1906.

EMPEROR v. DWARKADAS.

resorting to a railway station. No evidence as to the number of persons employed at the theatre was given, so no point arises as to the second branch of the section.

For these reasons we answer the question sent to us in the "affirmative."

With regard to *Regina* v. *Cleworth*(1) relied on by Mr. Coyaji, the object of that Statute was to prevent certain classes of workmen from working on Sunday.

ASTON, J.—I concur that the answer must be in the affirmative. The places of public resort specified in the sentence preceding the words "or other place of public resort" do not differ *inter se* less than a theatre differs from them. There is nothing therefore in the "*ejusdem generis*" argument. It is therefore unnecessary for the purpose of answering this reference to ascertain whether the theatre in question comes under any other category in section 249.

Attorneys for the Municipality:—*Messrs. Crawford, Brown and Co.*

R. R.

(1) (1864) 4 B. & S. 927.

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Scott.

APPEAL No. 735 OF 1904.

1906. *January* 19.

MINALAL SHADIRAM BY HIS MUKHTYAR RAMLOTANSING BUDHANSING (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHARSETJI JIVAJI (ORIGINAL DEFENDANT), RESPONDENT.

APPEAL No. 771 OF 1904.

KHARSETJI JIVAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* MINALAL SHADIRAM BY HIS MUKHTYAR RAMLOTANSING BUDHANSING (ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Civil Procedure Code (Act XIV of 1882), section 13—Consent-decree—Fraud—Defence—Limitation.

On the 4th June 1893, the defendant signed an acknowledgment (Ruzu) for Rs. 11,534-15-0 in favour of the shop of Bakhatram Nanuram, represented in the suit by the plaintiff.

* Cross-Appeals Nos. 735 of 1904 and 771 of 1904.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHALIRAM.

On the 19th June 1894, the defendant paid Rs. 400 cash, and a Hundi for Rs. 600, and for the balance Rs. 10,534-15-0 he passed an instalment-bond payable by yearly instalments of Rs. 1,000 with interest at 6 per cent. on overdue instalment.

The *Hundi* for Rs. 600 was dishonoured in 1895 and the firm sued the defendant for its amount plus Rs. 45 interest in Suit No. 249 of 1895. The defendant pleaded want of consideration for the Hundi and further said that the acknowledgment had been passed in ignorance of the true state of accounts and because the facts had been concealed and misrepresented. A Commissioner was appointed to examine the plaintiff's accounts. He reported that the debt really due on the 4th June 1893 was Rs. 3,016-3-0 and not Rs. 11,534-15-0 as stated in the Ruzu. Upon this the claim in the suit was decreed without an adjudication of other questions raised by the defendant.

In 1897, the firm sued the defendant for the first and second instalments which had become due under the instalment-bond. This was Suit No. 105 of 1897 and was for Rs. 2,000 and interest. The defendant admitted the claim, which was decreed accordingly by consent.

In 1898, the defendant instituted Suit No. 412 of 1898 against the Bakhatram firm for cancellation of the instalment-bond, alleging that it was obtained by misrepresentation and fraud, and was void in law having been passed in respect of wagering transactions and that nothing was due under it. The final decision in the case was passed by the High Court, who, without giving any decision on the merits, dismissed the suit as time-barred.

Pending the above proceedings, the plaintiff filed this suit in 1902 against the defendant on the instalment-bond to recover the 3rd, 4th and 5th instalments amounting in all to Rs. 3,000 and interest. The defendant pleaded *inter alia* that the instalment-bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contracts unenforceable by law. No findings were recorded on these points, as the Subordinate Judge held that the defendant was precluded by the decrees in suits No. 249 of 1895 and 105 of 1897 from raising any of his contentions. The claim was decreed with costs. On appeal, the District Judge also came to the conclusion that the bar of *res judicata* operated against the defendant, but held that the claim as to the 3rd and 4th instalments was barred by limitation.

Both the parties preferred appeals to the High Court.

Held by ASTON, J.—(1) that unless it be established that the pleas which the defendant had raised in the present suit and had not been allowed to prove, would, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June 1893 to less than Rs. 600, plus the Rs. 400 paid in cash, the decision in the Hundi suit could not operate as *res judicata* in respect of the said pleas, for the matter which might and ought to be made a ground of defence in the Hundi suit must be a ground of defence to "the claim actually made" in the said former suit.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

(2) that the plea that the consideration for the instalment-bond partly failed because of the reasons set up in the pleas aforesaid, would have been irrelevant in the later suit No. 195 of 1897 for the first two instalments of Rs. 1,000 due under that bond, unless by setting up these pleas and proving them the claim in that later suit for Rs. 2,000 the amount of the first two instalments would have been reduced.

