to cost only Rs.2000, apart from the fact that the value of the Indian rupee has been eroded and Indian life has become dearer since the time the statute was enacted, and the consciousness of the comforts and amenities of life in the Indian community has arisen, it would have been quite appropriate to revise this fossil figure of Rs.2000 per individual, involved in an accident, to make it more realistic and humane, but that is a matter for the legislature; and the observation that I have made is calculated to remind the law-makers that humanism is the basis of law and justice.

13. We find ourselves in complete agreement with the observations made by the Kerala High Court in the aforesaid case and we would like to remind the law-makers that the time has come to take a more humane and practical view of things while passing statutes like the Motor Vehicles Act in regulating compensation payable by Insurance Companies to victims of motor accidents. We have not the slightest doubt that if the attention of the Government is drawn, the lacuna will be covered up in good time.

14. The result is that Civil Appeal Nos. 1826 of 1968 and 132 of 1969 are dismissed and Civil Appeal No. 2310 of 1968 is allowed to this extent that the claim preferred by Raha is enhanced from Rs.60,000 to Rs.1,00,000. As no authentic proof of any settlement between Gupta and Raha has been produced before us, the decree passed by us will be jointly and severally recoverable from Gupta and Bhuta after giving credit for the amounts received by Raha. It will, however, be open to the executing court on proof of any full and final settlement of the claims of Raha with Gupta or any other judgment-debtor to adjust the claims accordingly under Order 23 Rule 3 of the Code of Civil Procedure. In the circumstances of the case, the parties will bear their own costs in this Court.

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(BEFORE A. N. RAY, C.J. AND M. H. BEG AND P. N. SHINGHAL, JJ.)

NARAYANA PRABHU VENKATESWARA PRABHU .. Appellant;

Versus

NARAYANA PRABHU KRISHNA PRABHU (DEAD) BY L. Rs. .. Respondents.

Civil Appeal No. 1763 of 1968† and C. M. P. No. 9359 of 1976

with

C. M. P. Nos. 8585-8586 of 1976 and SLP No. 2816 of 1976‡, decided on January 19, 1977

Civil Procedure Code, 1908 — Section 11, Explanation II — Bar of res judicata, held, does not depend on the existence of a right of appeal

†From the Judgment and Decree dated the 28th July, 1964 of the Kerala High Court in Appeal Suit 843 of 1960.

‡From the Judgment and Order dated July 28, 1964 of the Kerala High Court in A. S. 600 of 1961.

Civil Procedure Code, 1908 — Section 11, Explanation VI — Applicability — Partition suit between all four brothers and a money suit between two of them

A partition suit was filed by the respondent impleading all the other three brothers. Defendant-appellant, one of those three brothers, also filed a money suit against the plaintiff-respondent. Both the suits though filed on different dates and in different courts were transferred to the Additional Sub-Judge who decided them on the same day. The plaintiff-respondent had appealed against both the decrees in the High Court. The two appeals were heard and decided together by the High Court. The High Court, after pronouncing judgment in the partition suit, proceeded to give judgment, under a new heading and number of the appeal in the money suit. The judgments were, therefore, two separate ones given in one continuation but under separate headings. Separate decrees were prepared in each appeal relating to a separate case.

No appeal lay as a matter of right against the judgment in the appeal in the money suit though on ground of valuation under the unamended Article 133, an appeal lay in the partition suit.

As the defendant-appellant did not seek leave to file any appeal by special leave against the High Court's judgment and decree in the money suit and there was no appeal therefore before the Supreme Court against the decree in the money suit, a preliminary objection was taken by the respondent that the other appeal to the Supreme Court by certificate was barred by res judicata.

Held :

(a) Section 11, Civil Procedure Code enables the party to raise the statutory plea of res judicata if the conditions given therein are fulfilled. The principle embodied in the statute is not so much the principle of "estoppel by record", which the British Courts apply, as one of public policy, based on the two maxims : it concerns the State that there be an end to law suit ; and, secondly, no man should be vexed twice over for the same cause. Hence, Section 11 of our C.P.C. contains in statutory form, with illuminating explanations, a very salutary principle of public policy. (Paras 11 and 12)

Sheoprasan Singh v. *Ramanandan Prasad Narayan Singh*, AIR 1961 PC 78 : 43 IA 91, *referred to*.

(b) Now the question whether there is a bar of res judicata does not depend on the existence of a right of appeal of the same nature against each of the two decisions but on the question whether the same issue, under the circumstances given in Section 11, has been heard and finally decided. The mere fact that the defendant-appellant could come up to the Supreme Court in appeal as of right by means of a certificate of fitness of the case under the unamended Article 133(1)(c) in the partition suit, could not take away the finality of the decision so far as the High Court had determined the money suit and no attempt of any sort was made to question to the correctness of finality of that decision even by means of an application for special leave to appeal Explanation I on "former suit" further supports this conclusion. (Paras 16 and 18)

Lonankutty v. *Thomman*, (1976) 3 SCC 538, *followed*.

Bhugwanbutti Chowdhrani v. *A. H. Forbes*, ILR 28 Cal 78 : 5 CWN 483, *approved*.

Govind Bin Lakshmanshet Anjorlekar v. *Dhonba 'Ra' V Bin Ganba 'Ra' V 'Ta' Albye*, ILR Vol XV Bom 104 and *Avanasi Gouden* v. *Nachammal*, ILR 29 Mad 195 : 17 MLJ 374, *distinguished*.

