APPELLATE CIVIL.

Before Mukerji and Mallik JJ.

ABDUL GANI

v.

NABENDRAKISHORE RAY.*

1929.
Mar. 20.

Res judicata—"*Litigating under the same title*"—"*Matter in issue*"—*Subject-matter—Object of the suit—Title—Code of Civil Procedure (Act V of 1908), s. 11.*

The words " litigating under the same title " in section 11 of the Code mean that the demand should have been of the same quality in the second suit as in the first one.

The expression " matter in issue " in section 11 of the Code is distinct from the subject-matter and the object of the suit, as well as from the relief that may be asked for it, and the cause of action on which it is based ; and the rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different.

The generality of the cases have taken the view that where the whole title was in issue in a previous litigation the same cannot again be agitated in a subsequent suit.

Kunji Amma v. *Raman Menon* (1) referred to.

It is the matter in issue and not the subject-matter of the suit that forms the essential test of *res judicata.*

Pahlwan Singh v. *Risal Singh* (2) and *The Raja of Pittapur* v. *Buchi Sitayya* (3) followed.

Where, in 1923, the High Court had decided upon the validity of a *wakf-nama* and, in a subsequent suit, the title of defendants Nos. 1 and 2 thereunder was in issue, as it was in the former litigation, though the subject-matter of the second suit was entirely different from the subject-matter of the first,

held that the decision of 1923 on that question operated as *res judicata* and could not be re-opened and the issue re-agitated in the subsequent suit.

Chandi Prosad v. *Maharaja Mahendra Mahendra Singh* (4), *Dwarka Das* v. *Akhay Singh* (5) and *Kedar Nath Singh* v. *Sheo Shankar* (6) referred to.

SECOND APPEAL by Abdul Gani and another, defendants.

*Appeal from Appellate Decree, No. 2426 of 1927, against the decree of Kamal Chandra Chunder, District Judge of Noakhali, dated July 30, 1927, affirming the decree of Tejendra Nath Basu, Munsif of Feni, dated Dec. 23, 1924.

(1) (1892) I. L. R. 15 Mad. 494.
(2) (1881) I. L. R. 4 All. 55.
(3) (1884) I. L. R. 8 Mad. 219 ; L. R. 12 I. A. 16.
(4) (1901) I. L. R. 24 All. 112.
(5) (1908) I. L. R. 30 All. 470.
(6) (1923) I. L. R. 45 All. 515.

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The facts of the case, out of which this appeal arises, appear fully in the following extracts from the judgment of the trial court:—

"Plaintiff's case is that defendants Nos. 1 and 2 inherited the land in suit "in equal shares from their father, Kamar Ali Bepari; that in Title Execution "Case No. 165 of 1922, the plaintiffs attached the half share of the land in "suit of defendant No. 1, in execution of the decree in Title Suit No. 9/343/24 "of 1912/1907 obtained by the plaintiffs against defendant No. 1; that de- "fendant No. 1, having raised an objection that he was possessing the land "as a *matwalli*, the land was released from attachment by an order passed "on the 28th August, 1922, in claim case No. 3 of 1922; that in Title Suit "No. 130/1702 of 1917/1916 of the local first court, present defendants Nos. 1 "and 2 brought a suit for establishment of their title as *mutwallis* under a "*wakf* created by their father; that the present defendants got a decree in " the first court, but the decree was reversed in appeal—the appellate court "finding that the *wakf* set up was a sham and colourable transaction, was "never acted upon by Kamar Ali or his sons and was never intended to be "acted upon; that a Second Appeal to the Hon'ble High Court against "the decree of the first appellate court has proved unsuccessful; that as a "matter of fact defendants Nos. 1 and 2 did never possess the properties "left by Kamar Ali as *mutwallis*, nor the income of the properties was ever "applied to the purposes of the alleged *wakf*; that the land in suit was "quite liable to be sold away for the personal decretal debt of defendant "No. 1.

"Defendant No. 2 appears and contests the suit. Defendant No. 1 does "not appear though duly summoned.

"The main contentions of defendant No. 2 are: that defendants Nos. 1 "and 2 have no personal interest in the land in suit, but they possess it as "*mutwallis* under a *wakf* created by their father by a deed dated the 20th "Pous, 1300 B. S.; that their father, Kamar Ali, died leaving two sons (de- "fendants Nos. 1 and 2), four daughters and two widows; that, at present, "one daughter, *viz.*, Ranik Bibi, and heirs of two other daughters are alive; "that the suit is bad for defect of parties, inasmuch as these persons have "not been made parties; that the *wakf* was created by Kamar Ali for the "purpose of the mosque at the *darga* of his homestead; that the mosque is "still in existence and the income of the *wakf* properties is fully applied "to bear the expenses of the mosque; that the *wakf* is quite valid; that the "land in suit cannot be sold for a personal debt of defendant No. 1 and the "claim case was rightly decided; that by way of inheritance, defendant No. 1 "could not have got more than 3 annas 11 *gandas* share of the land in suit. "Other contentions will appear from the issues."

