APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

1922, January 5.

SEETHAPATI RAO DORA (PLAINTIFF), APPELLANT,

v.

VENKANNA DORA AND OTHERS (DEFENDANTS, 7 TO 14, 16, 17 AND 18), RESPONDENTS.*

Evidence Act (I of 1872), Sec. 35—Recital of relevant fact in judgment not inter partes, *relevancy of.*

A recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under section 35 of the Indian Evidence Act.

SECOND APPEALS against the decrees of C. V. VISWANATHA SASTRI, Acting District Judge of Ganjām at Berhampur, in Appeal Suits Nos. 82 and 55 of 1918, respectively, preferred against the decree of T. KRISHNASWAMI NAYUDU, Temporary Subordinate Judge of Ganjām at Berhampur, in Original Suit No. 56 of 1916.

The necessary facts are stated in the Opinion of the Full Bench.

The Second Appeals came on for hearing before AYLING and ODGERS, JJ., who made the following :—

ORDER OF REFERENCE TO A FULL BENCH.

The only question argued before us in these Second Appeals is whether the Lower Appellate Court was right in treating as inadmissible in evidence a judgment in certain summary suits (Exhibit B). These suits were

* Second Appeals Nos. 383 and 384 of 1920.

not between the present parties or their predecessors-in-title and the only importance of the judgment consists in a recital therein that a certain R. Chendramma died on 3rd May 1904. There is nothing in the judgment to show on what this recital is based. The fact of Chendramma's death was undisputed and it may be that both sides agreed as to the date. But the date itself was immaterial for the suits turned on the simple question of whether Chendramma had, while alive, alienated her property to third parties so as to deprive the plaintiff in that suit of the right of succession. The date of R. Chendramma's death is relevant to the question of limitation raised in the present Second Appeals : and Mr. K. P. M. Menon, for appellant, contends that the recital in the judgment is admissible in evidence under section 35, Indian Evidence Act, as an entry in an official record made by a public servant in the discharge of his official duty.

The general rule as to the relevancy of judgments is contained in section 43, Indian Evidence Act. Respondents' vakil argues, relying on this section as well as on the ruling of the Calcutta High Court in *Kashi Nath Pal* v. *Jagat Kishore*(1), that recitals in a judgment not *inter partes* are not relevant. He has also drawn our attention to a recent case, *Ram Parkash Das* v. *Anand Das*(2), in which their Lordships of the Privy Council appear to take the same view. The passage referred to is at page 720 of the report and there has been some discussion before us of its meaning : but we understand their Lordships to say that a recital in the Magistrate's judgment of a relevant admission is not relevant evidence of the fact of that admission. If that be so, the same principle would cover the present case.

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(1) (1916) 20 C.W.N., 643. (2) (1916) I.L.R., 43 Calc., 707 (P.C.).

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This is the view to which we incline, but Mr. Menon has pressed us with *Parbutty Dassi* v. *Purno Chunder Singh*(1), and three cases of this Court, *Byathamma* v. *Avulla*(2), *Thama* v. *Kondan*(3), and *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*(4).

If the Calcutta case stood alone, we should feel no great difficulty. It is not binding on us; and its correctness has been doubted in subsequent decisions of the same Court [vide *Ram Sunder Gope Sikdar* v. *Haribala Dhubi*(5)]. It is moreover possible to distinguish it on the ground that the entry of an abstract of the pleadings in the decree in that case (which it was sought to put in evidence) was enjoined by specific circular orders binding on the Court which passed the decree. In our case, the only provision as to the contents of the judgment is that of section 68 of the Rent Recovery Act, which simply says that the judgment shall contain the reasons for the same. It would be difficult to bring this recital of date under the head of reasons for the judgment.

The decisions of our own Court, however, stand on a different footing; and even if it were possible to distinguish them we think the point is of such general importance that its decision by a Full Bench is desirable.

We find some difficulty in understanding *Byathamma* v. *Avulla*(2). The learned Judges say that *Parbutty Dassi* v. *Purno Chunder Singh*(1), applies and names section 35 as the section under which the entry is applicable, but the reasoning at the top of page 24 applies rather to section 13 and this is the section dealt with in the Madras case on which they rely; *Ramasami* v. *Appavu*(6).