Narhari v. *Shanker*, 1950 SCR 754 : AIR 1953 SC 419, *limited*.

Lachmi v. *Bhuli*, AIR 1927 Lah 289, *referred to*.

(c) Explanation VI is not confined to cases covered by Order 1, Rule 8 but extends to include any litigation in which, apart from the Rule altogether, parties are entitled to represent interested persons other than themselves. (Para 19)

Kunaravelu Chettiar v. *T. P. Ramaswami Ayyar*, AIR 1933 PC 183 : 60 IA 278 : 143 IC 665, *followed*.

In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided there is no reason why the others making the same claim cannot be held to be claiming a right "in common, for themselves and others". Each of them can be deemed, by reason of Explanation VI, to represent all those the nature of whose claims and interests are common or identical. If one were to hold otherwise, it would necessarily mean that there would be two inconsistent decrees. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. (Para 20)

Sheodan Singh v. *Daryao Kunwar*, (1966) 3 SCR 300 : AIR 1966 SC 1332, *relied on.*

Raj Lakshmi Dasi v. *Banamali Sen*, 1953 SCR 154 : AIR 1953 SC 33, *distinguished*, on the ground that it was based on the general principles of res judicata and not on Section 11.

Civil Procedure Code, 1908 — Section 11 — Decisions given beyond jurisdiction to try an issue cannot operate as res judicata (Para 13)

Civil Procedure Code, 1908 — Section 11 — Court competent to try such subsequent suit — Partition suit and money suit filed in different courts but transferred to the Additional Sub-Judge who actually tried and decided both of them — Held, the difference in the jurisdiction of the Courts, in which the suits were initially filed, became immaterial (Para 15)

Civil Procedure Code, 1908 — Section 11 — Applicability — One of the tests is whether non-applicability of the doctrine of res judicata results in inconsistent decrees (Para 20)

C.M.P. Nos. 8585-8586 of 1976, S.L.P. No. 2816 of 1976 and C.A. No. 1763 of 1968 dismissed
C.M.P. No. 9359 of 1976 allowed M/3409/C

Advocates who appeared in this case :

T. C. Raghavan, Senior Advocate (*Sardar Bahadur Saharya, V. B. Saharya*, Advocates with him), for the Appellant ;

T. S. Krishnamoorthy Iyer, Senior Advocate (*M. R. K. Pillai*, Advocate with him), for Respondent 1 ;

T. S. Krishnamoorthy Iyer, Senior Advocate (*P. K. Pillai* and *N. Sudhakaran*, Advocates, with him), for Respondent 2.

The Judgment of the Court was delivered by

BEG, J.—This is a defendant's appeal by certificate granted by the Kerala High Court under Article 133(1)(a) of the Constitution as a matter of course before its amendment because the High Court had modified a decree in the partition suit and the subject-matter satisfied the requirements of the unamended Article 133.

2. The parties to the partition suit are descendants of Narayana Prabhu (hereinafter referred to as 'Narayana'). Krishna, the plaintiff (now dead) was the third son of Narayana. The defendant-appellant, Venkateswara, was the eldest of the four sons of Narayana. The partition suit related to 72 items mentioned in Schedule 'A' to the plaint claimed by the plaintiff to be joint family property. It appears that there was no dispute with regard to certain items, but, the defendant-appellant claimed other items as his exclusive property on the ground that they had been purchased from his personal income due to his own enterprise and exertions and ability in carrying on business. The trial Court had accepted the

case of the defendant-appellant that all items, except No. 35 and a part of item No. 52 which belonged to the third defendant, were the self-acquired properties of the defendant-appellant. The High Court reversed this finding on the ground that there was "little reliable evidence on record as to the exact source of the fund with which the first defendant started the trade". The High Court rejected the submission of the defendant-appellant that, when the tobacco business under consideration was started, Narayana being the Karta of the family, the fact that the eldest son, Venkateswara, the defendant-appellant, was carrying on the business, raised a presumption that it was the separate or self-acquired business of Venkateswara. The High Court relying on certain documentary evidence, including the letter-heads showing the business as that of "P. N. Venkateswara Prabhu & Brothers" held that the business was joint family business.

3. The partition suit was filed originally in another Court but was sent to the Court of the Second Additional Sub Judge of Alleppey in 1957, and the preliminary decree was passed on August 5, 1960. The High Court allowed the appeal, modifying the decree to the extent that three-fourth share of items 4 to 72 of the schedule, except item 35 and part of 52 standing in the name of the third defendant, were held to be partible properties as part of joint family business, but it excluded assets which came into existence after the filing of the partition suit which operated as a clear unequivocal expression of intention to separate. It also left the extent of mesne profits of landed properties to be decided in proceedings for the passing of the final decree.

4. It appears that the defendant-appellant had also filed a money suit in the Court of the Munsif only against defendant 3, one of the four brothers, but all of them were impleaded in the partition suit. The money suit was, however, transferred to the file of the Additional Sub Judge and tried together with the partition suit and was also decided by the Additional Sub Judge of Alleppey on the same date as the partition suit. The plaintiff-respondent had appealed against both the decrees in the High Court. The two appeals were heard and decided together by the High Court. The High Court, after pronouncing judgment in the partition suit, proceeded to give judgment, under a new heading and number of the appeal in the money suit. It said, in this separate judgment :

> The suit that gave rise to this appeal has been instituted by the respondent against the appellant for money due on 14.10.1123 on account of tobacco delivered to the latter's shop. The defence was that the trades run by both the brothers were parts of the joint family trade, and not separate to foster such a claim by the respondent on the appellant. The Court below, having found in the other suit the shops run by the parties to belong to the concerned individuals, has decreed the suit. As we have reversed that finding in A.S. No. 843 of 1960 and found the shop standing in the name of each brother to be a branch of the joint family trade in tobacco and directed ascertainment of the assets and liabilities of the entire trade to be settled as on 2.3.1124, the date of that partition suit, this suit has to be dismissed.

