be barred. The section states that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue between the same parties, litigating in the same rights, and has been heard and finally decided by such Court. The first explanation shows what is meant by the words directly and substantially in issue. They mean that the matter must be alleged by one party and either denied or admitted expressly or impliedly by the other. The question of excess profits was such a matter in the former suit. It was directly alleged in the plaint itself, where an express claim was made for surplus profit. It was denied by the other side. The general issue, what amount is due to the defendant on the mortgage, did not expressly raise the contention, but it impliedly raised that question. The matter was heard and decided by both the Courts, when they held that the mortgage debt had been paid off either in 1878 or 1883. The Appellate Court held that the defendant had received surplus profits for seventeen years after the expiry of the stipulated eight years, and that a large balance was due to the plaintiff. Under these circumstances, if the plaintiff had in the first Court or in appeal claimed the surplus, it would have been awarded to him. This matter of surplus was a relief claimed in the plaint, which was not expressly granted by the decree, and it must, for the purposes of this section, be deemed to have been refused, and if once refused, it is plain that it cannot be the subject of a separate suit. This view of the matter is confirmed by the fact that plaintiff deemed it necessary to go through the process of taking a fresh deed of assignment in 1897 for a consideration which was held to be nugatory by the Court of first instance for the reason that the assignor had no interest left in the surplus profits which was included in the previous deeds of sale passed in 1894. Quite independently of the authorities, therefore, it is clear that the appellant had no right to bring his present suit. His remedy was by way of review or appeal in the previous proceedings.

As regards the authorities, it may be useful to take the Bombay cases first. In the case of *Baloji v. Tamangouda*⁽¹⁾ a mortgagor filed a suit to redeem, and alleged that the mortgagee had been overpaid, but he did not sue to recover the overpayments. These were, therefore, not awarded to him, and when he brought a second suit, it was held that he could not claim such overpayments. This is, therefore, a distinct authority against the present appellant. The case of *Sitaram v. Bhagvant*⁽²⁾ is not to the point, because it only relates to mesne profits after the date of the suit. If the omission to grant such profits was not deliberately made in the old decree, they could be claimed in a separate suit. The third case—*Bakshiram v. Darku*⁽³⁾—is no doubt not easily reconcileable with *Baloji v. Tamangouda*, quoted above. But it may be distinguished on the ground that in that case there was no adjudication about the improvements, while in the present case both Courts found that the debt had been paid off and a balance was due to the plaintiff. The ruling in *Haji Hasam Ibrahim v. Mancharam*⁽⁴⁾ directs that plaintiff must bring forward all the grounds for the relief he seeks. If he fails to do so, he cannot bring separate suits to harass the defendants. The decision in *Shivalingaya v. Nagalingaya*⁽⁵⁾ was to the same effect. The case of *Fatmabai v. Aishabai* contains a ruling on Explanation III of section 13, and decides that where the declaration was not sought by way of specific relief, the omission to give it was not a refusal within the meaning of this explanation. In the case before us the award of extra profits was sought as a principal relief, and the silence of the decree must be regarded as a refusal. The decision in *Thakore Becharji v. Thakore Pujaji*⁽⁷⁾, on which the Court of first instance had chiefly relied, was really based by the Judges on the fact that the refusal to grant the amendment asked for made the decision one in which there was no hearing and no determination which are essential to create the bar under section 13. In the present case there was a hearing and a determination that defendant owed a balance to the plaintiff. This ruling, therefore, is not applicable to the present case. In *Ram-*

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(1) (1869) 6 Bom. H. C. R., 97.

(4) (1878) 3 Bom., 137.

(2) (1869) 6 Bom. H. C. R., 109.

(5) (1878) 4 Bom., 247.

(3) (1873) 19 Bom. H. C. R., 369.

(6) (1888) 13 Bom., 242.

(7) (1889) 14 Bom., 31.

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krishna v. Vithal⁽¹⁾, though no actual finding on the issue of *bona fides* was recorded, yet as the decision was passed in plaintiff's favour, it was held that the second suit questioning the *bona fides* could not be maintained. This supports the view taken by the District Judge in the present case. The decision in *Ghela Ichharan v. Sankalchand Jetha*⁽²⁾ ruled that where the issue is not necessary, the decree in the former suit does not cover that issue, and a separate suit raising the question involved in such issue is not barred. In the present case the issue was not unnecessary, and the decree, therefore, covers the finding which awarded possession, but was silent about the profits. The general conclusion to be derived by a study of these Bombay decisions seems thus to lend support to the view taken by the District Judge, and the distinctions made in the judgment of the Court of first instance seem to be not well founded.