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(1) (1883) I.L.R., 9 Calc., 586.
(2) (1892) I.L.R., 15 Mad., 19.
(3) (1892) I.L.R., 15 Mad., 378.
(4) (1895) I.L.R., 18 Mad., 73.
(5) (1917) 37 I.C., 911.
(6) (1889) I.L.R., 12 Mad., 9.

The judgment in *Thama* v. *Kondan*(1), does not discuss the point but follows the earlier decision and states the recital of an admission in a judgment is relevant under section 35, i.e., to prove the admission. The judgment in *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*(2) is to the same effect.

It has been suggested that the case of admission may be different from that of other relevant facts; but we can find no basis for such a distinction in section 35.

We therefore refer the following question for the decision of a Full Bench.

Is a recital in a judgment, not *inter partes*, of a relevant fact admissible in evidence under section 35, Indian Evidence Act?

ON THIS REFERENCE—

K. P. M. Menon, with *C. Sambasiva Rao*, for appellant.—The recital in the judgment is relevant. A judgment is a public record within the meaning of section 74 of the Evidence Act; a judge is a public servant and when he writes a judgment, he makes a public record; a statement in a judgment is therefore an entry made by a public servant in a public record, which, if it relates to a relevant fact, would be evidence under section 35, irrespective of whether the judgment in which the statement occurs is or is not between the same parties: see *Parbutty Dassi* v. *Purno Chunder Singh*(3), *Byathamma* v. *Avulla*(4), *Thama* v. *Kondan*(1), *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*(2), *Lekraj Kuar* v. *Mahpal Singh*(5), and *Ram Parkash Das* v. *Anand Das*(6). The person who made the statement is dead; hence it is also admissible under section 32 (5):

(1) (1892) I.L.R., 15 Mad., 378.
(2) (1895) I.L.R., 18 Mad., 73.
(3) (1883) I.L.R., 9 Calc., 586.
(4) (1892) I.L.R., 15 Mad., 19.
(5) (1880) I.L.R., 5 Calc., 744 (P.C.), 754.
(6) (1916) I.L.R., 43 Calc., 707 (P.C.), 720.

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see *Chattan Raja* v. *Rama Varma*(1). Reference was made to Taylor on Evidence, Volume II, page 1114, paragraph 1546, and Amir Ali on Evidence, page 410.

C. S. Venkata Acharyar, with *H. Suryanarayana*, for respondents.—The judgment is not relevant. It is only such judgments as come within sections 40 to 43 of the Evidence Act that are relevant. Section 43 refers only to the existence of and not to the contents or recitals in judgments: *Subramanyan* v. *Paramaswaran*(2), *Gujju Lall* v. *Fatteh Lall*(3) and *Kashi Nath Pal* v. *Jagat Kishore Acharya Chowdhury*(4): *Parbutty Dassi* v. *Purno Chunder Singh*(5), is wrong and has been dissented from in later cases in Calcutta; the Madras cases which have followed it are also wrong: see *Ram Sunder Gope Sikdar* v. *Haribala Dhubi*(6), *Sunder Das* v. *Fatimul-ul-Nissa Begam*(7), *Satindra Kumar Choudhuri* v. *Krishna Kumari Choudhurani*(8). The recital will not be secondary evidence of what the witness stated: see section 63 of the Evidence Act and *Ram Ranjan Chakerbati* v. *Ram Narain Singh*(9).

SCHWABE, C.J.

SCHWABE, C.J.—In this case I had the opportunity of reading the judgment of KUMARASWAMI SASTRI, J., and I agree with him entirely.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I agree.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The question referred to us for determination is whether a recital in a judgment not *inter partes* of a relevant fact is admissible in evidence under section 35 of the Evidence Act. The suit was filed by the plaintiff-appellant to recover the

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(1) (1915) 28 M.L.J., 669, 681.
(2) (1888) I.L.R., 11 Mad., 128.
(3) (1881) I.L.R., 6 Calc., 171 (P.C.).
(4) (1916) 20 C.W.N., 643.
(5) (1883) I.L.R., 9 Calc., 586.
(6) (1917) 37 I.C., 911.
(7) (1896) 1 C.W.N., 513.
(8) (1916) 36 I.C., 882.
(9) (1895) I.L.R., 22 Calc., 533, (P.C.), 541.

