APPELLATE CIVIL.

Before D. N. Mitter and Rau JJ.

1935

July 29, 30, 31; *Aug.* 1.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

ATEENDRANATH DAS.*

Res judicata—*Consent decree—Findings which operate as a bar to subsequent suit—Code of Civil Procedure (Act V of 1908), s. 11.*

A decree passed by consent is as effective a bar to a subsequent suit as one passed on contest, not only with reference to the conclusions arrived at in the previous suit, but also with regard to every step in the process of reasoning on which the said conclusions are founded.

The point to be considered in deciding a question of *res judicata* is whether the judgment in the previous case could be sustained without the determination of the question at issue in the subsequent suit, even though the subject matters of the two suits are different. If the judgment in the previous suit could not be sustained without the determination of the question in the subsequent suit the previous decision operates as *res judicata* and bars the subsequent suit.

In re *South American and Mexican Company* (1), *Kinch* v. *Walcott* (2) and *Wilding* v. *Sanderson* (3) referred to.

By "every step in the process of reasoning" is meant the findings on the essential facts on which the judgment or the ultimate conclusion was founded.

FIRST APPEAL by the defendant, the Secretary of State for India in Council.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Saratchandra Basak and *Bijankumar Mukherji* for the appellant.

Heeralal Chakrabarti and *Shymadas Bhattacharjya* for the respondents.

*Appeal from Original Decree, No. 210 of 1931, against the decree of Phaneendranath Mitra, Temporary Additional Subordinate Judge of Khulna, dated April 14, 1931.

(1) [1895] 1 Ch. 37. (2) [1929] A. C. 482.
(3) [1897] 2 Ch. 534.

1935

Secretary of State for India Council
v.
Ateendranath Das.

D. N. MITTER J. This is an appeal on behalf of the Secretary of State for India in Council, who was the principal defendant in the suit commenced by the plaintiffs, for a declaration that the lands described in the schedule to the plaint are not liable to additional assessment of revenue and that they are part and parcel of the plaintiffs' revenue-paying estate No. 165 as originally permanently settled with them in the latter part of the eighteenth century. They asked for a further declaration that the *kabuliyat* executed by the plaintiffs on the 17th October, 1927, in favour of the Secretary of State for India in Council with respect to *touzi* No. 1226 of the Khulna Collectorate be declared to be invalid and that the same may be cancelled and that the plaintiffs' possession of the said estate No. 165/2 under the Permanent Settlement of 1793 through their predecessor-in-interest entitles plaintiffs to remain in and retain possession of the said lands mentioned in the schedule to the notice, dated the 25th August, 1927, without any further liability for additional revenue and for confirmation of possession of the same. It was further prayed that if the execution of the *kabuliyat* constituted dispossession then the plaintiffs might be awarded a decree for recovery of possession with *mesne* profits. There was also a third prayer, namely, that the order of the Hon'ble Board of Revenue, dated the 30th April, 1928, might be declared to be void as made without jurisdiction. In prayer (iv) the plaintiffs asked for a refund of Rs. 582 paid by the plaintiffs as revenue and cess on account of *touzi* No. 1226 of the Khulna Collectorate. It is said that certain *diârâ* proceedings were started, by which the disputed lands were assessed to revenue under the provisions of Act IX of 1847, on the ground that these lands form part of a navigable river known as Madhumati in the district of Khulna. The area of the lands which were assessed to revenue was about 238·35 acres. The plaintiffs by their plaint claim this land as a part of the permanently settled estate bearing *touzi* No. 165 consisting of *mouzâ* Garfa