The judgments were, therefore, two separate ones given in one continuation but under separate headings. Separate decrees were prepared in each appeal relating to a separate case.

5. As the defendant-appellant did not seek leave to file any appeal against the High Court's judgment and decree in the money suit and there is no appeal before us against the decree in the money suit, a preliminary objection is taken on the ground that the defendant's appeal now before us is barred by res judicata.

6. Learned Counsel for the defendant-appellant urges that the two suits were different in nature and were filed in different Courts originally so that the Court trying the partition suit and the Court in which the money suit was triable were not Courts of coordinate jurisdiction. It was also objected that the partition suit was earlier and the money suit having been filed sixteen days later could not be deemed to be a suit decided earlier. Furthermore, it was pointed out that the judgment was common. It was also urged that all the four brothers were parties to the partition suit but the money suit was only between two brothers.

7. It is true that the appeals against both the decrees of the trial Court were heard together in the High Court, and, although the appeal in the money suit is decided under a separate heading and the short judgment in it appears to be practically consequential on the judgment in the partition suit, yet, the judgments in the two appeals decide a common issue and resulted in two decrees.

8. It is urged that, whereas the defendant-appellant had filed an appeal on the strength of a certificate granted to him as a matter of right, following upon the modification of the decree of the trial Court by the High Court, the defendant-appellant had no such right of appeal in this Court. Hence, it was submitted that neither in law nor in equity could the defendant-appellant be barred from putting forward his objections to the decree in the partition suit.

9. Certain decisions were relied upon by learned Counsel for the defendant-appellant Venkateswara in support of the contention that the plea of res judicata is not available as a preliminary objection to the respondent to the hearing of the appeal before us in the circumstances of this case. We proceed to consider these cases.

10. *Narhari* v. *Shankar*[1] is no doubt the judgment of the Supreme Court of India, although it was, if one may so put it, "the Hyderabad Wing" of it in a transitional period when a learned Judge of this Court, Mr. Justice Mehr Chand Mahajan, presided over a bench of which the other two members were formerly members of His Exalted Highness the Nizam's Judicial Committee. Technically, however, it was this Court's judgment. In that case, Naik, J. had followed a decision of the Judicial Committee of the Hyderabad State and held that, when there was only one suit and the appeals had been disposed of by the same judgment, it was not necessary to file two separate appeals. It elaborated the ratio of the decision as follows (at p. 757-758) :

> It is now well settled that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have

1. 1950 SCR 754 : AIR 1953 SC 419.

been drawn up. As has been observed by Tek Chand, J. in his learned judgment in **Mst. Lachmi** v. **Mst. Bhuli**[1a] mentioned above, the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment cannot remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one.

It seems to us that to be fair to confine the ratio decidendi of the Hyderabad case to cases where there is only one suit. In the case now before us, not only were the decrees different but the suits were different. The mere fact that the judgment in the two suits were given together or in continuation did not matter. In fact, even in form, the judgment in the appeal relating to the money suit was separate from the rest of the judgment. And, in any case, there were two separate decrees.

11. We think that Section 11 Civil Procedure Code enables the party to raise the statutory plea of res judicata if the conditions given therein are fulfilled. The principle embodied in the statute is not so much the principle of "estoppel by record", which the British Courts apply, as one of public policy, based on two maxims derived from Roman jurisprudence : firstly, *interest reipublicae ut sit finis litium* — it concerns the State that there be an end to law suits ; and, secondly, *nemo debet bis vexari pro una et eadem cause* — no man should be vexed twice over for the same cause.

12. *Sir Lawrence Jenkins* pointed out, in *Sheoprasan Singh* v. *Ramanandan Prasad Narayan Singh*[2], that the rule of res judicata "while founded on ancient precedent, is dictated by a wisdom which is for all time". Litigation which has no end or finality defeats its very object. This object is decision of disputes or an end to each litigation. But, if there is no finality to it, the dispute cannot be said to be really decided at all. It is the duty of the State to see that disputes brought before its judicial organs by citizens are decided finally as early as possible. Hence, Section 11 of our Civil Procedure Code contains in statutory form, with illuminating explanations, a very salutary principle of public policy. An "estoppel", even if it be "by record", rests on somewhat different grounds. Even such an estoppel savours of an equity or justice created by actions of parties the results of which have become recorded formally behind which they are not allowed to go.

13. Reliance was also placed on *Govind Bin Lakshmanshet Anjorlekar* v. *Dhondba 'Ra' V Bin Ganba' Ra 'V' 'Ta' Mbye*[3], on behalf of the appellant. Here, it was held that decisions in previous suits of the nature of small cause suits in which there was no right of second appeal could not operate as res judicata in suits before Courts in which questions

1a. AIR 1927 Lah 289.
2. AIR 1916 PC 78: 43 IA 91: 43 Cal 694.
3. ILR Vol. XV Bombay 104

were elaborately litigated and decided in cases which could go to the High Court in second appeal. We were also referred to a Full Bench decision of the Madras High Court in *Avanasi Gounden* v. *Nachammal*[4], where it was similarly held that: "A decision in a previous suit of a small cause nature, in which no second appeal is allowed by law, is no bar to a subsequent suit, in the same Court, which, not being of a small cause nature, is open to second appeal". We have to remember that Small Cause jurisdiction is a limited one exercisable only in specified matters. Decisions given beyond jurisdiction to try an issue cannot operate as res judicata.

