place that in February, 1931, the decree-holder obtained a certificate of search of certain documents from the office of the Sub-Registrar. The obtaining of this certificate of search cannot by any stretch of language be called a step in aid of execution. Similarly the fact that the decree-holder, Musammat Suraiya Begam, obtained a copy of the settlement *khewat* of the first regular settlement relating to village Pahiya-Azampur cannot be deemed to be a step in aid of execution of her decree. Again the fact that the decree-holder got back certain documents filed by her in the previous execution of decree case (No. 142 of 1928) can also not be looked upon as a step in aid of execution of her decree. There is no oral evidence on the record to connect these various acts of the decree-holder so as to make them appear to the Court executing the decree as being step in aid of execution of the decree.

The order of the learned Additional Subordinate Judge is very full and convincing and we need not repeat the arguments which have been fully set forth in his order under appeal. There is no force in this appeal and we accordingly dismiss it with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice J. J. W. Allsop

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November, 20

MUSAMMAT MOOLA (PLAINTIFF-APPELLANT) *v.* BITHAL DAS AND ANOTHER, DEFENDANTS AND TWO OTHERS, PLAINTIFFS (RESPONDENTS)*

Res judicata—*Mortgage—Redemption suit—Issue whether certain trees were included in mortgaged property—Same issue raised again between the parties in a subsequent suit—Decision in the previous suit, whether operates as* res judicata.

Per Full Bench (HASAN, *C.J., dissenting*).—On general grounds the title of the mortgagor to the mortgaged property cannot arise

*Second Civil Appeal No. 313 of 1932, against the decree of M. Humayun Mirza, Subordinate Judge of Malihabad at Lucknow, dated the 3rd of November, 1932, upholding the decree of M. Munir Uddin Ahmad Kermani, Munsif Havali, Lucknow, dated the 1st of September, 1931.

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in a mortgage suit but it does not necessarily follow that no question of title to any property can ever arise in a suit of that nature ; it is a matter which would depend upon the pleadings.

When it is to be considered whether a certain decision in a previous suit operates as *res judicata* in a later suit, it is necessary to see in the first place what the exact issue was in the previous suit and whether the decision of that issue was necessary for the decision of the dispute between the parties. Where, therefore, in a suit for the redemption of a mortgage it was necessary for the court to decide whether certain trees were included in the mortgaged property and on the pleadings the court did decide that point the decision must operate as *res judicata* between the parties if the issue is raised again between them in a subsequent suit. *Ram Udit* v. *Ram Samujh* (1) and *Muhammad Ibrahim* v. *Sheikh Hamza* (2), referred to. *Rajah Run Bahadoor Singh* v. *Musammat Lachoo Koer* (3), *Amanat Bibi* v. *Imdad Husain* (4), and *Kanhaiya Singh* v. *Kundan* (5), distinguished.

Per HASAN, C.J.—The issue in a previous redemption suit whether certain trees were or were not included in a specified *patti* was clearly an issue raised for the purpose of determining the question as to whether those trees were or were not part of the mortgaged property. The question of plaintiff's title to the trees in suit was wholly outside the natural and proper scope of the previous suit and any decision on that question was not a decision on a direct and substantial issue in the case and cannot operate as *res judicata* on the question of plaintiff's title to those trees independently of the mortgage. *Ram Udit* v. *Ram Samujh* (1), relied on.

THE case was originally heard by a Bench consisting of Hon'ble the CHIEF JUDGE and Mr. Justice J. J. W. ALLSOP, and there being difference of opinion in the Bench on the point of law involved therein, it was referred to a third Judge (RAZA, J.) for opinion. Separate judgments of the members of the Bench are as follows:

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ALLSOP, J.—This is a second civil appeal against the appellate judgment of the Subordinate Judge of Malihabad, dated the 3rd of November, 1932. The sole question raised is one of *res judicata*. It appears that one Jawahir Singh, who was a co-sharer in a *bhayachara*

(1) (1931) I.L.R., 7 Luck., 73 (F.B.).
(2) (1911) I.L.R., 35 Bom., 507.
(3) (1884) L.R., 12 I.A., 23.
(4) (1888) L.R., 15 I.A., 106.
(5) (1925) I.L.R., 47 All., 561.