1935

Secretary of State for India in Council v. *Ateendranath Das.*

D. N. Mitter J.

amongst other *mouzâs*. The plaintiffs set up their title in paragraph No. 3 of the plaint and their title to the said *touzi* and the said *mouzâ* is now in dispute. *Pro forma* defendants Nos. 2 to 5 have been impleaded in the suit as they are the representatives-in-title of the other co-sharers of Babu Amritanath Das, the plaintiffs' predecessor, and between whom and the present plaintiffs there has been a separation and partition. It is stated that during the recent survey and the settlement of record-of-rights in the district of Khulna these lands were claimed on behalf of the Government on the ground that they were alluvial accretions formed out of the bed of the river Madhumati. It was further claimed that these lands were not in existence during the Permanent Settlement of estate No. 165 and as such were not liable to assessment under Regulation II of 1819 and Bengal Act IX of 1847. It is admitted in the plaint that in pursuance of such claims notices were issued and served on the plaintiffs (proprietors) under section 3 of Regulation II of 1819 and under section 6 of the Act of 1847. Plaintiffs complained, and that is the complaint which has been put forward before us, that there has been fundamental irregularities in so far as the procedure before the Board of Revenue is concerned in that the essentials of the procedure provided by Regulation II of 1819, Regulation VII of 1822, Regulation XI of 1825 and Bengal Act IX of 1847 were not complied with or observed in making the assessment and the assessment is thus vitiated by fundamental irregularities. It may be stated here that on this point the finding of the Subordinate Judge has been against the plaintiffs and although the learned advocate on behalf of the plaintiffs tried at first to support the judgment of the Subordinate Judge on this ground, challenging the finding of the Subordinate Judge on this point, ultimately, however, Mr. Chakrabarti did not press this point in view of the untenable nature of the objection. We shall not, therefore, say anything further

with regard to this point which really refers to prayer No. (iii) of the plaint. The plaintiffs state that that as these proceedings before the Board of Revenue had terminated plaintiffs were compelled to execute a *kabuliyat* in favour of the Government for the Government claimed it to be added land within the meaning of Bengal Act IX of 1847 without prejudice to any right to sue, with reference to this land. The plaintiffs referred to a previous decision in a suit between the Secretary of State and themselves in the year 1914, the suit being suit No. 70 of 1914 and they contend in paragraph No. 13 of the plaint that the previous decision operates as a sort of estoppel by judgment against the Secretary of State and bars their defence. It is true that the previous proceedings were with reference to land other than the lands in dispute. The position of this land which was in dispute in the suit of 1914 would appear from the map, which has been marked as Ext. 6, the map prepared by one Kedarnath Sarkar. The subject matter of these proceedings are shown in several plots and included the particular plot No. 13 to which we will have to refer in the course of our judgment later. The plaintiffs put before the court, in order to support this plea of *res judicata*, the previous judgment of the Subordinate Judge. In support of their case on merits that these lands now in dispute are lands of their permanently settled estates the plaintiffs rely on certain resumption proceedings. They also rely on the two copies of quinquennial reports submitted by the predecessors of the plaintiffs, marked as Exts. 2 and 7, to be found printed at pages 40 and 49 of the second part of the paper book; they also relied in addition to the resumption proceedings just referred to on some maps prepared in connection with those proceedings which were held in or about the years 1828-34; they also relied in support of their case on some recognized treatises on the past history of the river Madhumati, *e.g.*, Mr. Westland's book which was published in 1871 and described as the report of the district of

1935

Secretary of State for India in Council v. Ateendranath Das.

D. N. Mitter J.

Jessore. They also relied on the District Gazetteers published under the authority of the Government of Jessore in 1912. It is true that Rennel's map was available as showing the position of the river Madhumati some time prior to the permanent settlement at about 1774 but in the present case that map is not in evidence although the Subordinate Judge, as we shall presently show, referred to the same in the suit of 1914. But this Rennel's map was never relaid on the spot with reference to the local conditions. On these materials the Subordinate Judge has come to the conclusion that the plaintiffs have established their case that their lands form part and parcel of the permanently settled estate of the plaintiffs, that the proceedings before the Hon'ble Board of Revenue, dated the 30th April, 1928, was for that reason without jurisdiction, void and *ultra vires* and that the *kabuliyat* executed by the plaintiffs in respect of the suit lands should be declared to be inoperative. The Subordinate Judge has decreed also the refund of the sum of Rs. 582 paid as revenue to the Secretary of State for India in Council and has declared plaintiff's title and possession of the lands in suit. The substantial defence of the Secretary of State for India in Council to the suit falls under two heads. In the first place it is contended that the previous decision in the suit of 1914 cannot possibly operate as *res judicata* as it is said that although a decree was given by the Subordinate Judge the matter was carried in appeal to this Court and the matter was compromised. It is contended that the result of the compromise was to make the decision operative as an estoppel in so far as the lands claimed in the first suit are concerned, but that cannot operate as an estoppel with regard to other lands of the same *mouzâ* which are claimed by the plaintiffs in the present suit and form the subject matter of the present controversy. It was contended in the second place that the lands formed part of the river Madhumati at the date of the Permanent Settlement and did not constitute a part of the permanently