14. Our attention was drawn to Explanation II of Section 11, on behalf of the respondents. It reads:

> **Explanation II.**—For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to a right of appeal from the decision of such Court.

15. It seems to us that Section 11 itself refers to a Court which actually tries the two suits. We think that, in the circumstances of the case before us, the incompetence of the Court, in which the money suit was initially filed, to try the partition suit did not matter when the actual hearing of both the cases took place in the same Court. That Court was, obviously, competent to try both the suits. After the money suit had been transferred from the Court of the Munsif, the Second Additional Sub Judge actually tried and decided both of them. This was enough to make the difference in the jurisdictions of the Courts, in which the suits were initially filed, quite immaterial. Similarly, the High Court was competent to hear appeals from judgments in both. It heard and decided the two appeals together.

16. So far as the question of appeal to this Court is concerned, it is true that no appeal lay as a matter of right against the judgment in the appeal in the money suit, but, we think that the learned Counsel for the respondents is correct in submitting that the question whether there is a bar of res judicata does not depend on the existence of a right of appeal of the same nature against each of the two decisions but on the question whether the same issue, under the circumstances given in Section 11, has been heard and finally decided. That was certainly purported to be done by the High Court in both the appeals before it subject, of course, to the rights of parties to appeal. The mere fact that the defendant-appellant could come up to this Court in appeal as of right by means of a certificate of fitness of the case under the unamended Article 133(1)(c) in the partition suit, could not take away the finality of the decision so far as the High Court had determined the money suit and no attempt of any sort was made to question to the correctness or finality of that decision even by means of an application for special leave to appeal.

17. Learned Counsel for the respondents appears to us to have rightly relied upon *Bhugwanbutti Chowdhrani* v. *A. H. Forbes*[5], where it was

4. ILR 29 Madras 195 : 17 MLJ 374

5. ILR 28 Cal 78 : 5 CWN 483.

held that "in order to make a matter res judicata it is not necessary that the two suits must be open to appeal in the same way". He also relied on *Lonankutty* v. *Thomman*[6], a recent decision of three Judges of this Court, where Chandrachud, J. observed (at p. 534, para 19):

> Respondents did not file any further appeal against the decree passed by the District Court in the appeals arising out of their suit. They filed a second appeal in the High Court only as against the decree passed by the District Court in A.S. 66 of 1958 which arose out of the decree passed by the trial Court in the appellant's suit. Thus, the decision of the District Court rendered in the appeal arising out of the respondent's suit became final and conclusive.

It was also observed there (para 19):

> The decision of the District Court was given in an appeal arising out of a suit which, though instituted subsequently, stood finally decided before the High Court disposed of the second appeal. The decision was, therefore, one in a 'former suit' within the meaning of Section 11, Explanation I, Civil Procedure Code.

18. The expression "former suit", according to Explanation I of Section 11, Civil Procedure Code, makes it clear that, if a decision is given before the institution of the proceeding which is sought to be barred by res judicata, and that decision is allowed to become final or becomes final by operation of law, a bar of res judicata would emerge. This, as learned Counsel for the respondents rightly submits, follows from the decision of this Court in *Lonankutty's case*.

19. The only other point which we need consider is whether the fact that the money suit was only between the defendant-appellant and one of his brothers, who was also a respondent in the partition suit, makes any difference to the applicability of the principle of res judicata in this case. Learned Counsel for the appellant submits that the defendant-appellant could not come within the ambit of Explanation VI of Section 11, Civil Procedure Code which provides as follows:

> Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

On the other hand, learned Counsel for the respondent submits that the case of the respondents is fully covered by this explanation and relies on *Kumaravelu Chettiar* v. *T. P. Ramaswami Ayyar*[7] where it was held:

> Explanation 6 is not confined to cases covered by Order 1, Rule 8 but extends to include any litigation in which, apart from the Rule altogether, parties are entitled to represent interested persons other than themselves.

20. We think that the submission made by the learned Counsel for the respondents is sound. In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided we do not see why the others making the same claim cannot be held to be claiming a right "in common for themselves and others". Each of them can be deemed, by reason of Explanation VI, to represent all those the nature of whose claims and

6. (1976) 3 SCC 528.

7. AIR 1933 PC 183: 60 IA 278: 143 IC 665.

interests are common or identical. If we were to hold otherwise, it would necessarily mean that there would be two inconsistent decrees. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. We think this will be the case here.

21. We need not deal with other cases of this Court cited, including *Sheodan Singh* v. *Smt. Daryao Kunwar*[8] which supports the respondents' submissions, and *Raj Lakshmi Dasi* v. *Banamali Sen*[9] which is not directly applicable inasmuch as that was a case in which the general principles of res judicata, and not Section 11 Civil Procedure Code, were applied. The preliminary objection in the case before us is fully supported, for the reasons given above, by Section 11, Civil Procedure Code read in the light of the explanations mentioned above. Consequently, the preliminary objection must prevail.