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village, had planted three mango trees in a plot which then bore the number 250 and now bears the number 391. In the year 1894 there was a partition of the village and several pattis were formed. Two of these were Patti Jawahir Singh and Patti Lalta Singh. Plot No. 250, or No. 391, was allotted to Patti Lalta Singh, but it was set forth in the partition proceedings that trees planted by any co-sharer would remain his property in spite of the fact that the plots in which the trees stood were allotted to pattis in which he was not a co-sharer. By two deeds of mortgage, dated the 19th of January, 1897, and the 20th of January, 1899, Patti Jawahir Singh was mortgaged with possession to the predecessors-in-interest of the defendants. By a deed of sale also, dated the 20th of January, 1899, Patti Lalta Singh was sold to the same persons. On the 30th of August, 1921, the co-sharers in Patti Jawahir Singh instituted a suit for the redemption of the mortgages. No specific allegations were made about the three mango trees in the plaint or in the written statement and no issue was framed upon this point. There was, however, an issue, No. 4, to the following effect, namely:

"What is the income per annum from Rakam Sawai and who enjoyed the same?"

When the court was deciding this issue the question was raised between the parties whether the three mango trees were included in the mortgage. The plaintiffs in that suit alleged that they were, and the defendants who were admittedly in possession of the trees said that they were not. The property which was mortgaged was described merely as Patti Jawahir Singh. The defendants at that time claimed that they were in possession of the trees in their capacity as proprietors of Patti Lalta Singh. The courts held that their contention was correct, but it is obvious that the question which had to be decided was merely whether the trees were included in the description of the mortgaged property, that is, in other words, whether the trees could be said

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to be part of the property included in Patti Jawahir Singh. In the present suit the plaintiff, as the representative-in-interest of Jawahir Singh, has claimed the trees on the basis of proprietary title. It has been held by the courts below that this question must be decided against the plaintiff as the decision in the previous suit operates as *res judicata.*

Learned counsel for the appellant has in the first place argued that the present suit is based upon title and that no decision in the previous suit can operate as *res judicata*, because no question of title arises in a suit upon the basis of a mortgage. If he had stated his proposition more precisely, that is, if he had said that no question about the title to the *mortgaged* property can arise in a suit upon the basis of a mortgage, I should have agreed with him. In such a suit the mortgagee, having accepted the mortgage from the mortgagor, is estopped *in limine* from alleging that the mortgagor had no title to the property mortgaged. That, I conceive, is the basis of the decision in the cases of *Ram Udit* v. *Ram Samujh* (1) and *Muhammad Ibrahim* v. *Sheikh Hamza* (2). Learned counsel for the appellant also quoted the ruling in *Amanat Bibi* v. *Imdad Husain* (3). The facts there were that it had been decided in a previous suit that the mortgagor had no title in the year 1853, and the question was whether he was entitled to redeem a mortgage executed in the year 1854. Their Lordships of the Privy Council said "If it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no title to the property at all?" This does not appear to be any authority for the proposition for which the appellant contends. In the case of *Rajah Run Bahadoor Singh* v. *Musammat Lachoo Koer* (4), the question whether there could be an issue about title in a mortgage suit did not arise. In that

(1) (1931) I.L.R., 7 Luck., 73 (F.B.).
(2) (1911) I.L.R., 35 Bom., 507.
(3) (1888) L.R., 15 I.A., 106.
(4) (1884) L.R., 12 I.A., 23.

case there were two points. One was whether the grant of a certificate to recover debts necessarily involved a decision that the person to whom the certificate was granted had a title. The other was whether a decision of a rent court could operate as *res judicata* in a case which was being tried by a Subordinate Judge. The decision on the first point is of no assistance in this appeal, and the decision upon the second turned upon the question of the jurisdiction of the two courts. In *Kanhaiya Singh* v. *Kundan* (1), the question arose whether the plaintiff was barred from raising a certain issue under the rule of *res judicata*, because it should have been made a ground of attack in a previous suit. The conclusion to which the court came was that the issue could not have been raised in the previous suit That was a decision on the facts of the particular case and is of no help in the decision of this appeal On general grounds it appears to me that the title of the mortgagor to the mortgaged property cannot arise in a mortgage suit for reasons which I have already given, but it does not necessarily follow that no question of title to any property can ever arise in a suit of that nature. This is a matter which would depend upon the pleadings.

In the mortgage case with which we are not concerned the dispute about the trees arose because the defendants had to account for profits which they had received. The plaintiffs in that case alleged that the three trees in dispute were part of the mortgaged property because they were included in Patti Jawahir Singh and that consequently, the defendants had to account for the profits which they had received out of the trees. The defendants on the other hand alleged that they were not bound to account for these profits, because the trees were not part of the mortgaged property. If it had been admitted by both sides that the trees were part of the mortgaged property, doubtless the question about the title to the trees could not have

(1) (1925) I.L.R., 47 All., 561.

