Before Mr. Justice Iqbal Ahmad and Mr. Justice Verma

SAHIB NASIB KHAN AND ANOTHER (PLAINTIFFS) *v.* QUTB-UN-NISSA AND ANOTHER (PLAINTIFFS) AND MUHAMMAD SAID KHAN AND OTHERS (DEFENDANTS)* — 1940 *August*, 6

Civil Procedure Code, section 11—Res judicata—"*Court competent to try the subsequent suit*"—*Pecuniary jurisdiction*—*Increase in value of the same subject-matter*—"*Competency*" *to be determined with reference to the date of the first suit*—"*Heard and finally decided*"—*Compromise decree*—*Estoppel*—*Admissibility in evidence*—*Statements recorded by, and report of, a member of Municipal Board on an inquiry regarding mutation of names.*

The decision of a Munsif's court can operate as *res judicata* in respect of a subsequent suit relating to the same property brought in the court of a Civil Judge by reason of an increase in value of the property in the interval between the two suits. The words, "court competent to try such subsequent suit", in section 11 of the Civil Procedure Code refer to the jurisdiction of the first court at the time when the first suit was brought, and if at that time that court would have been competent to try the subsequent suit if it had been then brought the decision would operate as *res judicata*, although on the date of the subsequent suit that court had ceased, by reason of a rise in the value of the property, to be a court of competent pecuniary jurisdiction to try the subsequent suit. The competency of the first court to try the subsequent suit has to be judged with reference to the time when the first suit was brought, that is, as if the second suit had been instituted at the time when the first suit was filed.

The question whether a compromise decree comes within the purview of section 11 of the Civil Procedure Code, having regard to the words "has been heard and finally decided" in that section, is to all intents and purposes a question of mere academic interest, as, even if such a decree fails to operate as *res judicata* under that section, it creates an estoppel against the parties to the compromise which was embodied in a decree and therefore bars the trial of the same question between the parties.

It is very doubtful whether statements of witnesses recorded by a member of a Municipal Board, and the report made by

*First Appeal No. 114 of 1937, from a decree of Zamirul Islam Khan, First Civil Judge of Saharanpur, dated the 13th of January, 1937.

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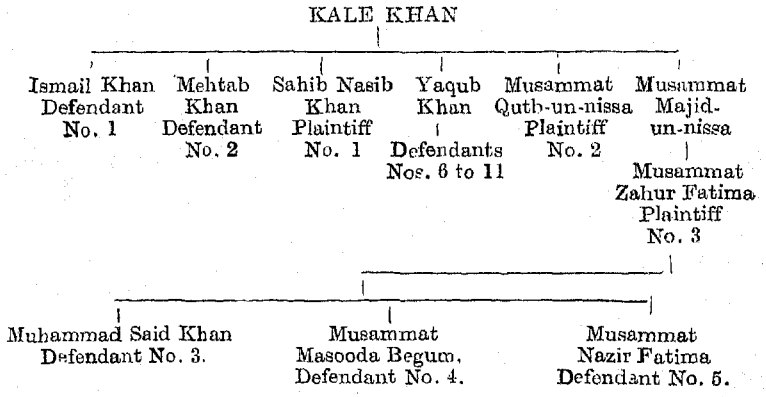
him, on an inquiry to which he was deputed by the Board upon an application for mutation of names in respect of a house in the municipality, are admissible in evidence; but the fact that on the application for entry of names an inquiry was directed by the Municipal Board and as a result of that inquiry the names of certain persons were entered in the municipal registers is admissible in evidence as a relevant fact.

Mr. *G. S. Pathak,* for the appellants.

Mr. *S. A. Rafique,* for the respondents.

IQBAL AHMAD and VERMA, JJ.:—This appeal arises out of a suit for the partition of a bungalow within the municipal limits of the town of Roorkee in the district of Saharanpur. Before stating the questions that arise for decision in the present appeal it would be convenient to set forth, as briefly as possible, the facts that have given rise to those questions.