22. Learned Counsel for the appellant, conscious of the difficulties in his way, filed, after the hearing of the appeal was begun before us, an application for condonation of delay in applying for leave to appeal against the judgment of the High Court in the money suit. He submits that, in view of the uncertain position in law, we should try to extend equities as much as possible in his client's favour. On the other hand, learned Counsel for the respondents points out that the objection based on the bar of res judicata was taken as long ago as 1968 by the respondents. It seems to us that the delay in waking up to the existence of the bar on the part of the appellant is much too long to be condoned. Moreover, we also find that the judgment of the High Court, based on the admissions of the appellant, does not disclose any error of law so as to deserve grant of special leave to appeal. Indeed, in so far as we could express any opinion at all upon the merits of the judgment of the High Court, based as it is upon documents containing admissions of the defendant-appellant, it seems to us that the appellant would have a very uphill task indeed in arguing his appeal even in the partition suit. We may mention here that the partition suit was instituted as long ago as 1947 and was only given a new number in 1957. If there is a case in which the principle that litigation should have an end ought to be applied, it is this on the face of facts of the case apparent to us. We, therefore, reject the Civil Miscellaneous Petition 8585 of 1976, the application for condonation of delay in the filing the Special Leave Petition. We dismiss the Civil Miscellaneous Petition 8586 of 1976 as well as the over-delayed Special Leave Petition 2816 of 1976.

23. The result is that this appeal must be and is hereby dismissed, but, in the circumstances of the case, the parties will bear their own costs.

ORDER

24. Allowed.

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8. (1966) 3 SCR 300 : AIR 1966 SC 1332. 9. 1953 SCR 154 : AIR 1953 SC 33

pointed in the arbitration proceedings. The award does not state clearly whether the plaintiffs were made parties as heirs of Shitabai and whether Ramabai, the mother of the plaintiffs, who was a party to the proceedings, was a party in her own right or as guardian of the minor plaintiffs. The question is one of mixed fact and law. If this objection had been taken in the trial Court, the defendant Bank might have been in a position to prove from the record of the arbitration proceedings that the plaintiffs had been made parties as heirs of Shitabai. It is not disputed that if they had been joined as heirs the arbitrators had jurisdiction under S. 54. The learned trial Judge says in his judgment :

> At the date of these proceedings Shitabai was dead and hence the present plaintiffs were made parties to the proceedings as heirs and representatives of the said Shitabai, because Shitabai has left a will bequeathing all her estate including the plaint property to the present plaintiffs.

An issue was framed (issue 6) "were plaintiffs members of the society", and in para. 22 of the judgment the learned Judge says :

> This issue is not pressed because, under S. 54, Bombay Co-operative Societies Act a dispute referred to therein includes a claim by the society for debts or demands due to it from a member or the heirs or assets of the past member.

This finding shows that it was apparently conceded during the trial that the plaintiffs had been sued as heirs of Shitabai. No objection was evidently taken at that stage that though the plaintiffs were heirs they were not sued before the arbitrators as such. The plaint itself contains an admission in para. 8 that in the proceedings before the arbitrators the minor plaintiffs were represented by their guardian Ramabai. There is therefore enough material before us to enable us to hold that the plaintiffs, who are admittedly the heirs of Shitabai, were sued before the arbitrators as such. The arbitrators were, therefore, acting within their powers, and under Ss. 54 and 57 their awards could not be questioned in a civil Court. I agree, threfore, with the orders made by my learned brother.

V.B.B./A.L. *Order accordingly.*

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* A. I. R 1937 Bombay 238

RANGNEKAR, J.

Gurushiddappa Gurubasappa Bhusanur and *others* — Plaintiffs — Appellants.

v.

Gurushiddappa Chenavirappa Chetni, and *others*, Defendants — Respondents.

Second Appeal No. 422 of 1934, Decided on 9th October 1936, against decision of Dist. Judge, Dharwar, in Appeal No. 51 of 1933.

(a) Representative Suit — Principle underlying explained—Expln. 6 of S. 11 and R. 8 of O. 1, Civil P. C., are based on this principle.

The principle admitted in all Courts upon questions affecting the suitor's person and liberty and his property is that the rights of no man shall be decided in a Court of justice unless he himself is present. Therefore, all persons having an interest in the object of the suit ought to be made parties, and the test is the interest the person sued or suing has in the specific relief prayed; but this general rule has an exception. It is that the Courts, to avoid inconvenience and to do justice once for all, allow one or more persons to represent others though absent, and that is why the principle of representation is adopted. Persons may be joined in a suit either on account of something personal as for instance having either sold or bought goods, or like officers of corporation as possessing certain knowledge, or because they are the owners or guardians of certain interests which the suit will affect. Upon the first ground they must be joined in their own person. Upon the other grounds the proceedings can go on with equal prospect of justice if the interests concerned are effectually and virtually protected. The absent parties in such cases appear by their representative or representatives ; their interests are protected or claims enforced. The exception is adopted by the Courts to avoid inconvenience, because if all persons interested are made parties, there would be considerable delay by abatement, change of interest, etc., and justice will be hampered. There is nothing contrary to these principles in the Civil Procedure Code and Expln. 6 of S. 11 and R. 8, O. 1 are based on these principles.