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arisen. In the circumstances of the particular case, however, the necessary issue between the parties was this, namely,

"Are the three trees included in Patti Jawahir Singh?"

From a perusal of the judgment in the case, I find that there can be no doubt that this was the issue. The learned Munsif who tried the suit originally came to the conclusion that the trees were in Patti Jawahir Singh and were consequently part of the mortgaged property. He relied upon the provision in the partition proceedings that trees planted by any co-sharer would remain his property in spite of the fact that the plots in which the trees were standing had been allotted to pattis in which he was not a co-sharer He held that the trees were planted by Jawahir Singh and that they remained his property although plot No. 250 went to Patti Lalta Singh. The learned Subordinate Judge in appeal decided that the provision in the partition proceedings referred to scattered trees He held that these three trees were part of a grove and that the trees in a grove were to go to the patti to which the land in which the grove stood had been allotted. The clear decision was that the trees in dispute were not in Patti Jawahir Singh. The learned Subordinate Judge went on to hold that the trees were in Patti Lalta Singh, but doubtless that was not a matter which it was necessary for him to decide.

When it is to be considered whether a certain decision in a previous suit operates as *res judicata* in a later suit, it is necessary to see in the first place what the exact issue was in the previous suit and whether the decision of that issue was necessary for the decision of the dispute between the parties. In the mortgage suit to which I have referred it was certainly necessary for the court to decide whether the trees were included in the mortgaged property and, on the pleadings, that meant that the court had to decide whether the trees were in Patti Jawahir Singh or not. The court did

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decide that the trees were not in Patti Jawahir Singh and, consequently, it seems to me that the decision must operate as *res judicata* between the parties if the issue is raised again between them in a subsequent suit.

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The next point to consider is whether the issue in the suit which has given rise to the appeal is this, namely, "Are the trees in suit in Patti Jawahir Singh?" If that is the issue, I have no doubt that the plaintiff is barred from raising it on the principle of *res judicata.* In the course of the arguments, learned counsel for the appellant contended that she was not basing her case upon the allegation that the trees stood in Patti Jawahir Singh. The arguments proceeded to all intents and purposes *ex parte* because the respondents were not represented by counsel and were not present when the arguments for the appellant were concluded. For this reason I have examined the record with some care. I find that the appellant, that is, plaintiff No. 1, stated in paragraph 7 of the plaint that Patti Jawahir Singh was sold to her by plaintiffs Nos. 2 and 3. It is evident that her only title to the trees arose out of the sale of Patti Jawahir Singh and, therefore, in order to succeed she must establish that these trees did lie in that patti. As it has been decided in a previous suit between the parties that the trees did not lie in that patti, I am of opinion that the plaintiff's allegation is clearly barred by the principle of *res judicata.*

I would consequently dismiss this appeal with costs.

1933 *November*, 9

HASAN, C. J.:—I have read the judgment of my learned brother ALLSOP, J. He is of opinion that this appeal should be dismissed on the ground that the previous decision constituted *res judicata* on the question of the plaintiff's title in the present suit. I find myself unable to agree with my learned brother. I am of opinion that there is no bar of *res judicata* and that the appeal should succeed.

The necessary facts have been stated at length in the judgment of my learned brother. I would only say

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hat it is agreed that the previous suit was one for redemption of the mortgages of the 19th of January, 1897, and the 20th of January, 1899. The issue therefore as to whether the trees in suit were or were not included in Patti Jawahir Singh was clearly an issue raised for the purpose of determining the question as to whether they were or were not part of the mortgaged property, that is, as to whether the plaintiff of that suit was entitled to obtain a decree for redemption in respect of them or not. The latter, to my mind, was the direct and substantial issue in the case. The court held that they were not part and parcel of Patti Jawahir Singh. Having regard to the nature of the suit this finding only means that they were not part and parcel of the mortgaged property. This decision cannot operate as *res judicata* on the question of the plaintiff's title to these trees independently of the mortgage for the simple reason that the question of title as such was not directly and substantially in issue in the previous suit. The trial of the question of the plaintiff's title to the trees in suit is therefore not barred by the rule of *res judicata*. Such a question was wholly outside the natural and proper scope of the previous suit and any decision of that question therefore, even if arrived at, was not a decision on a direct and substantial issue in the case. The grounds of my opinion have been fully stated by me in my judgment in the case of *Ram Udit* v. *Ram Samujh* (1), and I do not propose to repeat them here.

