

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

SHANGARA (PLAINTIFF), APPELLANT,

1891.
Nov. 3, 11.

v.

KRISHNAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13—“Res judicata” — Suit by benamidar.

In a suit to recover a parcel of land, the plaintiff's case was that it had been purchased by him *benami* in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, and that it had been instituted with the plaintiff's knowledge :

Held, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 263 of 1890, affirming the decree of A. Venkataramana Pai, District Munsif of Telli-cherry, in original suit No. 166 of 1889.

Suit to recover possession of land. The plaintiff's case was that he had obtained a conveyance of the land in the name of his brother, defendant No. 1, whom he placed in management of it ; that defendant No. 1 leased it to defendant No. 2 and subsequently brought original suit No. 610 of 1887 against defendant No. 2 and defendant No. 3, who claimed to be the *jenmi* to recover possession ; that that suit was not proceeded with due diligence and was consequently dismissed.

The District Munsif held that there was no negligence in the conduct of the previous suit and that the present claim was *res judicata* and dismissed the suit. The District Judge on appeal upheld these findings, distinguishing as to the latter point *Gour Sundar Lahiri v. Hem Chander Chowdhury*(1) and *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar*(2), and affirmed the decree of the District Munsif.

* Second Appeal No. 1338 of 1890.

(1) I.L.R., 16 Cal., 355.

(2) I.L.R., 16 Cal., 364.

SHANGARA
v.
KRISHNAN.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Ryru Nambiar for respondents.

JUDGMENT.—Original suit No. 610 of 1827 was instituted by the defendant No. 1, the plaintiff's brother, who is alleged by the plaintiff to have been his agent, the property which defendant No. 1 sought to recover in the above suit having been purchased in his name *benami* for the plaintiff. The question is whether the plaintiff is bound by the decision in that case. The presumption is that the *benamidar* instituted the suit with the authority and consent of the true owner *Gopi Nath Chobey v. Bhugwat Pershad*(1); and the lower Courts have found upon the evidence that the suit was instituted with the knowledge of the plaintiff. He is therefore as much bound by the decree as if he had himself instituted the suit, and the present suit is barred as being *res judicata*. The plaintiff stood by and permitted his undivided brother to sue for possession. There was nothing to put the person in possession upon inquiry as to who was the real owner, and it is too late now for plaintiff to be allowed to recover on his secret title. The second appeal is dismissed with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and
Mr. Justice Handley.*

SHAN MAUN MULL AND ANOTHER (REPRESENTATIVES OF
DEFENDANT NO. 2), APPELLANTS,

v.

MADRAS BUILDING COMPANY (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, ss. 3, 78, 101—Priority of mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of 1877, ss. 17 (d), 48—Notice by registration.

In a suit for the declaration of the priorities of mortgages and for foreclosure, it appeared that the mortgage premises had been purchased by the mortgagor from the second defendant and others in 1878, under a conveyance containing a covenant that they were free from incumbrances, and the mortgagor then received *inter alia*

(1) I.L.R., 10 Cal., 697.

* Appeal No. 43 of 1890.