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too clear to bear the construction that he puts upon it. There is no reference to the guardian in the question at all and the question is a direct question as to the liability of the minor. The second portion of the question clearly shows that the question was with reference to the liability of the property in the hands of the minor.

I would, therefore, accept this appeal and dismiss the objection with costs throughout and direct the Court to proceed with the execution according to law.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

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Nov. 28.

FAZAL HUSSAIN AND OTHERS (PLAINTIFFS) Appellants,

versus

JIWAN SHAH AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 3070 of 1927.

Civil Procedure Code, Act V of 1908, Section 11: Res judicata—*Jurisdiction of Court which tried previous case to try the subsequent suit — necessary — Attestation of deed — effect of—whether attesting witness is presumed to know contents of document.*

Held, that although Section 11 of the Civil Procedure Code is not exhaustive of the law of *res judicata* and the general principles underlying that rule can be invoked in reference to matters on which the section is silent or with regard to proceedings to which it does not in terms apply; as regards matters which are specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the phraseology used by the Legislature and have no power

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to ignore the express provisions of the Statute in order to give effect to general principles.

Makhanlal v. *Gulzari Mal* (1), *Hook* v. *Administrator-General of Bengal* (2), *Ramachandra Rao* v. *Ramachandra Rao* (3), *Nirbhe Ram* v. *Mool Chand* (4), and *Mussammat Lachhmi* v. *Mst. Bhulli* (5), relied upon.

Hence, for a decision in a former case to be *res judicata* in a subsequent suit, the Court which tried the former suit must be competent to try such subsequent suit.

Gokul Mandar v. *Pudmanund Singh* (6), *Qasim Ali* v. *Puran Mal* (7), and *Husssain Shah* v. *Ghulam Nabi Shah* (8), followed.

Mussammat Sahibzadi Begum v. *Muhammad Umar* (9), dissented from.

Held also, that it is settled law that the attestation of a deed proves no more than that the signature of an executing party had been made to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor fix him with notice of its provisions.

Banga Chandra Dhur Biswas v. *Jagat Kishore Acharjyo* Chowdhuri (10), and *Pandurang Krishanaji* v. *Markundeya Tukaram* (11), relied upon.

First Appeal from the decree of Bawa *Jhanda Singh, Senior Subordinate Judge, Jhang, dated the 9th August, 1927, dismissing the plaintiffs' suit.*

GHULAM MOHY-UD-DIN and DEV RAJ SAWHNEY, for Appellants.

J. L. KAPUR, JOWAHAR SINGH DHILLON, NAIN SINGH GAUBA and MEHR CHAND SUD, for Respondents.

TEK CHAND J.

TEK CHAND J.—The plaintiffs' suit was dismissed by the learned trial Judge on the ground (*inter alia*),

(1) (1884) I.L.R. 6 All. 289 (P.C.).
(2) (1921) I.L.R. 48 Cal. 499 (P.C.).
(3) (1922) I.L.R. 45 Mad. 320, 331
(4) (1929) 117 I. C. 83.
(5) (1927) I.L.R. 8 Lah. 384, 394.
(6) (1902) I.L.R. 29 Cal. 707 (P.C.).
(7) (1929) 117 I. C. 68.
(8) (1928) 108 I. C. 623.
(9) (1927) I.L.R. 8 Lah. 15.
(10) (1917) I.L.R. 44 Cal 186 (P.C.).
(11) (1922) I.L.R. 49 Cal. 334 (P.C.).

that the question of his relationship with Chiragh Shah, the husband of *Mussammat* Jintan Bibi, deceased, was *res judicata* by reason of a previous decision by *Sardar* Ghulam Haidar Khan, Munsif, 1st class, dated the 24th November 1914 in *re Umid Ali Shah* v. *Ahmad Shah*, printed at page 67 of the paper book. In coming to this decision the learned Judge followed a ruling of the Division Bench reported as *Must. Sahibzadi Begum* v. *Muhammad Umar* (1). It is clear, however, that *Sardar* Ghulam Haidar Khan, who decided the previous suit, was a Munsif of the first class and was not competent to try the present suit. This being so, his decision cannot be *res judicata* in the present case in view of the provisions of section 11 of the Code of Civil Procedure, which expressly lays down that in order that a decision in a former case be *res judicata* in a subsequent suit, the Court which tried the former suit must be competent to try such subsequent suit. In *Gokul Mandar* v. *Pudmanund Singh* (2), the question came up before their Lordships of the Privy Council in reference to the identical provision in section 13 of the Code of 1882, and it was ruled that under that section a decision in a former suit "cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself, in which the issue is subsequently raised." Lord Davey in delivering the judgment of their Lordships observed that "in this respect the enactment went beyond the previous Act X of 1877 and also beyond the law laid down in the *Duchess of Kingston's Case* (3)." This decision of their Lordships has been followed in numer-

(1) (1927) I. L. R. 8 Lah. 15. (2) (1902) I. L. R. 29 Cal. 707 (P.C.).
(3) (1776) 2 Smith's L. C. 10 Ed. 713.