Held by SCOTT, J.—(1) that before the present suit was brought the issue as to consideration had not been raised except with reference to the Hundi and had been heard and determined in Suit No. 249 of 1895 with reference to that document alone. The defendant was, therefore, not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration.

(2) that the lower Court was wrong in holding that the defendant was barred by section 13 of the Civil Procedure Code (Act XIV of 1882) from raising the questions of fraud or wager as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895 was a sufficient issue for the disposal of the case on the Hundi and in that suit the defendant's liability under the Hundi was the only matter in issue. In Suit No. 105 of 1897 there was no hearing and disposal of any matter in issue and the provisions of section 13 had, therefore, no application. Regard must be had to the reason and scope of the consent decree.

A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may have himself brought an unsuccessful suit to set aside the transaction, and is not under certain circumstances like those in hand precluded from urging that plea by lapse of time.

Rangnath v. *Govind*(1) followed.

Mahomed v. *Ezekiel*(2) not followed.

SECOND appeal from the decision of E. M. Pratt, District Judge of Khándesh, varying the decree passed by B. S. Joshi, First Class Subordinate Judge at Dhulia.

Suit to recover a sum of money.

There were dealings between the firm of Bakhatram Nanuram, represented in this suit by the plaintiff, and Kharsetjee the defendant. These resulted in the latter signing an acknowledgment (Ruzu) for Rs. 11,534-8-0 on the 4th June 1893.

On the 19th June 1894, the defendant gave to the plaintiff Rs. 400 in cash, a Hundi for Rs. 600 and for the balance of Rs. 10,534-15-0 an instalment-bond payable by yearly instalments of Rs. 1,000.

(1) (1904) 28 Bom. 639 : 6 Bom. L. R. 592. (2) (1905) 7 Bom. L. R. 772.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

The Hundi was dishonoured. The plaintiff thereupon filed Suit No. 249 of 1895 to recover Rs. 600 and interest. The contentions of the defendant were that there was no consideration for the Hundi, and that the plaintiff had shown him false accounts. The only issue raised in the suit was: "Is the Hundi sued on without consideration." The Court appointed a Commissioner to examine the accounts of plaintiff. He reported that the debt really due was only Rs. 3,016-3-0. The Court awarded the plaintiff's claim on the ground that the Hundi debt was within the total amount of the debt found due by the Commissioner.

The plaintiff then filed Suit No. 105 of 1897 to recover the first two instalments under the bond dated the 19th June 1894. The defendant allowed the decree to go by consent.

In 1898, the defendant filed Suit No. 412 of 1898 for cancellation of the instalment-bond on the grounds that it was fraudulent and that it was void in law, as it had been passed in respect of wagering transactions and that nothing was due on it. The suit was ultimately decided by the High Court who, without expressing any opinion as to its merits, dismissed it on the ground of limitation.

While these proceedings were going on, the plaintiff filed the present suit to recover the 3rd, 4th and 5th instalments that had accrued due. The defendant made the same averments as to fraud and wager and pleaded that two of the instalments were time-barred.

The issues raised in the Court of first instance were:

1. Whether the defendant is estopped from raising any contentions against the bond sued on?

2. Whether this suit is barred by section 13 of the Civil Procedure Code?

3. Whether the suit is not barred by limitation?

4. Whether the bond and the prior Ruzu are proved to have been obtained by fraud and misrepresentation?

5. Whether the debt was due on wagering contracts and therefore unenforceable by law?

6. Whether the defendant can claim to re-open the account and, if so, whether any and what balance turns up due by defendant to plaintiff on taking an account afresh?

7. Whether plaintiff was entitled to recover the amount claimed or any part thereof?

The Subordinate Judge took up the first three issues for decision in the first instance as involving preliminary points. He found the first in the affirmative, the second in the negative, and on the third his finding was "suit is not barred by limitation."