Syed Nasim Ali and *Mr. Bhagirathchandra Das*, for the appellants.

Mr. Rameshchandra Sen and *Mr. Bankimchandra Banerji*, for the respondent.

Cur. adv. vult.

MUKERJI AND MALLIK JJ. This appeal has arisen out of a suit for setting aside an order passed in a

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claim case releasing certain property from attachment, for a declaration of the defendant No. 1's title thereto and for a further declaration that the property is liable to be sold in execution of a decree against the said defendant No. 1. The courts below have decreed the suit. The defendants Nos. 1 and 2 have appealed to this Court.

The plaintiff's case was that the defendants Nos. 1 and 2 inherited the property in equal shares from their father, Kamar Ali Bepari. He attached a half share of the defendant No. 1 in the said property in execution of a decree he held against the said defendant, but the defendant No. 1 having raised an objection that he was possessing it as *mutwalli*, the property was released from attachment. Hence the present suit under Order XXI, rule 63, of the Code of Civil Procedure.

The property in suit are some lands in a *taluk* named Sitaram. In 1894, Kamar Ali created a *wakf* in respect of 5 *taluks*, of which Sitaram was one, the other four *taluks* being Jaykrishna, Manwar Khan, Durgaram and Mahomed Mokim. Kamar Ali died in the same year.

In 1898, one Emdad Ali attached *taluk* Sitaram in execution of a decree. The defendants setting up the *wakf* got the *taluk* released from attachment.

In 1897, the plaintiffs purchased the 4 annas *pahali zemindari* at a revenue sale and, in 1907, they brought a suit for *khas* possession of two of the *taluks*, viz., Jaykrishna and Manwar Khan, on the ground that they had been annulled by the revenue sale. The defendant No. 1, in the present suit, was one of the defendants (being No. 10) in that suit. The suit was decreed *ex parte* in 1908, the plaintiff being awarded *khas* possession, mesne profits and costs. As a result of proceedings taken by the defendant No. 1, this *ex parte* decree was eventually set aside in so far as it was against the said defendant No. 1. The defendant No. 1 then entered appearance and contested the suit with the result that, in 1914,

it was decreed on contest as regards *taluk* Jaykrishna, the plaintiffs getting *khas* possession of the lands of that *taluk* with costs, while it was dismissed as regards *taluk* Manwar Khan, as it was found to have been created before the permanent settlement.

While the defendant No. 1 was contesting the *ex parte* decree of 1908, in the aforesaid way, the said decree, in so far as it was for mesne profits and costs, was executed by the plaintiffs and, in such execution, the plaintiffs attached the lands of *taluk* Sitaram, *i.e.*, the property in the present suit. The defendant No. 1 started a claim case on the allegation that it was *wakf* property. The plaintiffs subsequently filed a petition in which they admitted that *taluk* Sitaram was *wakf* property and consented to its being released from attachment. This was sometime in 1910.

Then, when after contest with the defendant No. 1, the plaintiffs, in 1914, obtained a partial decree in respect of *taluk* Jaykrishna with costs, they started execution in respect of the decree for costs and attached the share of the defendant No. 1 in *taluk* Manwar Khan and, having put it up to sale, purchased it themselves.

In 1915, the plaintiffs instituted two rent suits against certain tenants of *taluk* Manwar Khan, making the defendant No. 1 a *pro formâ* defendant therein. The defendant No. 1, as such *pro formâ* defendant, took the plea that the properties were *wakf* and the rent suits were dismissed in 1916, the dismissal being finally upheld on appeal in 1918.

One of the *taluks*, namely Durgaram, was sold for arrears of rent by the Maharaja of Tippera, the superior landlord, and was purchased by the plaintiffs, after which, in 1915, the plaintiffs instituted a suit, in which the defendant No. 1 pleaded that the rent decree had not been obtained against the *mutwallis* but only against one of them in his personal capacity and so the tenure did not pass at the sale. The suit was dismissed in 1918, but the dismissal was reversed

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on appeal in 1919 and ultimately, on a Second Appeal to this Court, the trial court's decree dismissing the suit was upheld in 1921.

In 1916, while the suit last mentioned was pending, the *mutwallis* including the defendant No. 1, brought a suit against the plaintiffs for a declaration that two of the *taluks*, Manwar Khan and Jaykrishna, were *wakf* properties. The suit was decreed by the trial court in 1919, but the decision was reversed on appeal by the court of first appeal in 1921, and, in 1923, this Court on Second Appeal upheld the reversal.

The above, in short, is a history of the *taluks*, in so far as it is necessary to be said for our present purposes.