I would therefore allow the appeal, set aside the decree of the lower court and remand the case to that court under Order XLI, rule 23 of the Code of Civil Procedure for decision on merits. Costs here and hitherto will abide the event.

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November, 9

HASAN, C. J.:—Under the proviso to sub-section (2) of section 98 of the Code of Civil Procedure I direct that this appeal shall be heard on the point of law involved therein by the Hon'ble Mr. Justice RAZA.

(1) (1931) I.L.R., 7 Luck., 73 (F.B.).

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Messrs. *M. Wasim* and *Ram Charan*, for the appellant.

Mr. *Makund Behari Lal*, for the respondents.

RAZA, J.:—This second appeal has been referred to me under the proviso to sub-section (2) of section 98 of the Code of Civil Procedure as there was difference of opinion between the Hon'ble the CHIEF JUDGE and Mr. Justice ALLSOP on the point of law involved therein.

This appeal arises out of a suit for possession of three trees called, "Belha", "Tuhru" and "Koeliya", standing on No. 250(old)/391/311 (recent), in village Raitha, in the district of Lucknow.

The facts relevant to the appeal may be shortly stated:

Jawahir Singh and Lalta Singh separately owned pattis in village Raitha, and these pattis were called after their names respectively. Ram Din Singh and Hewanchal Singh were the successors of Jawahir Singh and Lalta Singh both. Thus they became the owners of Patti Jawahir Singh and also of Patti Lalta Singh in Raitha. Village Raitha was partitioned in or about 1894. Ram Din Singh and Hewanchal Singh sold Patti Lalta Singh to the defendants (or their predecessors) and mortgaged Patti Jawahir Singh to the same persons in or about 1899. Thus the defendants (or their predecessors) got possession of Patti Lalta Singh as vendees and of Patti Jawahir Singh as mortgagees.

The plaintiffs who are the representatives-in-interest of Ram Din Singh and Hewanchal Singh instituted a suit for redemption of Patti Jawahir Singh against the defendants in August, 1921. The question in that suit was how much usufruct was enjoyed by the mortgagees. The plaintiffs contended that the usufruct enjoyed was much more than the amount due under the mortgage, and that a considerable amount was to be paid back to them by the defendants at the time of redemption. In the course of the determination of the usufruct, a question arose as to whether the usufruct of the three trees

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in suit mentioned above was also to be accounted for by the defendants as mortgagees. The defendants contended that the three trees mentioned above did not form part of Patti Jawahir Singh, that they formed part of Patti Lalta Singh which was owned and possessed by them, and that the trees were held by them as vendeees and not as mortgagees. The plaintiffs' contention on the other hand was that the trees in dispute formed part of their patti (i.e. Patti Jawahir Singh) in this way, that though they stood on the land of Patti Lalta Singh according to the partition papers, still by virtue of clause 9 of the partition proceedings, they were allotted to Jawahir Singh as the owner of the trees alone. The defendants replied that the trees were not covered by the provisions of clause 9 of the partition proceedings, but they fell under clause 6 of the partition proceedings and thus formed part of Patti Lalta Singh. No definite issue was struck on that point, but the parties made it clear by their pleadings that that point was to be decided by the court. They thus invited the court to decide the point and it was eventually decided. The learned Munsif held that the trees in dispute belonged to the mortgaged patti (i.e. Patti Jawahir Singh) and the defendants must render accounts for their profits to the plaintiffs. The defendants filed their appeal challenging the finding of the learned Munsif on that point. The learned Subordinate Judge who heard the appeal disagreed with the finding of the learned Munsif on that point. He held that the trees had not been mortgaged to the defendants and did not form part of the mortgaged patti (i.e. Patti Jawahir Singh) but they formed part of Patti Lalta Singh and belonged to the defendants as owners of that patti (i.e. Patti Lalta Singh), and that the income from those trees could not be taken into consideration at the time of accounting between the parties. The plaintiffs appealed to this Court challenging the findings of the learned Subordinate Judge on that point; but their appeal was dismissed on the 22nd of November, 1926.

