Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kameswar Pershad v. *Rajkumari Ruttun Koer and others, from the High Court of Judicature at Fort William in Bengal; delivered June 21st, 1892.*

Present :

LORD MORRIS.
LORD HANNEN.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Morris.*]

THE facts which it may be necessary briefly to recapitulate, in order to make clear the grounds upon which their Lordships are about to decide this case, are as follows:—Rani Asmedh Koer was the senior widow of Rajah Modhnarain Singh, and as such was entitled to a widow's interest in certain mouzahs, part of the property of her deceased husband. She appears to have incurred debts to the Appellant, and on the 1st March 1872 she executed a bond to him for the sum of Rs. 61,000, to meet the amount of her liability, and thereby hypothecated the mouzahs. On the 31st August 1872 an agreement was entered into between her and Run Bahadoor, whereby she surrendered her interest in her husband's estate to Run Bahadoor, upon condition that he was to pay her an allowance of Rs. 24,000 for her maintenance, and was to pay off her liabilities. On the 31st March 1876 the Appellant instituted a suit on the bond against the Rani and Run Bahadoor, which was decreed by the Subordinate Judge on the 6th December 1876 in the terms of the prayer. The High Court varied this decree, and by their decree of the 2nd July 1878 held the Rani personally liable for the amount covered

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by the bond with interest thereon, and held the mortgage not to be binding upon the estate. The matter was brought before this Board by way of appeal, and in 1880 the appeal was dismissed. In 1884 the Appellant sought to execute, against Run Bahadoor and the properties in his possession, the personal decree obtained against the Rani who was dead. The Court to which the application for execution was made held that the decree could not be executed against Run Bahadoor, except in respect of personal property of the Rani which had come to him on her death. The High Court on appeal upheld this decision by their judgment of the 14th January 1886. On the 13th January 1887 the Appellant instituted the present suit against Run Bahadoor, praying to have him declared liable, under the agreement of the 31st August 1872, to satisfy the decree obtained against the Rani on the bond.

The first objection taken to the suit was that it was barred by the law of limitation.

Primâ facie, this would be obvious, for the bond was by its terms made payable in the month of September 1875, whereas the right to sue the Defendant for a personal debt would be limited to 6 years, and the present suit was not commenced until the month of January 1887, an interval of over 11 years. The Appellant, however, alleges that he comes within the limitation applicable to a charge on immoveable property, which would be 12 years; if he is right in that contention, the suit, being instituted 11 years and some months afterwards, is not barred.

But it is necessary for the Appellant to satisfy this Board that the charge upon the estate was one which was binding upon it, and, bearing in mind the facts of the earlier suit, and what was said by the Board in that case, their Lordships are not satisfied that it was so binding in fact. In this view, the period of

6 years, and not the period of 12 years, applies in this case, and the suit is consequently barred.

Another ground appears to their Lordships fatal to the suit, and that is that it offends against the principle of *res judicata* laid down in the Code of Civil Procedure of 1882. In the suit of 1876 Run Bahadoor was joined as a Defendant, upon the ground that the Rani had, under the agreement of 1872, given over to him the whole of her properties, including what was mortgaged by the bond, but no relief was claimed against him personally. It was clearly competent for the Appellant to have alleged in that suit the personal liability which he now says he can establish against Run Bahadoor. He had relied upon the fact of the mortgage being one affecting the whole estate, but he could have also alleged that Run Bahador was bound at all events to pay him, in consequence of the agreement which he had entered into with the Rani. This, however, he did not do.

Section 13 of the Code of Civil Procedure of 1882 says: "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 2 of that section says: "Any matter "which might and ought to have been made "ground of defence or attack in such former "suit shall be deemed to have been a matter "directly and substantially in issue in such suit." Their Lordships think that the present ground of attack was a good ground of attack in the suit of 1876, because the money had not been

paid in September 1875, the date named in the bond.

That it "might" have been made a ground of attack is clear. That it "ought" to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadoor, and it appears to their Lordships that the matter "ought" to have been made a ground of attack in the former suit, and therefore that it should be "deemed to have been a matter "directly and substantially in issue" in the former suit, and is *res judicata*.

But it has been urged that the first suit having been brought in 1876, the Code of Civil Procedure of 1877, and not the Code of 1882, governs the case; but it is to be observed that the Code of 1882 says that "No Court shall try any suit or issue"; that is, shall try after the passing of that Act, though the circumstances had arisen previously.

Neither should it be lost sight of that the Act of 1877 and the Act of 1882 were not introducing any new law, but were only putting into the form of a Code that which was the state of the law at the time.

The state of the law at the time was, that persons should not be harassed by continuous litigation about the same subject matter.

Upon these grounds their Lordships will humbly advise Her Majesty that the Judgment of the High Court should be affirmed, and the appeal dismissed. The Appellant must pay the costs of the appeal.