The bungalow in dispute along with other house properties belonged to one Kale Khan, who died leaving four sons and two daughters. The family tree of Kale Khan is as follows:



After the death of Kale Khan his sons and daughters partitioned amongst themselves the properties left by Kale Khan, and it is common ground that by partition the bungalow in dispute and a house in Saharanpur, called Haveli, were allotted to the two daughters Qutb-un-nissa and Majid-un-nissa in equal shares. In other words, by virtue of partition Qutb-un-nissa and Majid-un-nissa each became entitled to a half share in

the bungalow in dispute and to a half share in the Haveli. Majid-un-nissa died on the 19th of May, 1919, leaving, as the pedigree noted above shows, a daughter Zahur Fatima and three children by that daughter. Zahur Fatima was married to one Ayub Khan. Ayub Khan has figured as a witness on behalf of the contesting defendants, viz. defendants 3 and 4, who are his children by Zahur Fatima. It appears that Ayub Khan was a military contractor and mostly resided in Bombay in connection with his contract business. It is said, and there is considerable evidence in support of the allegation, that during the absence of Ayub Khan from Roorkee Zahur Fatima contracted illicit connection with some person and eventually eloped with him, taking with her her youngest child, Nazir Fatima. Muhammad Said Khan and Masooda Begum, the other two children of Zahur Fatima, however, continued to reside in Roorkee with their grandmother Majid-un-nissa.

The bungalow in dispute was entered in the municipal papers in the names of Qutb-un-nissa and Majid-un-nissa and continued to be so recorded till the year 1921. In that year, however, the name of Majid-un-nissa was expunged and the names of Muhammad Said and Masooda Begum were entered in the municipal papers as owners of a half share in the bungalow. It may be stated at this stage that Zahur Fatima never applied for the entry of her name in the municipal papers, nor was her name ever recorded in those papers against the bungalow in dispute.

On the 22nd of February, 1926, Zahur Fatima executed a deed of gift with respect to a one-fourth share in the bungalow in favour of Qutb-un-nissa. It was recited in the deed that she had inherited that share from her mother, Majid-un-nissa. Qutb-un-nissa, however, took no steps to have her name recorded in the municipal papers against the share gifted to her.

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At or about the time of the execution of the deed of gift just mentioned, Qutb-un-nissa and Ismail Khan executed a sale deed of the Haveli in Saharanpur in favour of one Muhammad Yasin Khan. The execution of the deed of gift and of the sale deed brought to a head the dispute between Qutb-un-nissa and Ismail Khan on the one hand, and Muhammad Said and Masooda Begum, defendants 3 and 4, on the other. Muhammad Said and Masooda Begum were minors then, and their father, Ayub Khan, as their next friend filed a suit for accounts in April, 1927, in the court of the Munsif against Qutb-un-nissa and Ismail Khan. In the plaint of that suit it was stated that Majid-un-nissa had before her death bequeathed her half share in the bungalow and the Haveli to Muhammad Said and Masooda Begum, the plaintiffs of that suit, and that the will was, after the death of Majid-un-nissa, consented to by all her heirs, viz. her daughter Zahur Fatima, her four brothers and her sister Qutb-un-nissa. It was recited in the plaint that on the assurance held out by the defendants of that suit that they would deposit the profits of the share of Muhammad Said and Masooda Begum in the savings bank, those defendants were allowed to act as managers and agents of the plaintiffs so far as the bungalow in dispute and the Saharanpur Haveli were concerned. On these allegations the plaintiffs prayed for a decree for rendition of accounts by the defendants. Both Qutb-un-nissa and Ismail Khan contested the suit. They filed a joint written statement in which they denied the fact of a will having been made by Majid-un-nissa and alleged that Ayub Khan had "by a trick" caused the names of the plaintiffs to be recorded in the municipal papers in respect of the bungalow. They asserted that Majid-un-nissa died intestate and that on her death her half share in the bungalow devolved by right of inheritance on her daughter Zahur Fatima, her four brothers and her sister Qutb-un-nissa. They pleaded that Zahur Fatima's share in the inheritance of Majid-un-nissa was to the extent of one half and the remaining

half devolved on the brothers and the sister. They therefore maintained that Zahur Fatima was entitled to execute the deed of gift of 1926. They denied that Muhammad Said and Masooda Begum, the plaintiffs of the suit of 1927, had any share either in the bungalow or in the Haveli and accordingly pleaded that the suit was not maintainable. The allegation that Qutb-un-nissa's and Ismail's position was that of managers or agents was also denied.