immoveable properties specified in the plaint, on the ground that he purchased them from the reversionary heirs of one Adinarayana on whose death his mother Chendramma succeeded to a limited estate conferred on her by Hindu Law as mother of the last male owner. Chendramma alienated the properties and the suit to recover the properties from the alienees had to be filed within 12 years from the date of Chendramma's death, under article 141 of the Limitation Act (IX of 1908). As the defendant pleaded that the suit was barred by limitation, the date of Chendramma's death became material and the plaintiff alleged that she died on May 3, 1904, while the case for defendants was that she died in February 1904, and not in May 1904, and that the suit was barred as it was filed more than 12 years from February 1904. On Chendramma's death the father of the second defendant in this suit filed a suit in the Revenue Court against certain tenants for the purpose of acceptance of *pattas* and *muchilikas* under the Rent Recovery Act (VIII of 1865). The suit was dismissed, but in the judgment there is a statement made by the Judge that Chendramma died on May 3, 1904. The only evidence let in by the plaintiff as to the date of the death of Chendramma was the statement in the judgment which is filed as Exhibit B in the case. The Subordinate Judge was of opinion that this statement was relevant to prove the issue as to the date of the death of Chendramma and, acting upon it, he held that Chendramma died within 12 years before the date of the suit and that therefore it was not barred by limitation. On appeal, the District Judge was of opinion that the statement in a judgment not *inter partes* was not evidence. He believed the evidence of the defendants' witnesses and dismissed the plaintiff's suit as barred by limitation. In Second Appeal the point raised is that the recital of the date of death in the

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judgment was evidence under section 35 of the Evidence Act and that the District Judge was wrong in rejecting it as irrelevant. The contention of Mr. K. P. M. Menon for the appellant is that a judgment is a public record within the meaning of section 74 of the Evidence Act, that a Judge is a public servant, and when he writes a judgment he makes a public record and that a statement in a judgment is therefore an entry made by a public servant in a public record, which, if it relates to a relevant fact, would be evidence under section 35, irrespective of whether the judgment in which the statement occurs is or is not between the same parties. In support of his argument he refers to *Parbutty Dassi* v. *Purno Chunder Singh*(1), *Byathamma* v. *Avulla*(2), *Thama* v. *Kondan*(3), and *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*(4). For the respondents it is contended that the relevancy of judgments is governed by sections 40 to 43 of the Evidence Act and that a judgment not *inter partes* is not evidence. Reference has been made to *Kashi Nath Pal* v. *Jagat Kishore*(5), and the observations of the Privy Council in *Ram Parkash Das* v. *Anand Das*(6). I am of opinion that section 35 has no application to judgments, and a judgment which would not be admissible under sections 40 to 43 of the Evidence Act would not become relevant merely because it contains a statement as to a fact which is in issue or relevant in a suit between persons who are not parties or privies. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments in Courts of justice. Section 40 enacts that the existence of any judgment, order or decree, which by law prevents any Court from taking

(1) (1883) I.L.R., 9 Calc., 586.
(2) (1892) I.L.R., 15 Mad., 19.
(3) (1892) I.L.R., 15 Mad., 378.
(4) (1895) I.L.R., 18 Mad., 73.
(5) (1916) 20 C.W.N. 643.
(6) (1916) I.L.R., 43 Calc., 707 (P.C.).

cognizance of a suit or holding a trial is a relevant act when the question is whether such Court ought to take cognizance of such suit or to hold such trial. Section 41 deals with final judgments, orders and decrees, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, or what is known as judgments *in rem* and states that such judgments, orders or decrees, are conclusive proof of the matters specified in the section, and, by virtue of that section of the Act, evidence would not be allowed to disprove those matters. Section 42 refers to judgments relating to matters of a public nature relevant to the enquiry and states that such judgments, though evidence, are not conclusive proof of what they state, thus allowing evidence to be given to disprove facts found in the judgments. Section 43 states that

"judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree, is a fact in issue or is relevant under some other provision of this Act" (e.g., section 13).