The contentions that have been urged before us are four in number, of which the first three are the following : 1st, that the plaintiffs are under a personal bar, they having, in 1910, admitted that *taluk* Sitaram was *wakf* and consented to the release thereof from attachment; 2nd, that the decision of 1921 operates as *res judicata* in defendants' favour; and 3rd, that the decision of 1923 cannot operate as *res judicata*.

The first contention above set out is founded upon a petition marked as Ex. D in the case. In it the plaintiffs merely stated that it appeared that the property (meaning *taluk* Sitaram) was included in the *wakf* and they had no objection to its being released from attachment. Now, in the first place, there was no admission as regards the validity of the *wakf*, which is the question in the present suit, but merely an admission to the effect that *taluk* Sitaram was included in the *wakf*. Nextly, even if it be regarded as an admission as to the validity of the *wakf*, there is nothing that may make this admission operate as an estoppel in the present case. The decision in the case of *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natchiar* (1), upon which the appellant relies, in our judgment, has no application to the

(1) (1866) 11 M. I. A. 50.

case upon the ground, amongst others, that there was here no decision based upon the admission, as there was in that case.

The second contention is based upon the decision of 1921. This decision is Ex. H. We agree with the learned District Judge in the view that he has taken of it and hold that the question of the validity of the *wakf* did not and could not legitimately arise in that suit and was not either expressly or even by implication decided therein.

The third contention relates to the decision of 1923. The suit in which this decision was passed related to two of the *taluks*, namely Manwar Khan and Jaykrishna. The defendants Nos. 1 and 2 were the plaintiffs in that suit. They sued for declaration of their title therein as *mutwallis* of the *wakf* and for other reliefs. The trial court decreed the suit, but, on appeal, the decree was reversed, the reversal being upheld by the High Court on Second Appeal, the suit being ultimately dismissed. The case of the defendants Nos. 1 and 2, as plaintiffs in that suit, was that the two *taluks* existed from before the permanent settlement, that their father possessed the properties in *taluki* right and made a *wakf* of those properties and dedicated them to a mosque and appointed them as *mutwallis*, that the plaintiffs in the present suit, on the strength of their revenue sale purchase, had obtained *khas* possession of some of the properties and, in execution of the decree for costs, had purchased the rest, but that their title as *mutwallis* was not affected. The present plaintiffs, as defendants in that suit, contended that the *wakf* set up was a collusive and paper transaction and had never been acted upon. The issue was: "Have the plaintiffs (the defendants Nos. 1 and 2 in the present suit) their alleged *mutwalli* right in the disputed properties? Was the *wakfnama* set up a valid and genuine document? Was it acted upon?" The Additional Judge held: "The *wakf* was a collusive paper transaction intended to keep the properties covered by the *wakfnama* safe from the claim of

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"any possible future creditor or other claims of "other persons.....It is clear that the disputed "property was never treated as *wakf* property and "it was treated as secular property of Kamar Ali "Patari and, after his death, it descended to his "heirs as secular property and was treated by them as "secular property.....There can be no doubt that the "*wakfnama* created by Kamar Ali Patari was a "sham, colourable transaction and it was not "intended to be acted upon and it was not given "effect to by Kamar Ali or by plaintiffs and they all "treated the properties covered by the deed of *wakf* "as their secular properties and enjoyed them as "such and not for the upkeep and maintenance of "the mosque. The properties covered by the deed of "*wakf* were treated as personal properties, both by "Kamar Ali and his heirs." This decision was upheld on appeal by the High Court. Now it is urged, on behalf of the appellants, that it does not operate as *res judicata* for two reasons: 1st, because, whereas in that suit the present plaintiffs, as defendants, challenged the validity of the *wakf* in their capacity as revenue-sale purchasers and were setting up a title paramount and were not claiming through the settlor, in the present suit they are challenging the validity of the *wakf* in their capacity of persons claiming through the settlor; and 2nd, because the subject-matters of the two suits are different—in the former suit, it was the lands of *taluks* Jaykrishna and Manwar Khan and, in the present, it is the lands of *taluk* Sitaram. As regards the first of these reasons, it appears that the present plaintiffs were resisting the earlier suit, not merely as purchasers at a revenue sale, but also as purchasers at a sale in execution of the decree for costs. They were defending, as revenue-sale purchasers, the *khās* possession of *taluk* Jaykrishna that they had obtained as such. But they were also defending their purchase of *taluk* Manwar Khan at the sale in execution of the decree which they had obtained for costs, and this they could not have done merely as revenue-sale purchasers and