The defendant appealed against this decision. The District Judge held that the defendant was barred by *res judicata* from pleading that the bond was voidable for fraud and from pleading that the bond was void as the consideration was a wagering debt; and that the claim as to the 2nd and 3rd instalments was not in time.

From this decision, both the parties appealed to the High Court.

G. S. Rao for the defendant:—We say that the bar of *res judicata* does not come in our way. In the first suit (No. 249 of 1896) on the Hundi we impugned the plaintiff's accounts, which led the Court to appoint a Commissioner to examine the accounts. He found that all that was due by the defendant was Rs. 3,016-3-0. That suit ended in plaintiff's favour and when Suit No. 105 of 1897 was brought, we allowed the claim to be decreed by consent, as its amount fell within the figure found by the Commissioner to be due from us. We contend, under these circumstances, that neither the adjudication of the Hundi suit nor the consent decree operates as *res judicata*.

The law of limitation does not prevent a defendant from resisting a claim on the ground of fraud: *Rangnath* v. *Govind*[1]; *Orr* v. *Sundra Pandia*[2]; *Krishna Menon* v. *Kesavan*[3]; *Hargovandas Lakhmidas* v. *Bajibhai Jijibhai*[4].

Setlur (with him *N. V. Gokhale*), for the plaintiff:—The case is properly decided as barred by *res judicata*. In the Hundi suit the defendant put forward the very pleas that he is now urging, and the suit was decided in our favour. So also, in a subsequent suit No. 105 of 1897, the defendant did not raise any of the present pleas and allowed a consent-decree to be passed against him. It is held that a consent-decree operates as

(1) (1904) 28 Bom. 639: 6 Bom. L. R. 592.
(2) (1893) 17 Mad. 255.
(3) (1897) 20 Mad. 305.
(4) (1889) 14 Bom. 222.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

res judicata: see *In re South American and Mexican Co.*[1]; *Nicholas* v. *Asphar*[2]; *Laksmishankar* v. *Vishnuram*[3].

The defendant is barred also by limitation from raising any of his pleas: *Mahomed* v. *Ezekiel*[4].

ASTON, J.:—On 4th June 1893 Kharsetji Jiwaji (defendant) signed a Ruzu acknowledging Rs. 11,534-15-0 to be due by him to the shop of Bakhatram Nanuram of which Minalal Shadiram (plaintiff) is the present owner.

On the 19th June 1894 Kharsetji paid Rs. 400 cash, and a Hundi for Rs. 600, and for the balance Rs. 10,534-15-0 an instalment-bond payable by yearly instalments of Rs. 1,000 with interest at 6 per cent. on overdue instalments.

The Hundi was dishonoured in 1895 and the firm sued Kharsetji for Rs. 600 plus Rs. 45 interest in Suit No. 249 of 1895. The latter pleaded want of consideration for the Hundi and further said that the Ruzu aforesaid had been passed in ignorance of the true state of the accounts and because the facts had been concealed and misrepresented. A Commissioner appointed in Suit No. 249 of 1895 reported on examination of the shop accounts that the debt really due on 4th June 1893 was Rs. 3,016-3-0 and not Rs. 11,534-15-0 as stated in the Ruzu, in other words, that there was full consideration for the Hundi. The claim in Suit No. 249 of 1895 was accordingly decreed, the defendant's plea of want of consideration for the Hundi having failed.

In 1897 in Suit No. 105 of 1897 the firm sued Kharsetji for the first and second instalments which had become due under the terms of the instalment-bond aforesaid, that is to say, for Rs. 2,000 for both instalments and interest.

According to the report of the Commissioner in the Hundi Suit No. 249 of 1895 the debt actually due by Kharsetji on June 1893 covered the Rs. 400 paid in cash, and the Rs. 600 for which he gave a Hundi, and the amount of the first two instalments of the instalment-bond, total Rs. 3,000, the true debt according to the Commissioner being Rs. 3,016-3-0 in June 1893, and Kharsetji's pleader in the Suit No. 105 of 1897 admitted the

(1) [1895] 1 Ch. 37.
(2) (1896) 24 Cal. 216.
(3) (1899) 24 Bom. 77: 1 Bom. L. R. 534.
(4) (1905) 7 Bom. L. R. 772.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

claim for the amount of the first two instalments and interest. The claim was decreed accordingly by consent.