Section 44 enables a party to show that any judgment, order or decree, which is relevant under sections 40, 41 or 42, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. It appears to me that these sections codify the law as to the admissibility of judgments in evidence. It is not suggested that under the provisions of these sections a judgment, unless it be a judgment *in rem*, would bind third parties who are not parties to the judgment or claim under those who are parties. Other judgments would be *res inter alios acta* and would not be admissible in evidence. The same is the law in England and I need only refer to *Natal Land, etc., Company* v. *Good*(1). Section 35 of the

(1) (1868) L.R., 2 P.C., 121.

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Evidence Act which enacts that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duties, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact, deals with a distinctly separate class of cases, namely, entries made by public officials acting in the exercise of a statutory duty or power conferred by special enactments which regulate matters of public or *quasi public* interest. It would be straining the language of section 35 to hold that a Judge, when he writes a judgment, is making entries in a public or official book, register or record, and that every statement made in a judgment is an entry in such book, register or record. If section 35 is applicable to judgments and if the contention of Mr. Menon is accepted, the result will be that every judgment would be admissible in evidence to prove a relevant fact if it contains any statement as to a fact in issue or relevant fact, even though that judgment may be between persons who are total strangers to the litigation in which it is sought to be filed as evidence. I find it difficult to hold that the legislature, which in sections 40 to 44 has carefully defined the limits within which judgments are admissible in evidence, would have, in a previous section, practically nullified the provisions as to the relevancy of judgments by including judgments in the category of public or other official books, registers or records. I am unable to agree with the decisions relied on by Mr. Menon. In *Parbutty Dassi* v. *Purno Chunder Singh*(1), the suit was for the possession of a fishery and the plaintiff wanted to let in evidence of an admission alleged to have been made by a predecessor-in-title of the

(1) (1883) I.L.R., 9 Calc., 586.

defendants in the written statement in a former suit. This would be evidence under section 21 of the Evidence Act. The written statement was not forthcoming as it was destroyed and the only evidence of the admission was that contained in a decree in the former suit which began by giving a short statement of the pleadings in the suit. The rules of Court required every decree to contain an abstract of the pleadings. PRINSEP and O'KINEALY, JJ., held that the statement in the decree was evidence of the admission made under section 35 of the Evidence Act. The learned Judges begin by stating that the original containing the admission of the defendant's predecessor-in-title could not be produced as it was destroyed and that under a circular issued by the Sudder Court, it was the duty of the Court to enter in the decree an abstract of the pleadings, and they relied on section 35 as authority for the view that the admission sought to be proved can be proved by the abstract prefixed to the decree. At the end of the judgment, however, they go on to state that the admission in the decree would be binding only if the person who is alleged to have made the admission was the predecessor-in-title of the defendants and observe :

"Whether the defendants are bound by the statements of Rashmoni depends on the question whether Rashmoni was their predecessor-in-title ; and this point has not been decided by the Subordinate Judge. If he holds that defendants do not represent Rashmoni, neither the decree nor the admission can be admissible against them. On the other hand if he holds that the defendants do represent Rashmoni, then, in our opinion, so much of the decree as purports to give the statement of Rashmoni is admissible in the present case. The amount of weight to be given to such statement is a matter to be decided by the Court below."

Lekraj Kuar v. *Mahpal Singh*(1), to which the learned Judges refer, was a case not of a judgment but of a

(1) (1880) I.L.R., 5 Calc., 744 (P.C.).

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statement made in a settlement register, and their Lordships of the Privy Council were of opinion that being an entry in a register kept by a public servant under statutory authority, it was admissible under section 35 of the Evidence Act. It seems to me that if the learned Judges were of opinion that any statement made in a judgment would be a statement made by a public officer in a public record and would bring it under section 35, all the discussion as to the duty of the Judge to make an abstract of the pleadings in the decree, the destruction of the original pleadings containing the admission and as to its relevancy depending upon whether Rashmoni, the person who is alleged to have made the statement abstracted in the decree, was the predecessor-in-title of the defendants would be immaterial, as a statement recorded under the circumstances mentioned in section 35 would depend for its relevancy on the mere fact that it was made by a public servant in the discharge of his duty apart from the sources of his information or the relationship of the persons giving the information to the persons who were interested subsequently in the matter. The correctness of this decision was doubted in *Sunder Das* v. *Fatimul-ul-Nissa Begam*(1) and *Ram-Sunder Gope Sikdar* v. *Haribala Dhubi*(2). In *Byathamma* v. *Avulla*(3) the question was whether the parties were governed by *Makkattayam* or *Marumakkattayam* Law and it was sought to prove that in a previous claim petition to which a preceding *karnavan* was a party he acted in the capacity of a *karnavan*, thus showing that the parties were governed by the *Marumakkattayam* Law. The order of the District Munsif reciting the petition of the previous *karnavan* was sought to be put in to prove the allegation made by the previous *karnavan* and it was