The suit was eventually compromised and the compromise was embodied in a decree dated the 16th of December, 1927. The terms of the compromise were as follows: "Compromise has been arrived at between the parties to the effect that the plaintiffs shall remain the owners in possession of 21 sihams out of 80 sihams in the bungalow in dispute and the remaining share shall be owned by defendant Qutb-un-nissa. The plaintiffs as the defendants shall have no concern with the Haveli in dispute or the consideration thereof. Muhammad Yasin, the vendee, is the owner of this Haveli in dispute. Defendant Qutb-un-nissa shall pay Rs.520-10-0 in all to the plaintiffs, but Rs.25 shall be paid monthly. The first instalment shall be due on the 31st of January, 1928. The prayer has been made that the suit may be decided in accordance with the terms of this compromise. The plaintiffs shall be entitled to the produce of the grove for 1928 and the bungalow. In case of non-payment of four successive instalments the entire amount together with interest at the rate of Re. one per cent. per month shall be due in a lump sum."

It appears that Lakshman Prakash, who was one of the plaintiffs in the suit giving rise to the present appeal, was in possession of the bungalow in the capacity of a tenant for some time and he, in the year 1935, obtained a sale deed with respect to a one-fourth share in the bungalow from Qutb-un-nissa. After securing the sale deed Lakshman Prakash proceeded to

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make repairs and additions in the bungalow. Muhammad Said and Masooda Begum then filed a suit for an injunction restraining Lakshman Prakash from proceeding with the repairs and the proposed additions and for an order directing him to restore the bungalow to its original condition. Qutb-un-nissa and Sahib Nasib Khan were also impleaded as defendants to the suit but the relief prayed for in the suit was directed mainly against Lakshman Prakash.

It was after the institution of the suit just mentioned that the suit giving rise to the present appeal was filed in the court of the Civil Judge by Sahib Nasib Khan, Qutb-un-nissa, Zahur Fatima and Lakshman Prakash. All the descendants of Kale Khan, other than the first three plaintiffs, were impleaded as defendants to the suit. The suit was based mainly on the allegation that no will was ever made by Majid-un-nissa, and that on the death of Majid-un-nissa her share devolved on her legal heirs according to the dictates of Muhammadan law. It was alleged that Qutb-un-nissa's share in the bungalow was to the extent of 36 out of 72 sihams and similarly Majid-un-nissa's share was 36 out of 72 sihams. It was then stated that on Majid-un-nissa's death 18 out of her 36 sihams devolved by right of inheritance on her daughter Zahur Fatima, and that each of her brothers got 4 sihams and Qutb-un-nissa inherited 2 sihams. Thus the share of Qutb-un-nissa in the bungalow in dispute was (36+2) 38 sihams. Reference was then made to the deed of gift executed by Zahur Fatima in favour of Qutb-un-nissa and it was alleged that after the gift Qutb-un-nissa's share became (38+18) 56 sihams. It was further alleged in the plaint that as Qutb-un-nissa had executed a sale deed of a one-fourth share in the bungalow in dispute in favour of Lakshman Prakash, the latter was entitled to 18 out of 72 sihams and Qutb-un-nissa's share in the bungalow was only to the extent of 38 out of 72 sihams. Lastly it was alleged that on the death of Majid-un-nissa each of her four

brothers became entitled to 4 out of 72 sihams and accordingly Sahib Nasib Khan, Qutb-un-nissa and Lakshman Prakash prayed for a decree for possession of (4+38+18) 60 out of 72 sihams by partition of the bungalow in dispute. Zahur Fatima, though arrayed as a plaintiff, did not claim any share in the bungalow as she, on her own showing, had gifted her alleged share in the bungalow to Qutb-un-nissa.