Then Kharsetji who had never after the attitude taken up by him in the Hundi Suit No. 249 of 1895 admitted that more than Rs. 3,000 were due by him to the shop in June 1893, instituted against the Bakhatram firm Suit No. 412 of 1898 for cancellation of the instalment-bond, alleging that it was obtained by misrepresentation and fraud, and was void in law and passed in respect of wagering transactions and nothing was due under it.

The final decision in that case was passed by the High Court and is reported at p. 562 of I. L. R. 27 Bom., *Baktaram* v. *Kharsetji*. The High Court without giving any decision on the merits dismissed Kharsetji's suit for cancellation of the said instrument as time-barred.

Pending that appeal, Minalal, present owner of the Bakhatram shop, having attained majority, filed the present suit No. 138 of 1902 on the same instalment-bond to recover from Kharsetji the 3rd, 4th and 5th instalments Rs. 3,000 and Rs. 705 interest.

Kharsetji pleaded, *inter alia*, that the instalment-bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contracts unenforceable by law and issues 4 and 5 framed by the Court of first instance covered these pleas.

No findings were recorded on these points, because the First Class Subordinate Judge held that Kharsetji was precluded by the decrees in the two prior suits Nos. 249 of 1895 and 105 of 1897 from raising any of these contentions now.

A plea that the claim as to the 3rd and 4th instalments was barred by limitation was decided against Kharsetji (defendant), because the Subordinate Judge held it proved by a judgment of the Punjab Chief Court that plaintiff Minalal attained majority on 28th March 1899. The claim was decreed with costs.

In appeal the District Judge decided that the claim as to the 3rd and 4th instalments was barred by limitation; his view being that the judgment of the Punjab Chief Court not being one *inter partes* is inadmissible in evidence and, therefore, it is not proved that plaintiff Minalal was a minor till 28th March

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

1899, and further the instalment-bond was executed to the firm or shop of Bakhatram Nanuram which was under no disability to sue during the minority of Minalal.

The District Judge however held that Kharsetji is barred by *res judicata* from pleading that the bond is voidable for fraud or from pleading that the bond is void by reason of its consideration being a wagering debt.

The decree of the first Court was varied by allowing only the plaintiff's claim for the 3rd instalment Rs. 1,000, with interest at 6 per cent. to date of suit, the plaintiff being granted ⅓rd of his costs in both Courts.

Against this decree both parties have again appealed to this Court and the points argued at the hearing were, in Appeal No. 771, whether it was wrongly decided that Kharsetji (defendant) is precluded by a bar of *res judicata* from pleading in this suit that the plaintiff cannot recover under the instalment-bond in suit more than the first two instalments Rs. 2,000 already decreed in Suit No. 105 of 1897, because as to such excess there is a want of consideration for the reasons set up in the 1st and 2nd issues framed by the lower appellate Court: and in Cross Appeal No. 735, whether it was wrongly decided that the claim as to the 3rd and 4th instalments is time-barred.

Now, it has already been pointed out that the claim actually made in the Hundi Suit No. 249 of 1895 was for Rs. 600 and interest, and unless it be established that the pleas which Kharsetji has raised in the present suit and has not been allowed to prove, would, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June 1893 to less than Rs. 600, plus the Rs. 400 paid in cash, the decision in the Hundi suit cannot operate as *res judicata* in respect of the said pleas, for the matter which might and ought to be made a ground of defence in the Hundi suit must be a ground of defence to "the claim actually made" in the said former suit: see *Ramaswami Ayyar* v. *Vythinatha Ayyar*[1]. This, however, has not been shewn.

Again, a plea that the consideration for the instalment-bond partly failed because of the reasons set up in the pleas aforesaid,

(1) (1903) 26 Mad. 760 at p. 767.

would have been irrelevant in the later suit No. 195 of 1897 for the first two instalments Rs. 2,000 due under that bond, unless by setting up these pleas and proving them the claim in that later suit for Rs. 2,000 for the first two instalments would have been reduced. This, however, does not appear to be the case. All that appears is that in Suit No. 249 of 1895 the Commissioner appointed to examine the shop accounts reported that the sum actually due by Kharsetji, when he signed the Ruzu for Rs. 11,534-15-0, was Rs. 3,016-3-0, and the conduct of Kharsetji in submitting to a decree for the claim actually made in Suit No. 195 of 1897 was in no way inconsistent with the attitude now taken up by him as to the further claim made in the present suit for other instalment.

