

**APPELLATE CIVIL.**

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*Before Addison and Agha Haidar JJ.*

KAPURIA AND ANOTHER (PLAINTIFFS) Appellants

*versus*

MST. GANGA DEVI AND OTHERS (DEFENDANTS)

Respondents.

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Feb. 2.

Civil Appeal No. 2574 of 1927.

*Civil Procedure Code, Act V of 1908, section 11: Res judicata—General principles—cannot affect express provisions of the Statute.*

*Held [following Fazal Hussain v. Jivan Shah (1)], that the general rule of res judicata which exists apart from the provisions of section 11 of the Code of Civil Procedure can be resorted to only in those cases which do not strictly fall within the four corners of section 11 of the Code. In other words, if a case clearly comes within the four corners of section 11, then it is not allowable to invoke in aid the more or less nebulous doctrine of the general principles of res judicata, and the case must be decided according to the language of section 11 as interpreted by Courts.*

*Mussammatt Sahib Zadi Begum v. Muhammad Umar (2).*  
dissented from.

*Held also, that where the decision relied upon as res judicata was by a Court not competent to try the suit in which the plea is raised, the fact that the decision was confirmed on appeal by a Court which was competent to try the subsequent suit, makes no difference in principle.*

*Second Appeal from the decree of R. S. Lala Shibbu Mal, District Judge, Ambala, dated the 25th June, 1927, reversing that of Sayyed Muhammad Abdullah, Subordinate Judge, 2nd class, Ambala, dated the 7th August, 1926, and dismissing the plaintiffs' suit.*

(1) (1933) I. L. R. 14 Lah. 369.

(2) (1927) I. L. R. 8 Lah. 15.

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JAGAN NATH AGGARWAL and J. L. KAPUR, for  
Appellants.

NANAK CHAND, for *Mst.* Ganga Devi, Respondent.

AGHA HAIDAR J.—This appeal arises out of a suit for possession of certain lands situate at *Mauza* Chadiali, *tahsil* Ambala. The trial Court decreed the plaintiffs' claim; but, on appeal by the defendant, the lower appellate Court has set aside the decree of the trial Court and dismissed the plaintiffs' suit. The plaintiffs have come up to this Court in second appeal.

The facts leading up to the present litigation, in so far as they are necessary for the purposes of the present appeal, are as follows :—

One Munshi died many years ago, leaving him surviving his widow, *Mussammat* Bhagirti, and two children Ram Bhaj (son) and *Mussammat* Ganga Devi (daughter). On the death of Munshi the property was mutated in the name of Ram Bhaj, his son, but Ram Bhaj also died some 8 or 9 months after the death of his father and the property was once again mutated in the name of *Mussammat* Bhagirti, the widow of Munshi and mother of Ram Bhaj. On the 5th July, 1922, *Mussammat* Bhagirti gifted 61 *bighas*, 8 *biswas* of land to her daughter, *Mussammat* Ganga Devi. In December, 1923, *Mussammat* Bhagirti died and the property was mutated in the name of *Mussammat* Ganga Devi, the sister of the last male owner, namely, Ram Bhaj. The plaintiffs, who claim to be the collaterals of Munshi Ram, brought the present suit against *Mussammat* Ganga Devi on the allegations that *Mussammat* Ganga Devi, as the sister of the last male owner, could not succeed to the property in suit and that the gift of the property by *Mussammat*

Bhagirti in her favour was invalid. The plaintiffs' suit was decreed by the Subordinate Judge on the ground that *Mussammat Ganga Devi*, who was the sister of the last male owner, Ram Bhaj, could not succeed to her brother and that the plaintiffs had a superior right as against her. *Mussammat Ganga Devi*, the sister, appealed to the District Judge who held that, in view of a previous decision between Kapuria, one of the plaintiffs who represented the collaterals, and *Mussammat Bhagirti* and some of her alienees, the present suit could not be maintained and was barred by *res judicata*. He accordingly dismissed the plaintiffs' suit on this ground.

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The question of *res judicata* in the present case arises in this way. *Mussammat Bhagirti* had made a mortgage in favour of certain persons for a sum of Rs. 500, some time in 1907. In April, 1907, a suit was brought by Kapuria, one of the present plaintiffs, who then claimed to be the collateral of Munshi in the 6th degree, against *Mussammat Bhagirti* and her mortgagees on the ground that *Mussammat Bhagirti* had no right to make any alienation of property which would injuriously affect the reversionary rights and interests of the plaintiffs. That suit was decreed by the Munsif, 1st class; but on appeal the judgment of the Munsif was set aside and the suit was dismissed by Mr. Dundas, Divisional Judge, on the 9th November, 1907. In that decision the following points were decided:—

(1) that the plaintiff was Munshi's collateral in the sixth degree;

(2) that the plaintiff and Munshi were governed by Hindu Law, although they were agriculturists, in matters of succession and alienation; and

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(3) that Kapuria was not an heir of the last male owner, Ram Bhaj, under the Hindu Law.

The learned Judge of the lower appellate Court has held that the decision of Mr. Dundas operated as *res judicata* because in that decision it was held that the plaintiff Kapuria was not an heir of the late Ram Bhaj under the Hindu Law.

Reliance was placed on *Mussamat Sahib Zadi Begum v. Muhammad Umar* (1). There cannot be any doubt that this decision supports the plea of *res judicata* raised on behalf of the defendant, since it lays down that the rule of *res judicata* is not confined to the provisions of section 11 of the Code of Civil Procedure but may be invoked as a general principle of law and the previous decision should be held to be a final decision on the question decided by it, although the Court which gave that decision had no pecuniary jurisdiction to try the subsequent suit. With the utmost respect to the learned Judges who decided that case, I beg to disagree with this view. The general rule of *res judicata* which exists apart from the provisions of section 11 of the Code of Civil Procedure can be resorted to only in those cases which do not strictly fall within the four corners of section 11 of the Code. In other words, if a case clearly comes within the purview of section 11 then it is not allowable to invoke the more or less nebulous doctrine of the general principles of *res judicata* and the case must be decided according to the language of section 11 as interpreted by the Courts. In the present case it is perfectly clear on the record that the judgment in the previous litigation was given in a case which was decided by a Munsif

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(1) (1927) I. L. R. 8 Lah. 15.

of the first class whose pecuniary jurisdiction extended to Rs. 1,000 only. The present suit was brought in a Court with a higher pecuniary jurisdiction and could not have been decided by the Munsif who tried the previous suit and the fact that the decision of the learned Munsif went up in appeal to Mr. Dundas. Divisional Judge, does not make any difference in principle. In my judgment, therefore, the point of *res judicata* was wrongly decided by the learned Judge of the lower appellate Court on the authority of the decision quoted above. I am fortified in my view by a judgment of this Court in *Fazal Hussain v. Jivan Shah* (1), decided by Tek Chand and Monroe JJ. with which I agree. No other point has been argued. This being the position, I would accept this appeal and set aside the judgment and decree of the lower appellate Court. As the case had been disposed of on a preliminary point I remand the case for decision on the remaining issues under the provisions of Order 41, rule 23 of the Civil Procedure Code. Costs heretofore shall abide the result. The appellants shall be entitled to a refund of the court-fee paid on the memorandum of appeal in this Court.

ADDISON J.—I agree.

*N. F. E.*

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*Appeal accepted.*

*Case remanded.*

(1) (1933) I. L. R. 14 Lah. 369.