**(1868) 08 CAL CK 0008**

**Calcutta High Court**

**Case No:** None

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| Cook and Others | | APPELLANT |
| | Vs | |
| Jadab Chandra Nandi | | RESPONDENT |

**Date of Decision:** Aug. 10, 1868

**Judgement**

Norman, J.

It appears that in a suit on the same written contract, instituted on the 12th of March in this year, for breaches of it, which had then been committed, the defendant put in an answer in these terms: "Denies liability." The Judge says, "the two questions of the factum of the contract, and of the authority of the person who executed the contract on his behalf were directly in issue, and were both decided by me in favour of plaintiffs," who had judgment accordingly. The Judge says, "on this ground I consider that the defendant was estopped in the present suit from pleading that there was no such contract between him and the plaintiffs, as the plaintiffs relied on." The effect in evidence of a verdict on a former trial on the same point between the same parties is discussed at great length by Lord Ellen borough in delivering the judgment of the Court of King''s Bench in the case of Outram v. Morewood (3 East, 346, 366). He concludes by saying, "none of the cases cited on the part of the plaintiffs negative the conclusiveness of a verdict found on any precise point once put in issue between the same parties. The cases adverted to on the other side are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive that the defendants in this case are estopped by the former verdict and judgment on the same point in the action of trespass." In the Duchess of Kingston''s case (2 Smith''s L.C., Ed. 1867, 979), in delivering the opinions of the Judges in the House of Lords, Chief Justice De Grey says: From the variety of cases relative to judgments being given in evidence in civil suits, the deduction seems to follow as generally true, that the judgment of a Court of concurrent jurisdiction directly upon 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 Court."

2. Such being the law, I think that as the same point directly in issue was tried and decided in the former suit, and as a decree upon such finding passed against the defendant, the former decision may be treated as a conclusive finding that the defendant did contract as alleged. I do not desire to be understood as saying that such a finding is necessarily and in all cases absolutely conclusive. But here it is not suggested that the former decision was obtained by fraud, or surprise, or that there was any fraud whatever for reopening the question once solemnly decided.

3. As to the second point--The contract is a contract to supply straw for a period of twelve months, the supplies to be sent as ordered daily. It appears that on the 12th of March the plaintiffs sued "for damages by reason of the defendants failing to supply straw as agreed." They claimed and recovered Rs. 198.

4. One of the questions raised by the defendant is whether, after a recovery of damages on a plaint so framed, any second action can be maintained by the plaintiff on the contract; it was gravely argued that the contract was not severable. It seems to me that it would be just as reasonable to contend that if a man lets a house for a year, at a monthly rent, he could not sue month by month for his rent. Day by day, as the defendant fails to supply straw as ordered, new breaches of the contract arise, and in respect of such breaches new causes of action arise from day to day. It is quite clear that in the suit brought on the 12th of March, the plaintiffs were only entitled to recover damages for the breaches that had occurred down to that day, and the damages were not, and could not have been a satisfaction of subsequent breaches. Whether the plaintiffs could have rescinded the contract or not, there is nothing whatever to lead to the inference that they did so, certainly no such inference can be drawn from the fact that they took the most active steps to enforce the contract, by suing promptly for breaches of it.

5. Whether the claim now made was adjudicated upon in the suit of the 12th of March is a question of fact. If there was a doubt about it arising from any ambiguity in the frame of the former plaint, it was open to the plaintiffs to show by extrinsic evidence that the causes of action were not the same. That was decided in Bagot v. Williams (3 B. and C., 239).

6. The second point stated was not argued before us. I may observe, however, that the decision, in the former suit, of the Judges of the Small Cause Court, on the motion for the new trial, overruling that of the first Judge on a mere point of law, though properly followed fey the learned first Judge in this suit, is not an estoppel. The decree appears to be perfectly correct. The defendant must pay the costs of the case sent up.

Phear, J.

7. Generally a plaintiff''s cause of action in any suit (excepting certain limited classes of suits) may be considered as divided into two essentially distinct parts, namely:

1. A right on his side, proprietary, contractual, or resting on duty as against the defendant.

2. Infringement of that right by the defendant.

8. If the right be put in issue, and a judicial decision be arrived at on that issue, whether affirming or negativing the right, I think the decision is conclusive between the same parties in any future action which may be brought by either of them against the other relative to the same matter of right (see Outram v. Morewood, 3 East, 346).

9. In the case before us all three of the plaintiffs'' actions were founded upon the same right, viz., the right created by the alleged contract, the cause of actions differed, if at all, the one from the others, in the acts of infringement which were complained of. The learned first Judge of the Small Cause Court states that the right under the contract was put in issue in the first action, and judicially determined in favour of the plaintiffs. It seems to me, therefore, that the defendant could not in the succeeding action again dispute the plaintiffs'' right which had been so determined. I also think from the learned Judge''s statement that the contract was a continuing contract not capable of being discharged by one act of the defendant, but requiring for its fulfillment a series of such acts extending over a considerable period of time. Had one act, of the defendant sufficed for due performance on his part, and had the action been brought against him for his omission to do this act, there could have been force in Mr. Kennedy''s argument urged to show that no second action would lie. The matter of the contract between the parties would have been brought to an end by reason of the plaintiff having sued the defendant in respect of the whole of that which it lay upon the latter to do. The plaintiff could not enjoy simultaneously a remedy in the shape of damages, and a continuing right of performance in respect of the same thing. But nothing of that kind has, in my opinion, happened here. The plaintiff brought his first suit merely for such default of the defendant, under the contract, as had taken place at the time of instituting the suit. He did not, as be probably might, elect to treat the defendant''s default as sufficient ground for rescinding the contract and sue as for nonperformance of the whole. He chose rather to keep the defendant to his bargain and to maintain his right to receive from him the benefit of the continuing contract, notwithstanding the breaches thereof, which the latter had already committed. This course, he was, I think, perfectly entitled to take (see Unwin v. Clarke, (1 L.R. Q.B., 417) and cases there cited) even although the defendant had, previously to the institution of the first suit, unmistakably, exhibited his intention not in any way to perform his part in the contract. This being so, while the right which formed the basis of the cause of action remained the same in all the suits, the infringement complained of was different in the different suits, and consequently the several causes of action differed. On the whole, therefore, I am of opinion that in the second and third suits, the defendant ought not to be allowed to dispute the contract, and that his plea of

res judicata is not well founded.