In *In re South American and Mexican Co. Ex parte Bank of England*(1) Lord Herschell, L. C., remarked as to a judgment by consent: "I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such a judgment, and were to allow questions that were really involved in the action to be fought over again in a subsequent action." But the question whether the consideration for the instalment-bond so far failed as to enable Kharsetji to dispute successfully any claim for the subsequent instalments was a question not really involved in the second suit No. 195 of 1897 in which by consent the claim for the first two instalments Rs. 2,000 and interest was decreed.

Mr. Setlur for the plaintiff Minalal fell back on the argument that as Kharsetji had in Suit No. 412 of 1898 sued the Bakhatram firm for cancellation of the instalment-bond on the grounds now sought to be raised in answer to the claim for the 3rd, 4th and 5th instalments and that suit was dismissed in final appeal as time-barred, Kharsetji should be treated as barred by the law of limitation from raising the pleas he now seeks to raise in the present suit. The case of *Mahomed Cassum* v. *Joseph Ezekiel*(2) was relied upon, where it was said by Tyabji, J.: "It is equally clear that a party cannot be allowed to make a claim as defendant which he could not make as plaintiff by reason of limitation."

(1) [1895] 1 Ch. 37 at p. 50. (2) (1905) 7 Bom. L. R. 772 at p. 787.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

But Kharsetji is not making a claim, he is resisting a claim made against him, and in *Rangnath* v. *Govind*,[1] which was decided by a Divisional Bench, it was clearly laid down: "A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea, though he may not have himself brought a suit to set aside the transaction, and is not, in circumstances like the present, precluded from urging that plea by the lapse of time."

On the same principle the defendants were allowed to raise a defence based upon grounds which would have entitled them to rectification of the instrument sued on, if they had brought a suit within the period of limitation to obtain that relief. In *Mahendra Nath* v. *Jogendra*[2] where Maclean, C. J., said: "I think it is only equitable that it should be open to the defendants to raise this defence" (of mutual mistake) "and that they ought not to be driven to a separate suit to rectify, which, I understand, would now be barred by the Statute of Limitation."

So here; and a defendant, who has sued for rectification of a money-bond after the period of limitation for such a suit has expired and has failed on the ground of limitaion, would not apparently be in a worse position than a defendant who has never sued for rectification.

The conclusion I come to therefore is that the questions raised in the issues 4 and 5 in the Court of first instance are not *res judicata* and Kharsetji is entitled to have them adjudicated in the present suit.

The decree must therefore be reversed and the case remanded to the Court of first instance under section 562 for decision on the merits on the issues 3, 4, 5, 6, 7; evidence under those issues to be taken.

There must be a fresh finding as to when the plaintiff attained majority, the parties being given opportunity to adduce further evidence on this point. Costs to be costs in the suit and abide the result.

SCOTT, J.:—The plaintiff sued to recover from the defendant Rs. 3,000 for principal and Rs. 705 for interest. The Rs. 3,000 was claimed as the aggregate of three instalments of Rs. 1,000 each

(1) (1904) 28 Bom. 639; 6 Bom. L. R. 592. (2) (1897) 2 Cal. W. N. 260 at p. 262.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

due in respect of the 3rd, 4th and 5th instalments under a bond, dated the 19th of June 1894, for Rs. 10,534-15-6, which was payable by yearly instalments of Rs. 1,000.

The bond had been passed in settlement of a sum of Rs. 11,534-15-0, which was alleged by the plaintiff to be due upon accounts stated between him and the defendant. The balance of the sum alleged to be due was provided for, on the day the bond was passed, by the payment in cash of Rs. 400 and a Hundi for Rs. 600.

The Hundi having been dishonoured, the plaintiff in 1895 filed Suit No. 249 of 1895 in the First Class Subordinate Judge's Court at Dhulia, to recover the Rs. 600 and interest. To the claim in that suit the defendant put in a written statement pleading that *although some money had been due* by him to the plaintiff he was induced, when harassed by his creditors, to rely upon the plaintiff's statement of account wherein, as he had since discovered, the plaintiff had falsely entered a sum as due in respect of certain *savda* transactions in which the defendant was under no liability whatever, and that the Hundi sued on being given in respect of a false loss was without consideration. The Court thereupon framed one issue only, "Is the Hundi sued on without consideration?" and appointed a Commissioner to examine the plaintiff's accounts. The Commissioner having reported that only Rs. 3,016-3-0 and not Rs. 11,534-15-0 was due, the Court awarded the plaintiff's claim on the ground that the total so found due exceeded the amount of the claim on the Hundi. The defendant does not appear ever to have challenged this finding as to the amount of his indebtedness.