settled estate of the plaintiffs. On this state of the pleadings several issues were framed by the Subordinate Judge, who after determining these issues which are to be found printed at page 20 of the first part of the paper book has come to the conclusion in favour of the plaintiffs.

Against this decree the present appeal has been brought by the Secretary of State for India in Council and it is contended that the Subordinate Judge has gone wrong both on the question of *res judicata* as well as on the merits. It has been argued that it is impossible, in so far as the merits of the case are concerned, to find out where the river Madhumati was located at the time of the Permanent Settlement, that is to fix its position at the time of the Permanent Settlement, without relaying Rennel's map and the best material which was available to the plaintiffs was not availed of. Indeed the burden lies on the plaintiffs of establishing that the state of things prevailing at the time of the Revenue Survey was not the same state of things existing at the time of the Permanent Settlement. It is contended that that burden has not been discharged by the plaintiffs and the plaintiff's suit must fail. It was argued that no question of *res judicata* can arise with reference to the previous decision of 1914 as the appeal by the Government was compromised and as a result of that the Government has certain lands settled by the plaintiffs and these were the lands in respect of which the claim of plaintiffs in the suit of 1914 were dismissed. It appears that in the previous suit the plaintiffs did not succeed with regard to a portion of the lands claimed and their claim was dismissed on the ground of their failure to establish that these portions of lands belonged to their permanently settled estate. It is with reference to those lands that the Government by the compromise made a settlement in favour of the plaintiffs on their acknowledging the Government's title to these lands. It becomes necessary, therefore, to consider in the first instance the plea of *res judicata* on which the Subordinate

1935

Secretary of State for India in Council v. *Ateendranath Das.*

D. N. Mitter J.

Judge has rested his decision apart from his decision on merits. Before we proceed to deal with the question we might refer to the decision of the trial court in the previous suit and to the subsequent career of that suit leading to the compromise in question. The decision in suit No. 70 of 1914 has been marked as Ext. 22 in the present case and is printed at pages 160 to 186 of the second part of the paper book. On the decision of the Subordinate Judge there followed a decree in favour of the plaintiffs as also in favour of the Secretary of State dismissing a portion of that suit. The matter was carried in appeal by the Secretary of State with reference to the lands in respect of which the suit of the present plaintiffs was decreed, and there was a cross-objection filed on behalf of the plaintiffs on the 12th November, 1923, challenging that portion of the decree of the Subordinate Judge which dismissed their suit. On the 21st July, 1925, a petition of compromise was filed on behalf of the Secretary of State for India in Council and the plaintiffs and an order was made by this Court sanctioning that compromise which has been marked as Ext. 27 in the suit and printed at page 193 of the second part of the paper book. It is necessary, before we proceed to discuss the law in question, to refer precisely to the terms of the petition of compromise. The portion which is material for the present purposes is printed at page 196. With reference to the appeal of the Secretary of State this was the term of compromise:—

> That the above appeal be dismissed in respect of the lands decreed by the trial Court in the above suit and the decree of the court below, dated the 26th July, 1922, be affirmed so far as it decreed portions of lands claimed in the suit.

See page 196, paragraph No. 4, clause (a).

