one coming under the administrative powers of the Court but that it is in fact a judicial act in so far as we had to interpret the Legal Practitioners Act relating to the subject. I do not think that this contention can be supported. It may always be necessary in performing administrative acts for the Court or the Judge or the person whose duty it is to carry out these acts to consider and come to a conclusion as to what his powers may be under a particular Act of Council and the mere fact that such a consideration arises does not seem to me to take the case out of the ordinary course. The decision we arrived at was one which was necessary to come to before we could determine whether or not Miss Hazra could be admitted as a pleader. It was all part and parcel of an administrative act and that being so I cannot see how we can grant leave in this case because it is a matter which lies solely within the jurisdiction of their Lordships of the Privy Council and this Court has no power to make the order.

I regret that this should be so but I think Miss Hazra would have been better advised had she proceeded immediately to their Lordships of the Judicial Committee to ask for special leave.

ADAMI, J.—I agree.

Application rejected.

LETTERS PATENT.

Before Dawson Miller, C. J. and Adami, J.

PRITHI MAHTON

v.

JAMSHAD KHAN.*

1922.

April, 25.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 11—Res Judicata—*Execution proceedings, whether* Explanations *to section* 11 *applicable.*

* Letters Patent Appeal No. 49 of 1921.

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Although the rule of *res judicata* enunciated in section 11 of the Code of Civil Procedure, 1908, may be applicable in certain execution proceedings arising out of the same judgment, and may also possibly be applicable in certain cases where separate suits have been brought raising points which have already been decided in execution cases between the same parties still the special rules laid down in the *Explanations* to section 11 which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally in execution cases.

Kaliyan Singh v. *Jagan Prasad*(1) and *Nityananda Gantayat* v. *Gajapati Vasudeva Devu*(2), approved.

On the 18th September, 1913, the landlord of a holding obtained a decree for rent against the tenant. In January, 1914, the tenant, defendant No. 2, transferred a portion of the holding to defendant No. 1. On the 16th April, 1914, the landlord purchased the holding in execution of the rent decree and obtained possession on the 4th August, 1914. Defendant No. 1 thereupon applied under Order XXI, rule 90, of the Code of Civil Procedure, 1908, to set aside the sale on the ground that he was a transferee of a portion of the holding, and the sale was set aside. In the present suit the landlord prayed for confirmation of possession of the holding and for a perpetual injunction restraining defendant No. 1 from obtaining possession or from recovering mesne profits. He also contended that there was no custom of transferability in the village in which the property was situated. Defendant No. 1 pleaded that the question of transferability not having been raised in the proceeding under Order XXI, rule 90, *Explanation* IV to section 11 was a bar to it being raised in the present suit. *Held*, that the plaintiff was entitled to raise the question of the transferability of the holding.

The facts of the case material to this report are stated in the judgment appealed from which was as follows :—

This is an appeal by the defendant. The plaintiff is the landlord and the defendant is the purchaser from the previous tenant of the holding. The landlord sues in ejectment on the ground that there is no custom of transferability of holdings in this village. Two points are taken in second appeal. The first is the question of transferability not having been raised in certain proceedings under Order XXI, rule 90, by the

(1) (1915) I. L. R. 37 All. 589. (2) (1901) I. L. R. 24 Mad. 681.

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present plaintiff, it is not open to him now to raise this contention. It appears that the plaintiff had a decree for rent against the predecessor of the defendant's vendor which was, so far as its legal effect was concerned, a decree for money. In execution of that decree he sold the holding and the defendant got that sale set aside in an application under Order XXI, rule 90. It is now contended that the landlord, the present plaintiff, ought in these proceedings to have taken the objection that the holding was non-transferable and as he did not do so then, he cannot do so now. It is admitted that the rule of *res judicata* does not apply strictly to execution proceedings, but it is contended that an analogous principle is applicable as has been recognized in *Mazaem Hossein Mundul* v. *Kumari Debi*(1) and *Maharaja Sir Rameshvar Singh Bahadur* v. *Keshwar Rai*(2). There are several answers to this contention. In the first place there is no evidence that the present plaintiff did not raise this objection in the case under Order XXI, rule 90. The point has not been dealt with by the District Judge and apparently was not taken before him. And there is no finding that this point was not raised in the execution case.