The suit was contested only by Muhammad Said Khan, defendant No. 3, and Masooda Begum, defendant No. 4, who filed a joint written statement. It was alleged in the written statement that Qutb-un-nissa and Majid-un-nissa became owners of the bungalow in dispute and the Haveli in Saharanpur by virtue of a private partition and that Majid-un-nissa bequeathed her share in the bungalow and the Haveli to the contesting defendants. The fact of the immorality of Zahur Fatima and of her having eloped with her paramour was mentioned in the written statement and it was alleged that after the death of Majid-un-nissa the names of the contesting defendants were entered in the municipal papers. It was therefore alleged that Zahur Fatima had no share in the bungalow in dispute and was not competent to execute the deed of gift in favour of Qutb-un-nissa. Reference was then made in the written statement to the suit of 1927 and to the compromise arrived at in that suit. On the basis of the compromise decree it was pleaded that the share of the contesting defendants in the bungalow in dispute was to the extent of 21 sihams out of 80 sihams and the remaining 59 sihams belonged to Qutb-un-nissa. The fact that Qutb-un-nissa had sold a one-fourth share in the bungalow in dispute to Lakshman Prakash was admitted, but it was pleaded that the decree in the suit of 1927 operated as *res judicata* and that in view of that decree Qutb-un-nissa and Lakshman Prakash plaintiffs were entitled only to a 59/80 share in the bungalow in dispute and not to a 60/72 share claimed by them. It was alleged that all the heirs

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of Majid-un-nissa, including Sahib Nasib Khan plaintiff, had consented to the will made by Majid-un-nissa and accordingly Sahib Nasib Khan had no share in the bungalow in dispute.

The pleadings of the parties gave rise to the following issues:

(1) Whether Majid-un-nissa made any valid gift in favour of the contesting defendants in the year 1919?

(2) Whether the suit is barred by section 11 of the Civil Procedure Code?

(3) What is the share of the plaintiffs in the property in dispute?

(4) Is the suit maintainable in this court?

On the question whether the suit was barred by section 11 of the Code of Civil Procedure the contesting defendants placed reliance on the compromise decree in the suit of 1927. The plaintiffs, however, maintained that section 11 had no application to the case. This contention of the plaintiffs was based on two grounds. Firstly, they contended that as the suit of 1927 terminated by a consent decree, section 11 could not be a bar to the suit. Secondly, they maintained that as the suit of 1927 was filed in the court of the Munsif and the present suit was filed in the court of the Civil Judge, the decree in the former suit could not operate as *res judicata* in the present suit.

The learned Civil Judge gave effect to the first contention of the plaintiffs and held that section 11 in terms had no application to a consent decree as it cannot be said in the case of consent decrees that the matters in dispute between the parties were "heard and finally decided" within the meaning of that section. He, however, held that the decree in the suit of 1927, though not operating as *res judicata*, raised an estoppel as against Qutb-un-nissa and her transferee Lakshman Prakash, and also as against Ismail Khan.

He overruled the second contention of the plaintiffs and held that in the circumstances of the present case

the mere fact that the suit giving rise to the present appeal was filed in a court of higher jurisdiction than the court of the Munsif could not prevent the application of section 11 of the Code of Civil Procedure. On the question of the alleged will he found in favour of the contesting defendants and held that Majid-un-nissa made a will of her entire share in the bungalow and the Haveli in favour of the contesting defendants and that after the death of Majid-un-nissa all her heirs consented to the will. As regards the extent of the shares of the plaintiffs in the bungalow in dispute he upheld the contention of the defendants and held that in view of the decree in the suit of 1927 the share of the contesting defendants must be held to be 21 out of 80 sihams and that out of the remaining 59 sihams Qutb-un-nissa's share was to the extent of 41/80 and Lakshman Prakash's share was to the extent of 18/80. Lastly, he held that the value of the bungalow in dispute was more than Rs.5,000 and accordingly the suit was rightly instituted in his court. As a result of his findings he passed a decree for partition in favour of Qutb-un-nissa and Lakshman Prakash, allotting to the former 41 out of 80 and to the latter 18 out of 80 sihams.

The present appeal has been filed by Sahib Nasib Khan and Lakshman Prakash plaintiffs and Mehtab Khan defendant and the findings of the learned Civil Judge on the questions relating to the will and the application of section 11 of the Civil Procedure Code have been impugned. It has also been contended that the shares of Qutb-un-nissa and Lakshman Prakash have not been correctly fixed by the learned Civil Judge.