With regard to the cross-objection the compromise was in these terms:—

> That the appellant, the Secretary of State in Council, do execute a *pâttâ* for a term of 60 years in favour of the plaintiffs respondents within six months, for the lands in the above suit in respect of which the plaintiffs' suit has been dismissed on a *jamâ*.

It is not necessary to state the rest of the paragraph. The effect, therefore, of the compromise decree, in our judgment, is that, in so far as the decree in favour of the plaintiffs in suit No. 70 of 1914 is concerned, the findings, on which the said decree was based, were adopted by the terms of compromise and were affirmed. It is contended on behalf of the Secretary of State that this compromise decree has no greater effect than as between the parties to the suit it is merely operative as an estoppel with regard to the particular land which forms the subject matter of the said suit. We are unable to accede to this contention. Before turning to the findings in that case No. 70 we propose to indicate the true legal position as to the effect of compromise decrees. The true position with regard to the effect of the compromise decree was laid down in the case of *South American and Mexican Company* (1). At page 45 Vaughan Williams J. points out :—

> It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end ; and if they agree upon a result, or upon a verdict or, upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.

On appeal against this judgment Lord Herschell delivered a judgment in which he practically affirms the true legal position as laid down by Vaughan Williams J. This is what Lord Herschell says on the point :—

> The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action.

Our attention was drawn by the learned Senior Government Pleader to another decision of the Privy Council in the case of *Kinch* v. *Walcott* (2) as

(1) [1895] 1 Ch. 37, 45, 50. (2) [1929] A. C. 482, 493.

1935

Secretary of State for India in Council v. *Ateendranath Das.*

D. N. Mitter J.

supporting the contention raised on behalf of the Secretary of State that the previous judgment only operated as a sort of estoppel by judgment in so far as the lands then in dispute were concerned. It could not be used as an estoppel by judgment with reference to the lands other than the lands then in controversy in suit No. 70 of 1914. We are unable to hold that this decision on which reliance is placed lays down anything of that kind. On the other hand it seems to us that this decision confirms the view which was adopted in the case of the *South American and Mexican Company* (1) to which we have just referred. At page 493 of the report the legal position is formulated thus :—

> A party bound by a consent order, as was tersely observed by Byrne J. in *Wilding* v. *Sanderson* (2) "must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose."
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> First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the court made otherwise than by consent and not discharged on appeal.
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> In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the court ; the second stands unless and until it is discharged on appeal.

On this authority it becomes absolutely clear that the consent order is as effective as an order passed on contest, not only with reference to the conclusions arrived at in the previous suit but also with regard to every step in the process of reasoning on which the said conclusion is founded. When we say " every "step in the reasoning" we mean the findings on the essential facts on which the judgment or the ultimate conclusion was founded. In other words the finding which it was necessary to arrive at for the purposes of sustaining the judgment in the particular case will operate as estoppel by judgment. The fact that the lands are now different does not in any way affect the question of *res judicata* for it is now well

(1) [1895] 1 Ch. 37. (2) [1897] 2 Ch. 534.

established that the doctrine of *res judicata* does not depend on the *identity of the subject matter of the dispute* but depends on the *identity of the issues*, and the question to be considered is whether the matter which is now in controversy in the present suit was substantially the matter in controversy in the previous case the decision in which is now sought to operate as barring the defence of the defendant. With these observations with regard to the position in law in so far as the question of *res judicata* by consent decree is concerned we may proceed to examine the findings of the trial court in the judgment of Suit No. 70 and see how far the findings in the previous suit operate as a bar and preclude the Secretary of State from re-agitating the same questions in the present case. In order to understand what was in controversy in the last case reference will have to be made to the map prepared by Kedarnath Sarkar, Ext. 6. This map purports to have been prepared, as the evidence shows, from the case map which was prepared by the commissioner in the previous case. The evidence in connection with this map is to be found printed at page 20 of the first part of the paper book. Matilal Ghosh, witness No. 2 for the plaintiffs, says:—

> This map was prepared by Kedarnath Sarkar, who was a surveyor of the plaintiff. He is dead. He prepared this map in my presence on seeing the *diârâ* map and the map in suit No. 70 mentioned above.