Turning next to the Calcutta cases, the decision in *Byjnath Pershad v. Badhoo Singh*⁽³⁾ related to mesne profits after the suit. In regard to this claim there was a prayer in the plaint, but no order was made in the decree either way, and it was accordingly held that the second suit would lie in such a case. In the present case the mesne profits after the institution of the first suit have been allowed by the District Court. In *Mahomed Gazee v. Noor Mahomed*⁽⁴⁾ it was ruled that plaintiff was bound to put forth every title on which he can succeed and to obtain decision thereon. If the Court neglects to decide any part of his claim, he cannot bring a separate suit in respect of it. This decision is clearly against the present appellant. In *Gungabishen Bhugut v. Roghoonath Ojha*⁽⁵⁾ the second suit was held maintainable because the Court of appeal disposed of the case on the point of possession, and did not decide the question of title. In the present case there was no such omission on the part of the Appellate Court. The ruling in *Ram Charan v. Reazuddin*⁽⁶⁾ relates to a case where the Court advisedly left undecided a particular issue, and reserved it for a fresh suit, which was, therefore, held maintainable. The question of surplus profits

(1) (1890) 15 Bom., 89.

(2) (1893) 18 Bom., 597.

(3) (1868) 10 Cal. W. R., 486.

(4) (1875) 24 Cal. W. R., 324.

(5) (1881) 7 Cal., 381.

(6) (1884) 10 Cal., 856.

was not so reserved in the present case. Evidence was given about it and the Courts declared their opinions. The decision in *Nundo Lall v. Bidhoo Mookhy Debee*⁽¹⁾ resembles the Bombay decision noted above—I. L. R., 18 Bombay, p. 597; *Ghela v. Sankalchand*. The ground of decision in *Jagatjit Singh v. Sarabjit Singh*⁽²⁾ was expressly stated to be that the question about what land belonged to Sipah was not in issue, and that nothing regarding it was heard or decided. In such cases section 13 has no operation. In the present case, however, the surplus profits were inquired into. The ruling, therefore, does not apply. The decision in *Nil Madhub Sarkar v. Brojo Nath Singha*⁽³⁾ was based on the fact that the first and second suits were both rent suits for different years, and defendant's failure to prove his defence in the first case did not prevent him from raising the same defence in the second suit which was based on a different cause of action. The next case is of *Jiban Das v. Durga Pershad*⁽⁴⁾—and it resembles in all respects the facts of the present case. The first suit was for possession and three years' profits. The decree gave possession, but was silent about profits. The second suit was brought to recover past and future profits. The claim for past profits was not allowed on the ground that the old decree operated as *res judicata*, while the claim for future profits was allowed. The judgment in this case was very properly relied on by the District Court. It distinguishes the claim for past profits from future profits. The seemingly opposed decision in *Mon Mohun Sirkar v. The Secretary of State for India in Council*⁽⁵⁾ was held to relate to future profits, in respect of which the Courts have a discretion to grant or refuse relief under the Civil Procedure Code.

The Allahabad High Court in *Ram Dayal v. Madan Mohan Lal*⁽⁶⁾ took the same view as the Calcutta Judges who decided the last case and made a distinction between past profits and future profits in respect of which last claim the Courts have discretion in allowing or refusing them, and, therefore, where the first decree was silent, a second suit was maintainable. There was

(1) (1886) 13 Cal., 17.

(2) (1891) 19 Cal., 159.

(3) (1893) 21 Cal., 236.

(4) (1893) 21 Cal., 252.

(5) (1890) 17 Cal., 968.

(6) (1899) 21 All., 425.

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no such discretion in regard to past profits, and if the decree was silent, no second suit can be maintained for the same. The Allahabad High Court disapproved the decision in *Ramabhadra v. Jagannatha*⁽¹⁾, which cannot be reconciled with the rulings of the other High Courts on this point. This review of the authorities shows that, as far as the present case is concerned, there is a general agreement of the High Courts of Bombay, Calcutta and Allahabad on the point that when a claim for past profits is made in the former suit and inquired into, and the finding recorded that there was a balance due to plaintiff, but no particular sum was fixed by the decree, no second suit can be maintained by reason of the bar created by section 13, Explanation III, and the plaintiff's obvious remedy was to apply for review to the first Court or appeal to the District Court. As he failed to do this, his present claim was properly held by the District Judge to be not-maintainable. In this view I would confirm the decree of the District Court and dismiss the appeal with costs.

Decree confirmed.

(1) (1890) 14 Mad., 323.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Batty.

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BHIMBHAT (ORIGINAL DEFENDANT), APPELLANT, v. YESHWANTRAC
 (ORIGINAL PLAINTIFF), RESPONDENT.*

Undue influence—Sale—Inadequacy of consideration—Contract—Voidable contract—Contract Act (IX of 1872), Sec. 16.

Inadequacy of consideration in conjunction with the circumstances of the indebtedness and ignorance of the vendor are facts from which a Court may infer the exercise of undue influence.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár.

Plaintiff sued to set aside a deed of sale passed by him to the defendant, on the ground that the deed was obtained from him by defendant by undue influence.

*Second Appeal, No. 636 of 1899.