(1) (1896) I C.W.N., 513. (2) (1917) 37 I.C., 911.
(3) (1892) I.L.R., 15 Mad., 19.

held on the authority of *Parbutty Dassi* v. *Purno Chunder Singh*(1), cited above, that it was admissible under section 35 of the Evidence Act. As pointed out by the learned referring Judges, the reasoning in this case would apply to section 13 rather than to section 35. *Ramasami* v. *Appavu*(2), which is referred to by the learned Judges, related to the relevancy of judgments under sections 13 and 42 of the Evidence Act and had nothing to do with section 35. *Thama* v. *Kondan*(3) cited above was a suit to redeem a *kanom*. The *kanom* document was lost and the judgment in a previous suit brought by a previous *Jenmi* to redeem the same *kanom* in which it is stated that defendants admitted their position as *kanomdars* was sought to be put in evidence. The learned Judges, following *Lekraj Kuar* v. *Mahpal Singh*(4) *Parbutty Dassi* v. *Purno Chunder Singh*(1), and *Thama* v. *Kondan*(3), cited above, held that the judgment was admissible and that the recital in a judgment of the admission of the relevant fact would be evidence of the *Jenmi's* title under section 35 of the Evidence Act. As the second suit to redeem was between the same parties as those to the first suit, it is difficult to see why recourse should be had to section 35 for the purpose of rendering the previous judgment admissible in evidence as the matter could well have been brought under sections 40 to 43 of the Evidence Act. Neither in this case nor *in Byathamma v. Avulla*(5) is there any discussion of the authorities and the Judges simply follow the decision in *Parbutty Dassi* v. *Purno Chunder Singh*(1) cited above. I think the correct principle has been laid down by MUKERJI, J., in *Kashi Nath Pal* v. *Jagat Kishore*(6), where the learned Judge held that

"Although a judgment not *inter partes* may be used in

(1) (1883) I.L.R., 9 Calc., 586.
(2) (1889) I.L.R., 12 Mad., 9.
(3) (1892) I.L.R., 15 Mad., 378.
(4) (1880) I.L.R., 5 Calc., 744 (P.C.).
(5) (1892) I.L.R., 15 Mad., 19.
(6) (1916) 20 C.W.N., 643.

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evidence in certain circumstances as a fact in issue, or as a relevant fact, or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties."

The judgment of the Privy Council in *Ram Parkash Das* v. *Anand Das*(1) cited above also makes it clear. The question there was whether a person was disqualified from being a *Mahant* by reason of his having been married. Evidence was sought to be let in of a recital in the judgment of a Magistrate of an admission of the marriage made in the course of proceedings before him. Their Lordships of the Privy Council held that the judgment was rightly rejected as not by itself evidence of the facts recorded therein. It is argued by Mr. Menon that what their Lordships rejected was not the judgment but a statement by one Hanuman Lal, made on oath, that the *Mahant* was married; but a reference to the passage in which the observation of their Lordships occurs makes it clear that they were referring to the judgment. It is unnecessary in this Reference to consider whether, if admissions made by parties to a suit or their predecessors-in-title are relevant and the originals containing the admissions are not forthcoming, secondary evidence of such admissions can be given by reference to extracts from judgments. The answer to the question will turn not on section 35 but with reference to the provisions of the Act relating to the relevancy of admissions and the sections relating to secondary evidence. On a consideration of the authorities and the provisions of the Evidence Act, I am clearly of opinion that section 35 would not render a judgment not *inter partes* evidence. I would answer the question referred to us in the negative.

N.R.

(1) (1916) I.L.R., 43 Calc., 707 (P.C.)