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ous cases in this Court as well as the other Courts in India. In *Must. Sahibzadi Begum* v. *Muhammad Umar* (1), however a Division Bench without reference to the Privy Council decision aforesaid held that notwithstanding the provisions of section 11 the judgment in a former suit will operate as *res judicata* in a subsequent suit by reason of "the general principles of law," even where the Judge who decided the former suit was not competent to try the subsequent one. With all deference to the learned Judges who decided that case, I am of opinion that the law has not been laid down correctly in it. It is no doubt true that section 11 is not exhaustive of the law of *res judicata*, and that the general principles underlying that rule can be invoked in reference to matters on which the section is silent or with regard to proceedings to which it does not in terms apply, *Makhanlal* v. *Gulzari Mal, &c.* (2), *Hook* v. *Administrator General of Bengal* (3), *T. B. Ramachandra Rao* v. *A. N. G. Ramachandra Rao* (4), and *Must. Lachhmi* v. *Must. Bhulli* (5). But as regards matters which are specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the phraseology used by the Legislature, and have no power to ignore the express provisions of the Statute in order to give effect to the "general principles of law." In *Nirbhe Ram* v. *Mool Chand* (6), this view was taken by Fforde J. himself, who was one of the Judges who decided *Must. Sahibzadi Begum* v. *Muhammad Umar* (1), and it was held that "though the rule of *res judicata* is not limited to the provisions of section 11, Civil

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(1) (1927) I.L.R. 8 Lah. 15.
(2) (1884) I.L.R. 6 All. 289 (P.C.).
(3) (1921) I.L.R. 48 Cal. 499 (P.C.).
(4) (1922) I.L.R. 45 Mad. 320 (P.C.).
(5) (1927) I.L.R. 8 Lah. 384, 394.
(6) (1929) 117 I. C. 83.

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Procedure Code, the doctrine of *res judicata* on general principles cannot be invoked in such a manner as to render the provisions of the said section nugatory." Further in *Hussain Shah* v. *Ghulam Nabi Shah* (1), which was decided by Dalip Singh J. sitting singly, the learned Judge observed that he had had the advantage of discussing the matter with Fforde J. and he understood it from him that *Must. Sahibzadi Begum* v. *Muhammad Umar* (2), does not lay down, nor purport to lay down, any rule of law contrary to the Privy Council ruling reported as *Gokul Mandar* v. *Pudmanund Singh* (3) In *Qasim Ali* v. *Puran Mal, &c.* (4), the learned Chief Justice and Agha Haidar J. did not follow *Must. Sahibzadi Begum* v. *Muhammad Umar* (2), and held that "if a case is covered by the provisions of section 11 the general doctrine of *res judicata* cannot be invoked." I must, therefore, hold that *Must. Sahibzadi Begum* v. *Muhammad Umar* (2) was not correctly decided, and respectfully refuse to follow it. The finding of the lower Court on this point is, therefore, erroneous and cannot be sustained.

On the finding by this Court that the judgment of *Sardar* Ghulam Haidar Khan does not operate as *res judicata* in the present case, Mr. Kapur for the respondent urges that he should be allowed an opportunity of producing evidence which was led by his client before *Sardar* Ghulam Haidar Khan and accepted by him in coming to a finding in his favour, but which his client did not think it necessary to produce in the present case in the belief that the judgment in the former suit was decisive of the issue as to relation-

(1) (1928) 108 I. C. 623
(2) (1927) I. L. R. 8 Lah. 15.
(3) (1902) I. L. R. 29 Cal. 707 (P.C.).
(4) (1929) 117 I. C. 68.

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ship. In my opinion, Mr. Kapur's prayer is reasonable and must be granted in the interests of justice. Mr. Ghulam Mohy-ud-Din for the appellant does not raise any objection, but asks for permission to lead evidence in rebuttal. This prayer also is reasonable and must be granted.

As neither party desires to produce fresh oral evidence, and both sides wish to file documents or certified copies thereof, it is not necessary to send the case back to the lower Court for the purpose. Both counsel have filed to-day lists of the documents on which they rely. These documents, or certified copies thereof, shall be filed on or before the 15th of June 1932. The documents produced shall be translated at the expense of the party producing them. It is not necessary to have the translations printed but it will be sufficient to have four typed copies prepared, two for the Judges who will hear the case and one for each counsel. The office will take steps to have the additional paper-book prepared with as little delay as possible.

Dated 26th May, 1932.