In 1897 the first two instalments under the bond having become due, the plaintiff sued to recover them in Suit No. 105 of 1897. No written statement was put in, but the defendant's pleader agreed, without trial and without raising any issue, to a decree for Rs. 2,179 as claimed. As the Purshis then recorded has been relied upon as evidence of a compromise under which the validity of the bond as a whole was admitted, it is necessary to set it out *in extenso*—

"The defendant is to pay to the plaintiff Rs. 2,179 as claimed, and costs in proportion, whatever the same may amount to, by

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

the end of Kartik in Shake 1819 (24th November 1897); he is not to pay interest after the date of suit. If the defendant fails to pay the above-mentioned Rs. 2,179 and costs by the end of Kartik, *i.e.*, at the fixed time as agreed to (by him), he is to pay interest at the rate of 0-8-0, eight annas per cent. per month, from the date of suit to the end of Kartik in Shake 1819 (24th November 1897). A decree may be passed in the foregoing terms. The date the 24th of June in the year 1897."

The plaintiff having by the cash payment of Rs. 400 and by the two decrees for Rs. 600 and 2,179 recovered the full amount found to be due by Commissioner appointed in Suit No. 249 of 1895, the defendant appears to have been minded to get rid of any further litigation by suing for the cancellation of the bond. With this object he filed Suit No. 412 of 1898, alleging that the bond was fraudulent and void in law as it had been passed in respect of wagering transactions. The suit was decided in his favour by the original Court, but was dismissed in appeal by this Court on the ground that the suit for cancellation was time-barred, but no decision was given on the issues of fraud or invalidity under section 30 of the Contract Act.

The plaintiff instituted the present suit in 1902 to recover as above stated the 3rd, 4th and 5th instalments of Rs. 1,000 each under the bond. In the first Court the first issue raised was whether the defendant is estopped from raising any contentions against the bond sued on.

The 4th, 5th and 6th issues were—

4. Whether the bond and the prior Ruzu are proved to have been obtained by fraud and misrepresentation?

5. Whether the debt was due on wagering contracts, and, therefore, unenforceable by law?

6. Whether the defendant can claim to re-open the account, and if so, whether any and what balance turns up due by defendant to plaintiff on taking an account afresh?

The first issue having been found against the defendant, the Subordinate Judge decided that any finding on issues 4 and 5 was unnecessary, and that issue 6th must be decided against the defendant. He then passed judgment for the plaintiff for Rs. 3,000 and interest as claimed.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

The defendant having appealed to the District Judge's Court, that Court varied the decree by disallowing the claim for the 3rd and 4th instalments as barred by limitation. The decree for the plaintiff was thus reduced to Rs. 1,000 and interest.

From the decree of the District Court both parties have appealed. The plaintiff on the ground that his claim for the 3rd and 4th instalments was wrongly held to be barred by limitation; and the defendant, on the ground that the lower Courts erred in holding that he was barred by *res judicata* from pleading in the present suit; that the bond was no longer supported by any consideration, or that the consideration, if any, was a wagering debt, or that the transaction was vitiated by fraud.

The District Judge disposed of the argument that the bond was no longer supported by any consideration in these words: "As a matter of law mere inadequacy of consideration apart from fraud is no defence. Mere inadequacy of consideration will not make the bond either wholly or partially voidable." His judgment upon this point is contrary to the decision in *Forman* v. *Wright*[1] and cannot be supported. In *Forman* v. *Wright*[1] Cresswell, J., said: "A small consideration may sustain a larger promise. Where there is a promise to pay a certain sum, all being, as in this case, supposed to be due, each part of the money expressed to be due is the consideration for each part of the promise; and the consideration as to any part failing, the promise is, *pro tanto*, *nudum pactum*. The rules of pleading require that a plea of no consideration, to a bill or note, which *primâ facie* imports consideration, shall show how the want of consideration arises. In the present case it is shown thus,—by a statement that the note was obtained from the defendant by the plaintiff by a false representation that £32-6-10 was due when in fact £10-14-11 only was due. The plea, it is true, goes on to state that that representation was made *fraudulently and deceitfully*. It was enough, however, that the representation was untrue. . . The consideration for the note failed as to so much as the misrepresentation applied to." Before the present suit was brought the issue as to consideration had not been raised except with reference

(1) (1851) 11 C. B., 488 at p. 491.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM

to the Hundi and had been heard and determined in Suit No. 249 of 1895 with reference to that document alone. The defendant was therefore not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration.