The map mentioned above refers to the commissioner's map as the witness states in an earlier part of his deposition. The witness says:—

> The commissioner submitted a map and a report of local investigation in the suit.

Further on this witness says:—

> The map Ext. 6 was prepared by tracing on this paper the *diârâ* map and the case map of Suit No. 70 of Faridpur. I saw the tracing by Kedar Babu. I also compared it with the maps and found that it was correct.

See page 21, lines 26 to 29, of the first part of the paper book.

Having regard to this evidence, we can take it that it represents fairly the position of the lands in

1935

Secretary of State for India in Council v. *Ateendranath Das.*

D. N. Mitter J.

controversy with reference to the commissioner's map in the last case to which reference has been made by the Subordinate Judge in his judgment and to which we will presently advert. It will appear from this map that amongst other plots which is now material and which was then in dispute is block No. 13. It is a block which is immediately adjacent to the disputed lands which are shown in this map by the hedged portion in red and is described as the present *diârâ* proceedings lands in the index to the said map. The question, therefore, for the purpose of considering the plea of *res judicata* is whether it was necessary in the previous suit for determining the position of block No. 13 to determine the position of the river Madhumati at the time of the Permanent Settlement and further whether the judgment in the previous case could be sustained without the determination of that question. If the judgment in the last suit could not be maintained or supported without a finding on the question of the position of the river Madhumati at the time of the Permanent Settlement then the finding in that case between the same parties would in our opinion operate as *res judicata*. It became necessary therefore to examine the precise effect of the finding in that case with regard to this block No. 13. In that case as in the present case the plaintiffs sought to prove that certain lands to wit block No. 13 among other blocks as shown in the map were firm or dry lands at the time of the Permanent Settlement. They sought to prove that, with reference to (a) the position of the river Madhumati at the time of Major Rennel's survey which took place in 1874-77, (b) the condition of the villages as they stand in 1816 and (c) the position of the river as disclosed by the resumption maps prepared between 1828 and 1834 and (d) the condition of the villages in 1851. After considering the effect of these documents and considering the contentions raised on behalf of the Secretary of State the Subordinate Judge came to the following conclusions *with reference to the evidence* on which the plaintiffs respondents in the

present case have relied for the purpose of sustaining the plea of *res judicata*. While dealing with issue No. 3, which was regarded as the most important issue in the suit the Subordinate Judge in Suit No. 70 came to the following conclusion :—

Briefly the conclusion which I am going to draw is that the river sank down from above. The two extreme points Gobra factory and Barni survived all vicissitudes but between these two points the river worked havoc and from up the position below Barasi, it came down to the position it came to occupy during the Revenue Survey. The " K " block is the key to the situation and Gobra factory stands at the north-eastern corner of this block. If the river flowed by its north as I believe that it did it must have flowed at that time by the north of blocks C. A. B. as well. Next it turned its course over and then by the south of K block. This is really the whole case in this region.

See page 176, lines 20 to 28 of the second part of the paper book.

These blocks appear in Ext. 6 as also in Ext. 5, the commissioner's map where they appear with greater distinctness as the map is on a much larger scale. In another part of his judgment the learned Subordinate Judge says this :—

The plot of controversy in map Ext. 40 being to the north-east of the river we further know that the river did not come up from below but sank down from above.

See page 179 bottom of the second part of the paper book.

Further on the learned Subordinate Judge says this :—

In my opinion these changes had occurred between 1828 to (sic)? 1840 and they do not rebut the conclusion which I drew from Ext. 40, *viz.*, there was no river in 1828 by the south of Sriramkandi and Ghoperdanga and over the disputed plots.

See page 180 of the second part of the paper book.