[P 239 C 2 ; P 240 C 1]

*** (b) Civil P. C. (1908), S. 11, Expln. 6 ; O. 1 R. 8—Scope of S. 11, Expln. 6 -Expln. 6 to S. 11 is not confined to cases covered by O. 1, R. 8, but includes any litigation in which parties are entitled to represent other interested persons.**

It is possible for a suit to be a representative suit within the meaning of Expln. 6 to S. 11, Civil P. C., although it need not come under O. 1, R. 8 and, therefore, need not be brought under the provisions of that order. Expln. 6, therefore, is not confined to cases covered by O. 1, R. 8, but would include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves : *2 Mad 328* and *A I R 1933 P C 183*, *Ref.* [P 240 C 2]

(c) Estoppel — Person in previous suit, allowing opposite party to be sued in representative capacity and getting decree in his favour—Such person in subsequent suit is estopped from contending that opposite party in previous suit was not sued in representative capacity.

Where a person in a previous suit allowed the opposite party to proceed with the suit on the footing that he was suing him (opposite party) in a representative capacity and having assumed this position took the chance of a decree in his favour, such person is estopped in a subsequent suit from contending that the opposite party in the previous suit was not sued in a representative capacity, on the principle of waiver or election or of conduct; it would be wholly inequitable to permit him to resile from the position he took in the earlier suit. [P 242 C 1]

S. V. Palekar — for Appellants.

A. G. Desai — for Respondents.

Rangnekar, J.—This is an appeal from a judgment of the District Judge of Dharwar, affirming a decree made by the Second Class Subordinate Judge at Hubli in a suit for redemption of a mortgage of certain property mentioned in the plaint. The suit was filed under the provisions of O. 1, R. 8, Civil P. C. The facts are not very clearly stated in the judgments, but it is sufficient to state that the plaintiffs are claiming through the owner of the property, and the principal contesting defendants, who are styled as the 'Hubli Pinjrapole Samstha,' are claiming as donees of the property from the representatives of the mortgagee of the property, who as a result of certain litigation had purchased the property at a Court-sale and claimed to have become owners of it. It was *inter alia* pleaded by these defendants that the suit was barred by res judicata by reason of a decree made in an earlier suit brought by the same plaintiff against them for the same relief in 1926. That suit was dismissed and the decree was confirmed in appeal. There was a second appeal to this Court, but the appeal was held to have abated. They also pleaded that the plaintiffs were estopped by their conduct from maintaining the suit. These are the only questions which have to be determined in this appeal.

The plaintiffs contend that the bar of *res judicata* does not arise, as the parties in the suit were not the same in the earlier suit or claiming under any of the parties to the earlier suit, and that the identity of the parties being different, the earlier decision is not binding on them. They say that the Pinjrapole is an unregistered association and, therefore, as the earlier suit was not brought against the members of the Pinjrapole or under the provisions of O. 1, R. 8, Civil P. C., and as the present suit is a representative suit there is no identity of parties. To this it is answered that the earlier suit also was a representative suit within the meaning of Expln. 6 of S. 11, Civil P. C., and that being the case, the bar of res judicata would apply. There is some dispute between the parties as to the exact description of the defendants in the title of the plaint in the earlier suit. Unfortunately neither side has produced the original plaint and it is not on record, but the decree in the original suit, which is available and which sets out the plaint, describes the defendants as "The Hubli Pinjrapole Samstha by its President Mahadeva Niranjanappa Sindgi" and that is also how the defendants are described in the title in the decree of the High Court in second appeal in the earlier suit. The appellants' counsel, therefore, says that the suit was brought against the Pinjrapole by its President, and as the Pinjrapole was an unregistered association the suit was not properly constituted. On the other hand, the learned counsel for the defendants says that in the earlier proceedings the President was sued as representing the Pinjrapole. The Court interpreter has translated the title of the previous suit which was in Kanarese as follows : "The Hubli Pinjrapole Samstha of this the President Mahadeva Niranjanappa Sindgi". This, in my opinion, means the defendant in the suit was the President and not the institute, and the only question would be whether he was sued in a representative character and as representing the Pinjrapole and all its members.

The principle admitted in all Courts upon questions affecting the suitor's person and liberty and his property is that the rights of no man shall be decided in a Court of justice unless he himself is present. Therefore, all persons having an interest in the object of the suit ought to be made parties, and the test is the interest the person sued or suing has in the specific relief prayed. But this general rule has an exception. It is that the Courts to avoid inconvenience and to do justice once for all allow one or more persons to represent others though absent and that is why the principle of repre-

sentation is adopted. Persons may be joined in a suit either on account of something personal, as for instance having either sold or bought goods, or like officers of corporation as possessing certain knowledge, or because they are the owners or guardians of certain interests which the suit will affect. Upon the first ground they must be joined in their own person. Upon the other grounds the proceedings can go with equal prospect of justice if the interests concerned are effectually and virtually protected. The absent parties in such cases appear by their representative or representatives; their interests are protected or claims enforced. A familiar instance is that of an executor or administrator. The rule, however, is, as observed by Sir John Leach in 5 Madd 4[1] at p. 13:

> Where it is attempted to proceed against two or three individuals, as representing a numerous class, it must be alleged that the suit is brought against them in that character. . . .

Story on Equity Pleadings put the case with regard to the latter class of cases in this way (pp. 118-19):

> The second class of cases, constituting an exception to the general rule, and already alluded to, is, where the parties form a voluntary association for public or private purposes, and those who sue or defend, may fairly be presumed to represent the rights and interests of the whole.

This exception is adopted by the Courts to avoid inconvenience, because if all persons interested are made parties, there would be considerable delay by abatement, change of interest, etc., and justice will be hampered. Is there, then, anything contrary to these principles in the Civil Procedure Code. I think not. Expln. 6 of S. 11, Civil P. C. is in these terms;

> Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The other rule, which allows a representative suit being brought against one or two persons or more persons as representing a larger body of persons is contained in O. 1, R. 8, Civil P. C.

> Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement as the Court in each case may direct.

In my opinion, these two rules are based upon the principles which I have set forth above. But it is argued on behalf of the appellants that O. 1, R. 8, controls Expln. 6 of S. 11, and, therefore, the only way in which the Pinjrapole could have been sued in the earlier suit was under O. 1, R. 8, and admittedly that was not done. In the first place, there was no evidence before the Court in the earlier suit—there is none on the record before me—to show how many members the Pinjrapole had in 1926. Secondly, O. 1, R. 8 is exhaustive of what it says, and it is clear from it that it is only when the parties are numerous that a suit can be brought under the provisions of O. 1, R. 8. That it is possible for a suit to be a representative suit within the meaning of Expln. 6, although it need not come under O. 1, R. 8, and, therefore, need not be brought under the provisions of that order has been held from very earliest times in this country, and I need only refer to one old case in 2 Mad 328,[2] where it was held that Expln. 5 of S. 13 of the old Code, corresponding to Expln. 6 of S. 11, Civil P. C., 1908, was not limited to the case of a suit under S. 30, which now corresponds to O. 1, R. 8, of the present Civil Procedure Code. Expln. 6, therefore, is not confined to cases covered by O. 1, R. 8, but would include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. But Mr. Palekar relies on 60 I A 278,[3] where it was held that, in a representative suit instituted under O. 1, R. 8, Civil P. C., 1908, the decision in a former suit does not operate as res judicata by force of S. 11, Expln. 6, unless the former suit was instituted in compliance with the above rule (formerly S. 30 of the Code of 1877), namely by permission of the Court, the Court giving notice as therein prescribed to all persons interested. If the suit is one under O. 1, R. 8, that is to say, if parties are numerous, then, of course, the provisions of that rule must be strictly complied with, otherwise Expln. 6 of S. 11 will not apply even though the omission

1. Lanchester v. Thompson, (1820) 5 Madd 4=56 E R 795.

2. Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi, (1880) 2 Mad 328.

3. Kumaravelu Chettiar v. Ramaswami Ayyar, A I R 1933 P C 183=143 I C 665=60 I A 278=56 Mad 657 (P C).

is due to inadvertence and has caused no injury. But Expln. 6 is not confined to suits under O. 1, R. 8, but extends to any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves; and that is clear from the observations of their Lordships at p. 294. This is what their Lordships say:

> And the result of the decisions has shown that the explanation is not confined to cases covered by the rule, but extends to include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves.

But it is argued that in the passage, which I have quoted, the Privy Council observed that in such cases parties ought to be entitled to represent others, and if a person is not entitled to represent others, he cannot sue or be sued in a representative capacity. This, of course, is a correct proposition. But it is difficult to see how it applies to the facts of this case. In this case, in the earlier suit, it was *inter alia* pleaded that the suit as framed was not maintainable. It is true that in their written statement the defendants did not specify clearly the grounds on which the contention was based, but it was open to the plaintiffs by an application to compel them to set out the grounds on which this plea was based. The plaintiffs however took no steps in the matter. Fourteen issues were raised in the case, including the issue that the suit was not maintainable. The Court went into the merits of the case and recorded findings on the first six or seven of them. No finding was recorded on this particular issue as to the maintainability of the suit, and it seems to me to be pretty clear that this, along with some other issues, was abandoned by the parties. Therefore, the position is that the issue as to the constitution of the suit against the President as representing the Pinjrapole was specifically raised and given up. The abandonment of the issue must mean that in any case the defendant conceded and admitted that he was sued in a representative capacity and as representing the Pinjrapole. The plaintiff acquiesced in this and elected to proceed with the suit on the footing that the President was sued in a representative character. Both the parties therefore proceeded upon the footing that it was a representative suit. The suit was conducted bona fide; the Court was satisfied that the other parties, who might have been joined, wished the Court to decide in the presence of one party, that is the President. The plaintiff took the chance of getting a decree in his favour as did the Pinjrapole, and the litigation went on in three Courts on that footing. It is conceded that the question that the Pinjrapole was not sued properly, or that the President did not represent it, or that the suit was not well constituted, was never raised in the three Courts; and on these facts it is difficult to see why it cannot be held that the President was entitled to represent the Pinjrapole, or that the suit was in a representative character.

Mr. Desai has very properly drawn my attention to the evidence, which shows that so far as the Pinjrapole is concerned, the litigation was adopted by the institution, and that the costs of the litigation were defrayed out of the funds of the institution. It is no answer to say that the plaintiff was ignorant of the constitution of the Pinjrapole. It was his suit, and it was his duty to see that proper parties were before the Court; otherwise even if he succeeded, and the suit in fact was not a representative suit, the decree would not bar the rights of the other members of the Pinjrapole. Apart from this, the objection raised can hardly come out of the mouth of the plaintiffs. It is true that in the case of an unregistered association the ordinary rule is to sue the members individually, but I am unable to see why some of the members, or a few of the members, cannot sue or be sued for themselves and on behalf of the other members. If the members are numerous, then, of course, the procedure laid down in O. 1, R. 8 must be followed. But whether persons interested are numerous or not is a question of fact, and, as I have pointed out, in this case there is no evidence on this point. Why cannot then the plaintiffs sue two or three or even one member as representing the others, provided this position is made perfectly clear in the pleadings? The whole question is, whether the Pinjrapole was represented and sued in a representative capacity, and if two or three can represent, say, twelve people, I am unable to see why on principle one cannot sue or be sued if the fact is made sufficiently clear. If that is so, and the other conditions in Expln. 6 are satisfied, as they admittedly are in this case, it is difficult to see why Expln. 6 is not applicable, and why a decree in such a litigation cannot bind not only the