The lower Court was also wrong in holding that the defendant is barred by section 13 of the Civil Procedure Code from raising the questions of fraud or wager as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895 was a sufficient issue for the disposal of the case on the Hundi, and in that suit the defendant's liability under the Hundi was the only matter in issue. In Suit No. 105 of 1897 there was no hearing and disposal of any matter in issue and the provisions of section 13 have therefore no application. It has, however, been argued that the consent decree in the last mentioned suit operates as an estoppel by judgment which prevents the defendant from raising the pleas of fraud and wager, but when the facts of the case and the wording of the Purshis, above set out, are borne in mind the reason and the scope of the consent decree at once become apparent. A decree for the amount claimed was then submitted to because that amount fell within the sum found due by the Commissioner and to the claim for Rs. 2,000 and interest the pleas of failure of consideration, fraud and wager would have afforded no defence. The consent was in no degree an admission that the balance mentioned in the bond which then remained unpaid would thereafter be payable.

Mr. Setlur also contended that the right of the defendant to claim cancellation of the bond on the ground of fraud being barred, he could not as a defendant plead fraud as a defence to any claim on the bond. He relied upon the decision of Tyabji, J., reported in *Mahomed* v. *Ezekiel*[1]. We are, however, bound by a contrary decision in *Rangnath* v. *Govind*[2].

The fact that the defendant was, owing to the bar of limitation only, denied the specific relief of cancellation claimed in Suit No. 412 of 1898 cannot prevent him from raising defences on the merits as a defendant in this suit.

(1) (1905) 7 Bom. L. R. 772 at p. 787.
(2) (1904) 28 Bom. 639: 6 Bom. L. R., 592.

1906.

MINALAL SHADIRAM v. KHARSETJI.

KHARSETJI v. MINALAL SHADIRAM.

The decree must be set aside and the case remanded for trial on the issues 4, 5 and 6 raised by the Subordinate Judge. And by the agreement of the parties further evidence may be recorded, if forthcoming, on the question as to when the plaintiff attained majority.

Decree reversed. Case remanded.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1906. *January* 25.

THE SURAT CITY MUNICIPALITY (ORIGINAL DEFENDANT 1), APPELLANT, *v.* CHUNILAL MANEKLAL GHANDI (ORIGINAL PLAINTIFF), RESPONDENT.*

District Municipal Act (Bom. Act III of 1901)—District Municipal Election Rules, Rule 13(1)*—Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality—Declaration—Injunction.*

The plaintiff offered himself as a candidate to be elected a Councillor in the Municipal elections, but his name was not included in the list of candidates

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* Appeal No. 20 of 1905 against an order of remand.

(1) District Municipal Election Rules, Rule 13 (see Jamietram and Chimanlal's Bombay Acts and Regulations, Volume II, page 595).

13. (1) Every person who desires or is willing to become a candidate for a Municipal Commissionership must be nominated in writing for this purpose by two persons entitled to vote at the election for such Municipal Commissionership, and the nomination paper must bear an endorsement signed by the nominee signifying his willingness to serve, if he should be elected, and be delivered to the officer appointed by the Collector for this purpose, at least seven days before the date fixed for the election.

(2) The said officer shall, if any nomination paper is prepared and delivered to him in accordance with sub-section (1), and if the nominators establish to his satisfaction that they are entitled to vote at the election and that the nominee is qualified as a candidate, include the nominee's name in a list of candidates which shall be prepared under his signature and posted up at the Municipal Office, or, in the case of a new Municipality, at the Village Chavdi or such other place as the Collector appoints for this purpose, and at the place at which the election is to be held and in other conspicuous places, at least five days before the date fixed for the election.

(3) When, in a Municipal District, which has been sub-divided for electoral purposes into wards, elections are to be held at or about the same time in two or more wards, one and the same person may be nominated for election in all or in any number of the said wards.