

(1880) 09 CAL CK 0003

Calcutta High Court

Case No: None

Niamut Khan and  
Others

APPELLANT

Vs

Phadu Buldia

RESPONDENT

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Date of Decision: Sept. 14, 1880

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 13

Citation: (1881) ILR (Cal) 319

Hon'ble Judges: Richard Garth, C.J; Prinsep, J; Pontifex, J; Morris, J; Mitter, J

Bench: Full Bench

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### Judgement

Richard Garth, C.J.

Pontifex and Mitter, JJ.--We think we are bound to follow, in its integrity, the rule which has been laid down by their Lordships of the Privy Council in the cases referred to, and adopted by the Legislature of this country in the 13th section of the new Code,--namely, that when a material question has been substantially tried and decided in a former suit, and in a competent Court, it cannot be tried again in any other suit between the same parties.

2. The question which is raised in this suit, namely--whether the tenure was liable to enhancement,--was undoubtedly tried and determined by the Munsif in the former suit; and although no declaration was made of the plaintiff's right in that respect, and although the decision was not embodied in the decree, so as to give the defendant a right of appealing against it, still it was a decision within the meaning of the rule laid down by the Privy Council, and we think that the defendant is bound by it.

3. It was argued at the bar, that where, as in this case, the decision in the former suit became immaterial for the purposes of that suit, and the defendant (as the decree was framed), had no opportunity of appealing against it, it is hard that it should be

binding upon him.

4. There is no doubt, that the application of the rule to case like the present may, occasionally, be productive of hardship; especially until the effect of the rule is more generally understood. Parties are very naturally unwilling to appeal against adverse decisions in cases where they are in the main successful, and where, for the purposes of the suit appeal is unnecessary. But, nevertheless, they must appeal, unless they are content to be bound by those decisions. It is most important that suitors should understand their position in that respect; and it obviously becomes necessary, in order to give parties a proper opportunity of appealing, that the material findings in each case should, in future, be embodied in the decree.

5. Unless the finding is thus embodied in the decree, the party against whom the issue is decided will have no right to appeal against it. Appeals can only be preferred against the decrees, not against the judgments of the lower Courts (see Sections 540 and 584 of the Civil Procedure Code); and therefore, if a party wishes to appeal against the decision of a particular issue, which does not appear in the decrees, he must first apply to the Court to amend the decree by embodying the decision in it.

6. This will render it necessary for the lower Courts to draw up decrees with much greater particularity than has hitherto been observed.

7. The effect of our decision in this case will be, that the judgment of this Court and of the District Judge will be set aside, and the judgment of the Munsif restored. The appellant will have his own costs in all the Courts.

Morris, J.

8. In my opinion this case falls within the rule laid down by the Judicial Committee of the Privy Council in the case of Soorjeemonee Dayee v. Suddanund Mohapatter 12 B. L. R. 304; s.c. 20 W. R., 377. In their judgment in that case, their Lordships say:

9. If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed, which, strictly construed, embraced the whole of it, therefore the judgment upon it was ultra vires. Their Lordships are of opinion that the term cause of action (Section 2 Act VII of 1859) is to be construed with reference rather to the substance than to the form of action. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the CPC would by no means prevent the operation of the general law relating to res judicata on the principle "*nemo debet bis vexari pro eadem causa*."

10. It is not unlikely, as has been suggested in the course of the argument, that the case before the Munsif having been dismissed, the defendant did not think it necessary to appeal against the judgment that his tenure was liable to enhancement, and was misled by the omission of that finding in the decree itself; but, to use the words of their Lordships of the Privy Council, "both parties invoked

the opinion of the Court upon this question and it was raised by the pleadings and argued." The omission of this finding in the decree is not material, because, as pointed out by Mr. Justice Markby in the case of *Sheik Enaetoola v. Sheik Ameer Buksh* (25 W. R. 225), their Lordships, when they delivered their judgment in the case of *Soorjeemonee Dayee* 12 B. L. R. 304: s.c. 20 W. R. 377, had not the decree before them, and neither in that case, nor in another very similar case, *Krishna Behari Roy v. Bunwari Lai Roy* I. L. R. 1 Cal. 144: s.c. 25 W. R. 1: L. R. 2 I. A. 283, did they think it necessary to have the decree before them. As a matter of fact, in neither case was the finding relied on embodied in the decree. It is true that, u/s 540 of the present Code of Civil Procedure, which corresponds with Section 23, Act XXIII of 1861 of the old Code, "unless when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal shall lie from decrees or from any part of decrees only." If, therefore, in this case the defendant desired to avoid the finding which was adverse to himself, he should have taken proper steps to have the decree amended, and so put himself in a position to appeal against it. It is a well-known practice in our Courts to give the decree, after it is drawn up and before it is signed by the Court, to the pleaders of both parties for their examination and signature. An opportunity is thus afforded them of comparing the decree with the judgment, and of correcting the former, if necessary, where it appears to be at variance with the (sic) the failure, however, on their part to avail themselves of this, and to ame(sic) decree so as to open the door to an appeal, cannot render a finding of (sic) or less binding upon the parties.

11. In this view, so long as the opinion of the Court has been given on a question which has been raised by the pleadings and argued, that opinion must be considered as *res judicata*, even though it may not have been embodied in the decree. I would answer the reference which has been made to this Bench accordingly.

Prinsep, J.

12. I concur in the judgment delivered by Mr. Justice Morris.