In the second place it is contended that under the decision of this Court a proprietor is not entitled to sell a non-transferable holding in execution of a money decree [*Macpherson* v. *Debibhusan Lal*(3)] and consequently this point was not open to the plaintiff. Thirdly, there is no reason why I should assume that the present plaintiff at that stage was aware that the defendant was a purchaser of the entire holding. The plaintiff had brought his suit for rent against the original tenant and after the execution sale the present defendant claimed as purchaser not of the entire holding but of a portion only and there is no ground for attributing then to the plaintiff a knowledge which he has now, that although a small portion of the holding had been nominally reserved by the original tenant the present defendant was in fact the purchaser of the entire holding.

Finally, the plaintiff in the present suit sues a landlord. In the proceedings under Order XXI, rule 90, he was opposing the defendant's application in the capacity of a purchaser under a decree for money.

On all these grounds I must hold that there is no substance in this contention.

In the second place it was argued that the findings are not sufficient to establish an abandonment of the holding within the meaning of section 87 of the Bengal Tenancy Act inasmuch as some of the elements provided in that section are not established. The short answer to this contention is that section 87 is not a comprehensive definition of what abandonment means. It is found as a fact that the original tenant has left the village and lost all connection with the holding. This is an abandonment.

The appeal is dismissed with costs.

The defendant 1st party appealed under the Letters Patent.

(1) (1909-10) 14 Cal. W. N. 433. (2) (1918) 47 Ind. Cas. 790.
(3) (1917) 2 Pat. L. J. 530.

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DAWSON MILLER, C. J.

Murari Prasad, for the appellant.

Mohamad Hasan Jan, for the respondent.

DAWSON MILLER, C. J.—This is an appeal on behalf of the defendant No. 1 from a decision of Mr. Justice Ross, dated the 27th of May last year. The plaintiffs are the proprietors of a plot of land measuring 2 *bighas*, 2 *dhurs*, of which the defendant No. 2 and apparently the defendant No. 3, for there is some doubt about his interest, were the tenants. The tenants sold the land to the defendant No. 1 under a *kabala* but it appears from the terms of that *kabala* that the whole holding less 12 *kanwas* alone was sold under that *kabala*. The purchaser, therefore, was not the transferee of the whole holding but transferee of a portion of the holding. Before the date of this transaction, namely, on the 18th of September, 1913, the plaintiff, as landlord, obtained a decree for rent against the defendant No. 1's vendors, and on the 16th April, 1914, the land was put up to sale in execution of that decree and purchased by the plaintiff. The decree obtained by the landlord for some reason which has not been explained was treated as a money decree only but nevertheless the land was sold and purchased by the landlord who on the 4th August in the same year actually got delivery of possession of the land. Subsequently the defendant No. 1, Prithi Mahton, the transferee, took proceedings under Order XXI, rule 90, Code of Civil Procedure, for setting aside the sale, and he produced his *kabala* under which he purchased the land in support of his application to show that he had an interest in the land. Now I pause here for a moment to point out that the interest asserted by the defendant No. 1 at the time of his application under Order XXI, rule 90, was an interest in a portion of the holding only, and therefore, so far as the plaintiff was concerned, there appears to have been no reason why he should then take the point that the holding was non-transferable because even if he succeeded in proving the point nevertheless

a transfer of a portion only of the holding would be binding as against him provided that the original holder or occupier had not abandoned possession of the whole holding. Eventually the application of the defendant No. 1 under Order XXI, rule 90, proved successful and the sale was ordered to be set aside. He however had some difficulty in getting possession and further proceedings were taken first under section 144, and subsequently under Order XXI, rule 101: but it would appear that although the defendant No. 1 had been in possession at some time between the date of his *kabala* in September 1913 and August in the following year when the plaintiff got possession by an order of the Court, still, from the latter date up to the time of this suit it seems, although it is not absolutely clear from the judgments, that the plaintiffs themselves had been in possession of this land. Indeed in the plaint amongst other things the plaintiffs prayed for confirmation of their possession and that in fact is one of the reliefs granted by the learned Munsif which was affirmed both by the Lower Appellate Court and by the Judge of this Court. I mention this because in one portion of the Munsif's judgment it would appear that he found upon the evidence of the plaintiffs' witnesses that the defendants were in fact in possession of the whole holding. It would seem, however, that in arriving at that finding what he really was discussing was the original possession of the defendants up to some time in August, 1914.

The plaintiffs claimed that possession of the property in suit may be confirmed and that a perpetual injunction may be issued upon the defendant 1st party restraining him from getting possession over the property in suit or from recovering mesne profits and further asked for that relief after finding that there was no custom of transferability in the *mouza* in which the property is situated and that the original tenants had in fact abandoned the property in suit.