We propose first to deal with the question as to whether the fact that the suit of 1927 was instituted in the court of the Munsif and the suit giving rise to the present appeal was instituted in the court of the Civil Judge does or does not bar the application of section 11 of the Civil Procedure Code. In accordance

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with the provisions of that section the bar of *res judicata* can apply only if the former suit was heard and finally decided by a court that is competent to try the subsequent suit in which the plea of *res judicata* is raised. It is argued on behalf of the appellants that as the present suit, the value of the subject-matter of which was in excess of Rs.5,000, could not be tried by a Munsif, the decree in the suit of 1927 could not bar the trial of the issues arising in the present litigation. The decision of the question raised depends on the answer to the question as to whether the competency of the court that decided the earlier suit to try the subsequent suit is to be determined with reference to the facts existing on the date of the institution of the earlier suit or with reference to the facts as they stand on the date of the institution of the subsequent suit. This question has been the subject of numerous judicial decisions and in almost all the cases it has been held that the words " court competent to try such subsequent suit " in section 11 refer to the jurisdiction of the court that decided the earlier suit at the time when the first suit was brought and that if at that time such court would have been competent to try the subsequent suit, had it been then brought, the decision of such court would operate as *res judicata*, although on a subsequent date, by a rise in the value of the property, that court had ceased to be a proper court, having regard to its pecuniary jurisdiction, to take cognizance of a suit relating to that very property. The leading case on the subject is that of *Gopi Nath Chobey* v. *Bhugwat Pershad* (1). This case was followed in *Rughunath Panjah* v. *Issur Chander Chowdhry* (2), *Gopal* v. *Ram Harak* (3), *Mustafa Khan* v. *Abdul Wahib* (4) and *Lalmohan Dhupi* v. *Ramlakshmi Dasee* (5). It was laid down in these cases that under section 11 the competency of the court to try the subsequent

(1) (1884) I.L.R. 10 Cal. 697.
(2) (1884) I.L.R. 11 Cal. 153.
(3) A.I.R. 1919 Oudh, 111.
(4) A.I.R. 1931 Lah. 217.
(5) (1931) I.L.R. 59 Cal. 636.

suit has to be judged with reference to the time when the first suit was brought, that is, as if the second suit had been instituted at the time when the first suit was filed, and that if during the interval between the institution of the two suits there has occurred a rise in the value of the property and so the latter suit has had to be filed in a court of higher jurisdiction, the bar of *res judicata* will apply to the subsequent suit, if on the date of the institution of the earlier suit the latter suit, having regard to the value of the subject-matter of that suit on that date, could have been filed in the court in which the earlier suit was filed. Some doubt was, however, expressed about the correctness of these decisions by a Bench of the Calcutta High Court in *Debendra Kumar* v. *Pramada Kanta* (1). The learned Judges in that case observed as follows: "Then as regards the other point in connection with the *res judicata* question it was said that the court which decided the suit in 1913 had no jurisdiction to try the present suit, inasmuch as the value of the property in the present suit was over Rs.1,000 which was beyond the pecuniary jurisdiction of the Munsif who heard the 1913 suit. Having regard to the words 'competent to try the subsequent suit' as they are to be found in section 11 of the Civil Procedure Code one would be inclined to think that this contention is not without some substance." After making these observations the learned Judges, however, followed the decision in *Gopi Nath's* case (2).

We are, if we may say so with respect, in complete agreement with the decision in *Gopi Nath's* case that has been consistently followed in numerous cases. Section 11 is silent as to the point of time with reference to which the competency of the court, that decided the earlier suit, to try the subsequent suit is to be determined. It is, however, clear that the question of the competency is to be judged either by reference to the date on which the earlier suit was filed or by

(1) A.I.R. 1933 Cal. 879. (2) (1884) I.L.R. 10 Cal. 697.

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reference to the date on which the subsequent suit was filed. To hold that the competency is to be judged by reference to the date of the institution of the subsequent suit would lead to anomalous and startling results and this may well be illustrated by two examples.