The following observations were made in the judgment of this Court on the point under consideration:

> "The trees in dispute mentioned above (Belha, Tuhru and Koeliya) admittedly stand on the land which is included in a certain patti not comprised in the mortgage. The learned Subordinate Judge has found on evidence that the land on which the said trees stand is included in a patti which belongs to the defendants and that the trees in dispute also belong to the defendants. These findings being findings of fact based upon admissible evidence must be accepted in second appeal."

The plaintiffs brought the present suit in 1931 alleging that they were owners of the trees in dispute, that the defendants had no right to or interest in the said trees, and that the possession of the trees had been delivered to the defendants' predecessors under misapprehension. The claim was resisted by the defendants and they set up the plea of *res judicata* also in defence. The plea of *res judicata* raised by the defendants was accepted by the lower courts and the result was that the plaintiffs' claim was rejected on that ground. The plaintiffs came to this Court in second appeal in December, 1932. This is the history of the litigation relating to the three trees in dispute.

I have examined the record and heard the learned counsel on both sides at some length.

In my opinion the plaintiffs' suit is barred by the rule of *res judicata*.

I have carefully examined the pleadings in the former suit. So far as I see, the parties had, by their pleadings, invited the court to decide the question of title to the three trees mentioned above. They had insisted on the point being tried. It was tried and was finally decided against the plaintiffs. The plaintiffs cannot now turn round and say that the point was not a necessary or proper one to be tried in the former suit and that it is open to them to say so in the present

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suit. In my opinion the question was directly and substantially in issue between the parties in the former suit, and they themselves had treated it as such and fought it out to the end. The final decision of the court of appeal upon the matter in dispute must be *res judicata* between the parties. I think that the observations made by their Lordships of the Privy Council in the following cases help the contention of the defendants learned counsel on the point under consideration: *Midnapur Zamindary Co., Ltd.* v. *Naresh Narayan Roy* (1) and *Krishna Chendra Gajapati Narayana Deo* v. *Challa Ramanna* (2).

In *Midnapur Zamindary Co., Ltd.* v. *Naresh Narayan Roy* (1) a suit for *"khas"* possession of land was resisted on the ground that as defendants had *jotedari* rights in the land the plaintiff was in any event not entitled to recover *"khas"* possession. The plaintiff maintained, and the first court held that a decision on the question of the *jotedari* right set up was unnecessary. The defendants, however, insisted that a decision on that question was necessary and urged that point in their appeal from the decree for possession passed by the first court. The appellate court went into the point, held against the defendants thereon and affirmed the decree below. The decree drawn up on appeal did not, however, expressly refer to the *jotedari* right. It was held that whether or not the decision of the point was necessary, the defendants having insisted upon the decision of that point by the appellate court and that court having decided the same against the defendants, the issue as to the *jotedari* right was *res judicata* against the defendants. The decree, though it did not expressly refer to the *jotedari* right, must be deemed to have given effect to the finding in the judgment.

In *Krishna Chendra Gajapati Narayana Deo* v *Challa Ramanna* (2) it was held that where a point is

(1) (1924) L.R., 51 I.A., 293 (299–303); 23 A.L.J.R., 76 (82–84)

(2) (1932) A.I.R., P.C., 50.

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not properly raised by the plaint, but both parties have without protest chosen to join issue upon that point, the decision on the point would operate as *res judicata* between the parties.

It may be that on general grounds the question of the title of a mortgagor to the mortgaged property cannot arise in a mortgage suit, but it does not necessarily follow that no question of title to any property can ever arise in a suit of that nature. Much depends upon the pleadings in the suit.

The plaintiffs' learned counsel has referred to my decision in *Ram Udit* v. *Ram Samujh* (1). That case differs materially from the present case in its facts and does not help the plaintiffs in the present case.

I should like to note also that this appeal has been filed by Musammat Moola alone. The plaintiffs Nos. 2 and 3 have sold Patti Jawahir Singh to her. It is clear that her only title to the trees in dispute arose out of the sale of Patti Jawahir Singh. She cannot succeed unless and until she establishes that the trees in dispute lie in the said patti. It has been finally decided between the parties that the trees do not lie in that patti. It must be held, therefore, that her claim is barred by *res judicata*.

I would, therefore, dismiss the appeal with costs.

1933 *November*, 20

By the Court (HASAN, C. J. and NANAVUTTY, J.):—As the decision of the majority of the Judges is in favour of the dismissal of the appeal, the appeal is hereby dismissed with costs.

Appeal dismissed.

(1) (1931) I.L.R., 7 Luck., 73 (F.B.).