MONROE J.

MONROE J.—I agree.

Judgment, dated 28th November 1932.

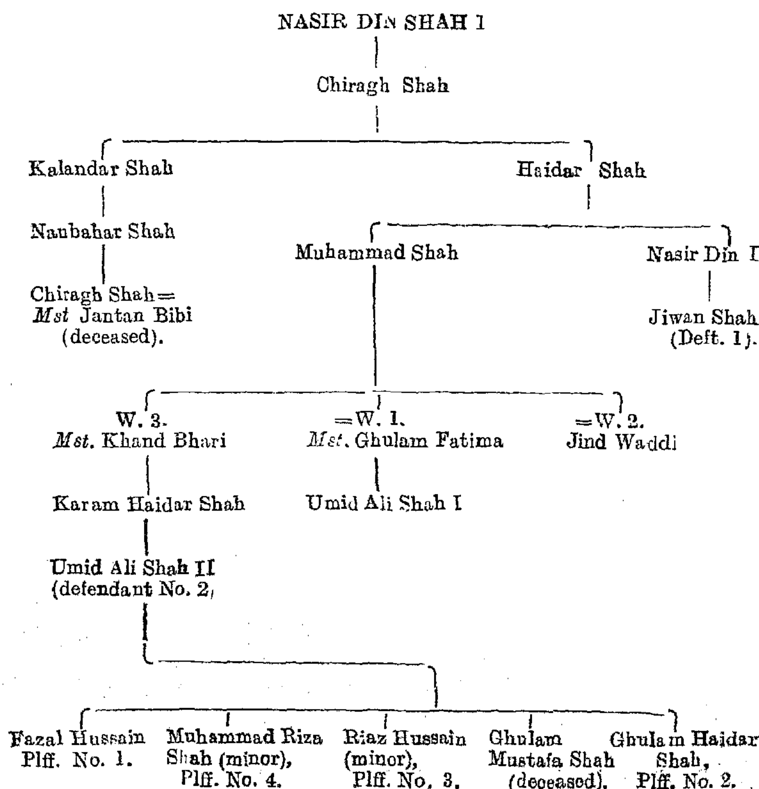
TEK CHAND J.

TEK CHAND J.—This should be read in continuation of our order of 26th May, 1932.

The copies of the documents on which the parties wished to rely, have been filed and translated and we have heard both parties on the other points requiring decision.

The land in suit admittedly belonged to one Chiragh Shah, a *Bukhari Sayyad* of the Jhang District who died childless many years ago. On his death, his widow *Mussammat* Jantan Bibi succeeded

on the usual life tenure. On the 24th May 1913 she made an oral gift of the whole of the land to Jiwan Shah, defendant No. 1, who is admittedly a collateral of her husband of the fourth degree. The plaintiffs, claiming to be agnates of Chiragh Shah, related in the same degree as the donee, have brought this suit for possession of one-half of the land, on the ground that the gift of ancestral property was ineffectual against their reversionary rights. The donor, *Mussammat* Jantan Bibi, died in February 1914 and the present suit was brought on the 10th of July 1926. It may be noted that Umid Ali Shah, father of the plaintiffs, is alive and has been impleaded as a *pro forma* defendant in the suit. In support of their claim the plaintiffs have propounded the following pedigree-table :—



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The defendant Jiwan Shah denied the alleged relationship of the plaintiffs to Chiragh Shah and pleaded that the plaintiffs' grandfather Karam Haidar Shah was not a son of Muhammad Shah, nor was *Mussammat* Khand Bhari one of his widows. He further urged that the question of Karam Haidar Shah's parentage had been decided against the plaintiffs' father Umid Ali Shah in a previous litigation between him and defendant No. 1 (Civil suit *Umid Ali Shah* v. *Ahmad Shah, etc.*, decided by *S.* Ghulam Haidar Khan on the 24th November 1914) and that that decision operated as *res judicata* against the plaintiffs. Lastly it was contended that the suit was barred by time.

The learned Subordinate Judge has upheld all these pleas and has dismissed the suit.

In our order of the 26th May 1932 we have held that the present suit is not barred by the rule of *res judicata* and, therefore, we must come to an independent finding on the question as to whether the plaintiffs, on whom the onus lay, have succeeded in proving that their grandfather Karam Haidar Shah was a son of Muhammad Shah.

It appears from the documents which have been placed on the record by the parties that Muhammad Shah died some time about 1860, leaving immoveable property of considerable value. On his death mutation was effected in favour of Umid Ali Shah I, who was admittedly his son by his senior widow *Mussammat* Ghulam Fatima. It is also clear that due provision was made at the time for the maintenance of his younger widow *Mussammat* Jind Waddi, who was childless. Nobody suggested at the time that Muhammad Shah had left a third widow *Mussammat* Khand

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Bhari, or that he had another son Karam Haidar Shah. It is inconceivable that no claim on behalf of Karam Haidar to one-half of the estate of Muhammad Shah, should have been made at the time, if he had been his son. Nor has it been explained why no provision was made for the maintenance of *Mussammat* Khand Bhari.