A suit with respect to a property the value of which is, say, Rs.4,000 is instituted in the court of a Munsif who is invested with jurisdiction to try suits up to the value of Rs.5,000. The Munsif decides that suit and dismisses the same. He is then transferred and replaced by a Munsif having jurisdiction to try suits only up to the value of Rs.3,000. If the application of section 11 is to depend on the competency of the court, that decided the earlier suit, to try the subsequent suit on the date of the institution of that suit, it would be open to the plaintiff, whose suit was dismissed by the Munsif, to file a subsequent suit with respect to the same subject-matter and for the same reliefs in the court of the Civil Judge after the transfer of the Munsif who decided the earlier suit. Such an anomalous state of affairs could not, however, have been in the contemplation of the legislature.

Again, take the converse case. A suit with respect to a property of the value of Rs.2,000 is filed in the court of a Munsif having jurisdiction to try suits up to the value of Rs.3,000. The Munsif tries and dismisses the suit. He is then transferred and his place is taken by a Munsif having jurisdiction to try suits up to the value of Rs.5,000. In the meantime, because of the condition of the market, the value of the property that was the subject-matter of the former suit goes up from Rs.2,000 to Rs.4,000. If the competency of the Munsif who decided the former suit to try the subsequent suit is to be determined with reference to the date on which the subsequent suit was instituted, it would be open to the original unsuccessful plaintiff to file a suit again in the court of the Munsif and to contend that the suit is not barred by *res judicata* as the Munsif who tried his earlier suit could not have tried the subse-

quent suit because the value of its subject-matter exceeded the pecuniary jurisdiction of that Munsif. This again, to say the least, would reduce the provisions of section 11 to an absolute farce.

We therefore consider that the competency of the court to entertain the subsequent suit must be determined by reference to the date on which the earlier suit was filed. If the properties in dispute in the two suits are identical, the mere rise in the value of the property by lapse of time cannot bar the application of section 11 of the Civil Procedure Code.

In the case before us it has been found that though the value of the bungalow in dispute now exceeds the pecuniary jurisdiction of the Munsif, its value on the date of the earlier suit was within the limits of the pecuniary jurisdiction of the Munsif. Accordingly, we hold that the mere fact of the institution of the present suit in the court of the Civil Judge cannot exclude the application of section 11 of the Civil Procedure Code.

We now proceed to consider whether section 11 does or does not apply to a decree based on compromise . It has been held in some cases that section 11 does not in terms apply to such decrees; for it cannot be said in the case of such decrees that the matters in issue between the parties "have been heard and finally decided" within the meaning of that section. To this effect are the decisions in *Sivadas Dutta* v. *Birendra Krishna Dutta* (1), *Musammat Said Khanam* v. *Said Muhammad* (2). It was, however, held in these cases that a consent decree has, to all intents and purposes, the same effect as *res judicata,* as it raises an estoppel as much as a decree passed *in invitum.* On the other hand, in *Bhaishankar Nanabhai* v. *Morarji Keshavji & Co.* (3) it was held by a learned Judge of the Bombay High Court that notwithstanding the words "has been heard and finally decided" in section 11 a consent decree does operate as *res judicata* It was pointed out by the learned Judge in that case that by a compromise decree a matter is much more

(1) A.I.R. 1926 Cal. 672. (2) A.I.R 1930 Lah. 487.
(3) (1911) I.L.R. 36 Bom. 283.

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finally decided than by a decree passed *per invitum,* for against a consent decree there is no appeal. Similarly in *Nicholas* v. *Asphar* (1) AMEER ALI, J., held that a consent decree is just as binding on the parties to the proceedings as a decree after a contentious trial.

The question whether a consent decree comes within the purview of section 11 is to all intents and purposes a question of mere academic interest, as, even if such a decree creates an estoppel, it would bar the trial of the same question between the parties. It is, therefore, unnecessary in the present case to decide whether or not the termination of a suit by a compromise is tantamount to the hearing and final decision of the same by the court that was seized of that case. In the case before us it is clear that Qutb-un-nissa was a party to the compromise of 1927 and that compromise was embodied in a decree. By that compromise the share of the contesting defendants was fixed at 21/80 and the share of Qutb-un-nissa was fixed at 59/80. Qutb-un-nissa is therefore now estopped from contending that the contesting defendants have no share in the bungalow in dispute or that their share is less than 21/80. This being so, the claim of Qutb-un-nissa and of Lakshman Prakash, who is a transferee from Qutb-un-nissa, could not be decreed for a share in excess of 59/80.