unless as persons claiming adversely to the endowment and through the settlor, which is exactly their position in the present suit. The words " litigating " under the same title " mean that the demand should have been of the same quality in the second suit as in the first one. In the present case, both the demands were of the same quality, both in the character of judgment-creditors seeking to enforce their claim adversely to the endowment. No new title has accrued to the plaintiff in the meantime and we are of opinion that in both these suits the plaintiffs and, for the matter of that, both the parties have litigated under the same title within the meaning of section 11 of the Code. As regards the second reason, it is true that the subject-matter in the former litigation was the lands of *taluks* Jaykrishna and Manwar Khan, and, in the present suit, it is the lands of *taluk* Sitaram. But the expression " matter in issue " in section 11 of the Code is distinct from the subject-matter and the object of the suit, as well as from the relief that may be asked for in it, and the cause of action on which it is based; and the rule of *res judicata*, requiring the identity of the matter in issue, will apply even when the subject-matter, the object, the relief and the cause of action are different. In *Barrs* v. *Jackson* (1), the subjects of the two suits were different, the two claims being perfectly distinct from each other, one for obtaining letters of administration and the other for taking a share of the property. In the case of *Sundhya Mala* v. *Debi Churn Dutt* (2), it was ruled that a suit for certain portion of A, on the ground of A having been leased to the plaintiff, would be barred by a decision as to A having been leased not to the plaintiff but to the defendant, in a previous suit by the plaintiff for another portion of A, with the same allegation of its having been leased to him. Similarly in *Ananta Balacharya* v. *Damodhar Makund* (3), it was said :— " It is true that in those suits the dispute was as to

(1) (1845) 1 Ph. 582 ; 41 E. R. 754. (2) (1881) I. L. R. 6 Calc. 715.
(3) (1888) I. L. R. 13 Bom. 25, 33.

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" a piece of land other than the land now in suit. "* * *The plaintiffs there, as now, merely alleged that " there had been a partition and that they had a " separate share; the defendants there, as now, " merely contended that there had been no partition. "* * *In the present case, it cannot be held that the " decision regarding the question of partition affected " only the particular piece of land then in dispute, " and left the defendants free to urge again in any " subsequent suit that the family was joint in all " other respects and as to all other property." There are, it is true, decisions here and there, in which a different view has been taken, but the generality of the cases have taken the view that, where the whole title was in issue in a previous litigation, the same cannot again be agitated in a subsequent suit, *e.g.*, *Kunji Amma v. Raman Menon* (1). In the case of *Pahlwan Singh* v. *Risal Singh* (2), both the suits were by the obligee for several instalments of the amount of a bond and the interests thereon from the date of the bond. In the former suit, the defendant's contention as to the interest being payable only from the date of the bond was overruled and the interest from the date of the bond decreed, and that decree was held to be *res judicata* in regard to the same contention raised in the second suit. This is a clear authority for the proposition that it is the matter in issue, and not the subject-matter of the suit that forms the essential test of *res judicata*. In *Balkishan* v. *Kishan Lal* (3), it was said : " There can be no doubt that, for " the purposes of *res judicata*, it is *not* essential that " the subject-matter of the litigation should be " identical with the subject-matter of the previous " suit of which the adjudication is made the founda- " tion of the plea." Their Lordships of the Judicial Committee in *The Raja of Pittapur* v. *Buchi Sitayya* (4) observed : " It was contended on the part of the " plaintiff that the cases do not establish that an " estoppel is binding unless the suit relates to the

(1) (1892) I. L. R. 15 Mad. 494, 497.
(2) (1881) I. L. R. 4 All. 55.
(3) (1888) I. L. R. 11 All. 148, 156.
(4) (1884) I. L. R. 8 Mad. 219; L. R. 12 I. A. 16.

"same subject-matter, but it appears to their Lord-"ships that the cases which have been referred to do "not establish that position." Therefore, even if the subject-matter of the second suit may be entirely different from the subject-matter of the first, yet if the validity of the *wakfnama* and the title of the defendants Nos. 1 and 2 thereunder was in issue, as it was in the former litigation, the decision on that question could not be reopened and the issue reagitated in the present suit. The proposition receives ample support from the cases of *Chandi Prasad* v. *Maharaja Mahendra Mahendra Singh* (1), *Dwarka Das* v. *Akhay Singh* (2) and *Kedar Nath Singh* v. *Sheo Shankar* (3). We are of opinion, therefore, that the decision of 1923 does operate as *res judicata* and that the view taken by the learned District Judge was right.

The fourth contention relates to the question that would have arisen if we were of opinion that the decisions of 1921 and 1923 had both decided the issue that arises in the present suit on the question of the validity of the *wakf*. We have already stated that, in our opinion, the decision of 1921 had not that effect, and we, accordingly, do not consider it necessary to go into this matter.

The appeal is dismissed with costs.

Appeal dismissed.

G. S.

(1) (1901) I. L. R. 24 All. 112. (2) (1908) I. L. R. 30 All. 470.
(3) (1923) I. L. R. 45 All. 515.