The learned judge dealt with an important matter with reference to Rennel's map. It is true that in that case, Rennel's map which was considered in the former case could not be relaid by the commissioner but the learned judge had Rennel's map before him and he says that the positions of these two villages

1935

Secretary of State for India in Council v. *Atendranath Das.*

D. N. Mitter J.

just mentioned are somewhere in meridian 28. See Ext. 5. The river was at that time between Jangiparha and Giradanga. The learned judge came to this finding :—

> The northern boundary being correctly fixed we can safely find that at some time before 1828 to 1834 the river was as far up as Barasia river.

See page 181 bottom of the second part of the paper book.

Then there is also the following finding printed at page 182, lines 18 to 24 of the second part of the paper book :—

> The general course of the river can be gathered if maps Exts. 12 and 13 (which are similar) and 8 are carefully inspected. The R. S. river evidently sank down from above and it came down from the position which it occupied by the north of K block, north of block and north of A and B. At some intermediate time it flowed over K. C. B. A. Resumption proceedings were initiated after the lands had become fit for cultivation. I find that blocks 16, 17, and 18 were firm lands some time before 1828-34 but the evidence about block 19 is doubtful.

Again we have this most important finding of the Subordinate Judge with reference to block No. 13, which is adjacent to the land now in dispute:—

> Maps Exts. 12 and 13 will show that at that time the river was flowing by the south of K block. The position of the Gobra Kothi is convincing on that point. It is also manifest that L. M. and N. appears to have formed. The maps Exts. 14, 10 and 11, *etc.*, will show progressive encroachment towards south.

Then further on we have the following observation :—

> In my opinion the channel by the south of the 1000 B block in Exts. 12 and 13 is the Kuthirkhal, and the one by the north is the old river bed and Goge. I find that plots 10 and 11 (blocks 12 and 13) were firm lands before 1828-34.

These findings show sufficiently that the learned judge has addressed himself with regard to the question as to what was the situation of the river at the time of Permanent Settlement and came to the conclusion that plot No. 13 was a firm land before 1834 and that this displaced the presumption that the course of the river at the time of the Revenue Survey as shown in

the Revenue Survey map was the same as at the time of the Permanent Settlement. It is contended on behalf of the Government that this finding correctly shows that they were firm lands in 1828-34 and do not show that they were firm lands at the time of the Permanent Settlement. We have to take the judgment as a whole and the learned Subordinate Judge has addressed himself to the question that the plaintiffs have to prove that these lands were firm lands at the time of the Permanent Settlement and that they have been in possession of these plots which have been found to be firm lands at the time of the Permanent Settlement. We are, therefore, clearly of opinion that the previous decision is *res judicata* with regard to the position of the river as determined in the previous judgment. The general effect of that judgment is that the river Madhumati was flowing from the north towards the south, that at the time of the Permanent Settlement it was in this position, that it was moving from the south Gobra *khâl* to Barni which is shown both in this Ext. 6 as well as in Ext. 5, the commissioner's map. As a matter of fact that is his finding. As the Subordinate Judge himself states :—

> Briefly the conclusion which I am going to draw is that the river sank down from above. The two extreme points Gobra factory and Barni survived all vicissitudes but between these two points the river worked havoc and from up the position below Barasi, it came down to the position it came to occupy during the Revenue Survey.

It has been sought to be argued on behalf of the Secretary of State that the judgment would not be *res judicata* with regard to the disputed lands for the judgment might be right with regard to block No. 13 and yet it might be consistent with the position that the disputed plot which is hedge-marked might still be outside the permanently settled estate and might be in the bed of the river as at the Revenue Survey. This contention might have been right but for the clear effect of the finding in this case No. 70 that the river was moving away from this position at the time

1935

Secretary of State for India in Council
v.
Ateendranath Das.

D. N. Mitter J.

of the Permanent Settlement and that whatever changes took place, took place after the date of the Permanent Settlement and between 1795 and 1801. We are, therefore, of opinion that this decision is conclusive on the question that the lands to the south of plot 13 could never have been in the bed of the river Madhumati at the time of the Permanent Settlement.

* * * * *

The result is that we affirm the decision of the Subordinate Judge and dismiss the appeal with costs.

RAU J. I. agree.

A. A.

Appeal dismissed.