Sahib Nasib Khan's claim was dismissed by the court below and it remains to consider whether or not the decision of the court below on that point is correct. The decision of this question necessitates the consideration of the question of the factum and the validity or otherwise of the alleged will by Majid-un-nissa. There is ample evidence on the record to show that Zahur Fatima became unchaste, left her family residence and eloped with some one, and that her two elder children, Muhammad Said and Masooda Begum, remained with Majid-un-nissa and were brought up by her. The evidence also shows that Zahur Fatima was not present in Roorkee at the time of Majid-un-nissa's death and that before Majid-un-nissa's death

(1) (1896) I.L.R. 24 Cal. 216.

Zahur Fatima had been divorced by Ayub Khan. All connection between Majid-un-nissa and Zahur Fatima had therefore ceased and Majid-un-nissa's affections must have been centred in her two minor grandchildren, Muhammad Said and Masooda Begum. This was the situation in which Majid-un-nissa is alleged to have bequeathed her property in favour of Muhammad Said and Masooda Begum. The testamentary disposition of her property by Majid-un-nissa in favour of her minor grandchildren in these circumstances was a most natural act. We are therefore inclined to believe the evidence of Muhammad Ayub and Ghasite who deposed about the factum of the will. Their evidence finds support from the fact that in the year 1921 the names of Muhammad Said and Masooda Begum were recorded as against the bungalow in dispute in the municipal papers. It appears that on an application for the entry of their names the Municipal Board deputed one of its members to make an inquiry and, on the submission of a report by that member, the names of Muhammad Said and Masooda Begum were entered in place of Majid-un-nissa. In the course of his inquiry the member of the Municipal Board who was charged with the inquiry recorded the statements of certain witnesses, and the court below admitted in evidence those statements and the report submitted by that member. We entertain grave doubts as to the admissibility of these documents. Nevertheless the fact that on the application for entry of names an inquiry was directed by the Municipal Board and, as a result of that inquiry, the names of the alleged legatees were entered in the municipal papers is a relevant fact and can legitimately be taken into consideration. It is thus clear that the alleged oral will was given effect to after the death of Majid-un-nissa and nobody questioned its factum or its validity ever in a court of law. For the first time in the year 1926 Zahur Fatima executed a deed of gift ignoring the will. The deed of gift, however, was not followed by mutation

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of names in the municipal papers, and there is nothing to show that any steps were taken by Qutb-un-nissa to dispossess Muhammad Said and Masooda Begum from the bungalow. Further, the compromise is consistent with the allegation that Majid-un-nissa had bequeathed her share in favour of her grandchildren. We, therefore, agree with the court below in holding that it was proved that Majid-un-nissa made a will in favour of her two grandchildren who were the contesting defendants in the present litigation.

There was evidence in the case to show that Mehtab Khan, Nasib Khan and Yaqub Khan gave their consent to the will of Majid-un-nissa after her death and this evidence was believed by the court below. Nothing has been said in argument that could lead us to arrive at a contrary conclusion. It follows that because of the consent given by them, Nasib Khan and Mehtab Khan are now debarred from claiming any share in the inheritance left by Majid-un-nissa. The appeal of Nasib Khan and Mehtab Khan must therefore fail.

Lakshman Prakash's appeal also must substantially fail for the reasons given above. There is, however, a slight error in the calculation of his share as disclosed by the decree of the court below. It was common ground that Qutb-un-nissa had transferred a one-fourth share in the bungalow to Lakshman Prakash. Lakshman Prakash's share was therefore to the extent of 20/80 and he was entitled to a decree with respect to that share. The decree of the court below therefore requires modification only to this extent that Qutb-un-nissa will get on partition 39 out of 80 sihams and Lakshman Prakash will be allowed 20 out of 80 sihams. The rest of the appeal is dismissed. The decree of the court below so far as the shares of the contesting defendants, viz., defendants 3 and 4 are concerned, is affirmed. As the appeal has substantially failed, we direct the appellants to pay the costs of Muhammad Said and Masooda Begum, the contesting respondents.