Again, we find that Umid Ali Shah I died childless in 1866 and the estate was mutated in the name of his mother *Mussammat* Ghulam Fatima and stepmother *Mussammat* Jind Waddi in equal shares. It is admitted that if Karam Haidar was the son of Muhammad Shah, he was entitled to succeed to the whole estate, but no mention was made of him or his mother *Mussammat* Khand Bhari on this occasion also. It is in evidence that *Mussammat* Jind Waddi, who had succeeded to half the estate, proceeded to make extensive alienations in favour of strangers, apparently without necessity, and yet no objection was raised by or on behalf of Karam Haidar.

Ten years later, in 1867 Karam Haidar appeared on the scene for the first time and succeeded in ingratiating himself in the good books of *Mussammat* Ghulam Fatima, who was anxious to see that the estate did not go to her husband's reversioner, Jiwan Shah, defendant. She, accordingly, stated before the revenue authorities that she had gifted her estate in favour of Karam Haidar Shah, who was described as a son of Muhammad Shah by a third widow *Mussammat* Khand Bhari. *Mussammat* Jind Waddi opposed the gift, denying that *Mussammat* Khand Bhari had been married to Muhammad Shah. Mutation was, however, effected in the name of Karam Haidar Shah. Jiwan Shah, defendant, was not present during these

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proceedings, and a few years later he brought a suit in the Civil Court for a declaration that Karam Haidar Shah was not the son of Muhammad Shah and that the gift by *Mussammat* Ghulam Fatima, in his favour was invalid and would not affect the plaintiffs' reversionary rights after the donor's death. In this suit a compromise was effected, whereby Karam Haidar Shah surrendered immediate possession of one-half of the gifted property to Jiwan Shah. It is contended by the appellants' counsel that this was an admission by Jiwan Shah that Karam Haidar Shah was the son of Muhammad Shah. But the terms of the compromise, the judgment which followed thereon and the proceedings in the case do not lend any support to this contention. It is no doubt true that the suit was decreed in respect of one-half of the gifted property only, but it is evident that Jiwan Shah preferred to get immediate possession of half the land, rather than wait for many years for succession to such portions of *Mussammat* Ghulam Fatima's estate, as might have remained unalienated at the time of her death.

Counsel next relied on Exhibits P. W. 2/2 and P. W. 2/3, which are deeds of alienation by Karam Haidar Shah in favour of third parties, and are admittedly attested by Jiwan Shah, defendant. In these deeds, Karam Haidar Shah described himself as the son of Muhammad Shah, and it is argued that this is a clear admission of the parentage of Karam Haidar Shah and is binding on the defendant. In my opinion this contention is without force. It is now settled law that the attestation of a deed proves no more than that the signature of an executing party had been attached to a document in the presence of a witness. As observed by their Lordships of the Privy Council it " does

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not involve the witness in any knowledge of the contents of the deed, nor fix him with notice of its provisions." *Banga Chandra Dhur Biswas* v. *Jagat Kishor Acharjya Chowdhuri* (1) and *Pandurang Krishanaji* v. *Markundeya Tukaram* (2). These documents, therefore, do not carry the case of the plaintiffs any further.

Lastly, Mr. Ghulam Mohy-ud-Din relied upon Exhibit P. 4 which is an extract from the pedigree-table prepared in the Settlement of 1904-05, in which Karam Haidar Shah is shown as the *son of Muhammad Shah by* Mussammat *Ghulam Fatima.* This document does not support the case of the plaintiffs which, as stated already, is that the name of Karam Haidar Shah's mother was *Mussammat* Khand Bhari and not *Mussammat* Ghulam Fatima. The plaintiffs produced some oral evidence also, but admittedly the witnesses have no personal knowledge of the relationship of the members of this family and their evidence, even if admissible, is obviously worthless.

After a careful consideration of the materials on the record and giving due weight to the arguments urged at the bar, I am of opinion that the plaintiffs have failed to establish their contention, that their grandfather Karam Haidar Shah was the legitimate son of Muhammad Shah. On this finding the plaintiffs' suit must fail, and it is not necessary to discuss the plea of limitation, which had been raised by the defendant and had been upheld by the Court below.

I would dismiss the appeal with costs.

MONROE J.

MONROE J.—I agree.

N. F. E.

Appeal dismissed.

(1) (1917) I.L.R. 44 Cal. 186 (P.C.). (2) (1922) I.L.R. 49 Cal. 334 (P.C.)