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Various defences were raised in the suit, and among others it was contended that the suit was barred by reason of the provisions of section 11 read in the light of the fourth *Explanation* to that section of the Civil Procedure Code. It was contended that the question of non-transferability which, if established, would put an end to the defendant's claim, could not now be raised because in the proceedings under Order XXI, rule 90, no such point had been taken by the landlord, and if it had not been taken then, it could not be taken now because it might have been taken then. It was therefore contended that the present suit was barred by *res judicata*. The Munsif with regard to this question came to the conclusion that the point had really never been taken at all or decided by the execution court in the proceedings under rule 90 of Order XXI, and therefore held that, the point not having been raised or decided, there was no bar to the plaintiffs raising the point now. He did not deal in terms with the fourth *Explanation* to section 11 but possibly he had in mind the result of certain cases which have been decided both in Madras and Allahabad, where it has been laid down that whatever may be the extent to which an analogous doctrine to that laid down in section 11 may be applied in execution cases, still, the *Explanations*, as for example *Explanation* 4 and *Explanation* 5, can have no application to proceedings of that nature so as to bar the plaintiffs in a subsequent suit from raising points which have not been determined in the previous execution proceedings. When the matter came before the District Judge, although a question was raised based upon the doctrine of estoppel, no question was raised, as far as appears from the learned Judge's judgment, upon the point which has now been argued before us in this appeal, and there is nothing to show that the point in fact was taken before the learned District Judge. Had it been taken it would have been open to the appellant before us to-day to bring some evidence or some proof that the point had in fact been argued

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and that the learned Judge omitted to deal with it. But it would appear on reading the judgment of the learned District Judge that the point was never taken and therefore one must assume that it was abandoned. Now when the matter came before the Judge of this Court that point, which I may say is the only point, which has been argued before us to-day, and other points were urged. The learned Judge dismissed the appeal and in dealing with the point I have just referred to, he pointed out that it should not succeed because for obvious reasons it had not been taken before the learned District Judge and therefore the appellant ought not to be allowed now to revive it in appeal before him. With that part of the learned Judge's judgment I entirely concur and that in itself would be sufficient to lead us to dismiss this appeal. I further think, however, that although the doctrine laid down in section 11 of the Civil Procedure Code relating to *res judicata* may be applied and rightly applied in certain proceedings in execution arising out of the same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases fought between the same parties, still I do not think that the special rules laid down in the *Explanation* to that section which go beyond the ordinary doctrine of *res judicata* ought to be applied generally in execution cases. The High Court at Allahabad in the case of *Kalyan Singh* v. *Jagan Prasad* (1) held that " if a judgment-debtor does not take exception to the amount erroneously set forth in an application for the execution of a decree as being the sum due, he is not prevented by the principle of *res judicata* from doing so on a subsequent application for the execution of the same decree ". It was argued in that case that by reason of *Explanation* 4 to section 11 of the Code, the judgment-debtor, not having taken the point in the first application for execution of his decree, was barred from taking the point in a subsequent

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application. The Court who delivered the judgment in that case, consisting of the Chief Justice and Rafiq, J., refused to accept this contention and refused to apply the principle laid down in *Explanation* 4 to section 11 to cases of that nature. Again in Madras in the case of *Nityananda Gantayet* v. *Gajapati Vesudeva Devu* (1) the Court refused to apply the law of *res judicata* as laid down in *Explanation* 3 of section 13 of the Code of 1882, which is now *Explanation* 5 of the present Code, to a case where the plaintiff had been awarded by a decree possession of land together with mesne profits and applied in execution for delivery of the land and for mesne profits but was not awarded mesne profits by the executing Court. In fact that Court made no reference to it in its decision and when the plaintiffs subsequently applied for mesne profits they were met with the objection arising under what is now *Explanation* 5 of section 11, and the Madras High Court refused to entertain the argument based upon that *Explanation* in such a case. I see no reason to differ from the principles laid down in those cases and therefore on this ground also I think that this appeal should be dismissed. The respondents are entitled to their costs of this appeal.

ADAMI, J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller, C. J. and Adami, J.

1922.

April, 27.

QAYAMUDDIN KHAN

v.

RAMYAD SINGH.*

Co-Sharer Landlords—some in direct possession of bakasht *lands—Collectorate partition—whether co-sharers*

* Letters Patent Appeal Nos. 101 and 102 of 1921.

(1) (1901) I. L. R. 24 Mad. 681.