plaintiff but those persons who are absent but are held by the Court to be represented by the person or persons on record. Admittedly there was no cause of action in this case against the President, except as representing the Pinjrapole. He raised the defence that the suit was not maintainable, and that defence was subsequently abandoned by him. I may now refer to an English case, 31 T L R 299,[4] where it was held that, where an unincorporated charity is sued, the proper practice is to sue a responsible official like the treasurer or secretary on behalf of the charity. In that case an objection was raised that the charity which was the National Church League, had been sued by name, and counsel suggested that this practice was not correct in the case of an unincorporated charity. Eve, J. intimated that where unincorporated charities were sued, the proper practice was to sue a responsible official, like the treasurer or secretary, on behalf of the charity. In this connection I may also refer to the remarks of Lord Macnaghten in (1901) A C 1,[5] which are in these words (p. 8):

> Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

Upon the whole therefore I have come to the conclusion that the lower Courts were right in holding that the suit was barred by *res judicata*. But I think there is another answer to the plaintiff's contention, and that is estoppel. In my opinion, having allowed the defendant to proceed with the suit on the footing that he was suing him in a representative capacity, having assumed this position and taken the chance of a decree in his favour in three Courts, clear estoppel arises against the plaintiff to prevent him from now contending in this suit that the Pinjrapole was not represented in his own earlier suit. Supposing there had been a decree against the Pinjrapole, could the Pinjrapole have disputed it in another litigation brought by them or some of the others? I think not. The obvious answer would have been that they were estopped. The principle is: *Allegans contraria non est audiendus*. "He is not to be heard who alleges things contradictory to each other." In other words, as Lord Kenyon says, a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest. Sherwood, C. J. in (1892) 110 Missouri 173[6] observed as follows:

> Having assumed the role of being a proper and necessary party defendant, having pleaded to the merits, she cannot, after being cast in the suit, now change front, and insist that error occurred in making her a party defendant. Courts of justice cannot be trifled with in this way. Parties litigant are not allowed to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt.

The plaintiff must be taken to have represented to the Court in the earlier suit that the President was sued in a representative capacity, that the suit was well constituted, and invited or allowed the Court to try the suit in a wrong way, and now he wants to go back upon it. He must be taken in the earlier suit to have insisted upon the President being sued in a representative capacity. In my opinion, there can be no stronger case of an absolute waiver or election or of conduct rendering it wholly inequitable to permit him now to resile from the position he then adopted. In the result, therefore, the appeal must be dismissed with costs.

B.D./D.S. *Appeal dismissed.*

4. *In re* Pritt; Morton v. National Church League, (1915) 31 T L R 299=113 L T 136.
5. Bedford (Duke of) v. Ellis, (1901) A C 1=70 L J Ch 102=83 L T 686=17 T L R 139.
6. Bensieck v. Cook, (1892) 110 Missouri 173.

A. I. R. 1937 Bombay 242

BEAUMONT, C. J.

Ezra Sion & Co. — Applicant.

v.

Kailas Viraiah — Opposite Party.

Civil Revn. No. 50 of 1936, Decided on 12th November 1936, against decision in Civil Suit No. 23578 of 1934.

Limitation Act (1908), S. 13—Extension of period—Plaintiff must prove that defendant was absent from British India and from

52. In the result of the detailed discussion aforesaid, we maintain the judgment of the High Court with the clarification and observations made above. This is further clarified that the legal position explained by us in this judgment would have application to pending and future proceedings but not to proceedings under the relevant chapter of the Act which have already been concluded.

53. Consequently, the appeals fail and are dismissed. We leave the parties to bear their own costs.

Appeals dismissed.

AIR 2003 SUPREME COURT 4295

(From : Madras)

SHIVARAJ V. PATIL AND D. M. DHARMADHIKARI, JJ.

Civil Appeal No. 8720 of 1997, D/- 26-9-2003.

K. Ethirajan (Dead) by L.Rs., Appellant v. Lakshmi and others, Respondents.

(A) Civil P. C. (5 of 1908), O. 20, R. 18 and S. 11 — Suit for partition — Claim for ownership and right of partition based not only on joint patta granted by Settlement Authorities but also on judgments rendered between same parties in previous suit for eviction against present plaintiff which was dismissed and claim of present plaintiff to remain in possession had been crystallised — Suit for partition entitled to be decreed.

S. A. No. 649 of 1987, D/- 11-7-1996 (Mad), Reversed.

T. N. Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 18(4).

It is true that joint patta granted by Settlement Authorities in proceedings under the Act of 1948 cannot itself be a source of title to claim ownership and right of partition, however, where in a suit for partition the plaintiff's claim for partition was not based on joint patta alone but judgments rendered between same parties in the previous suit and appeal, have also been relied wherein the claim of the present plaintiff to remain in possession of the suit property without any interference by defendants had been crystallised by decree of dismissal of suit for eviction against him and it could not be said that in the earlier suit, co-ownership to the suit property was not claimed by plaintiff inasmuch as the trial Court dismissed that suit on the ground that the case of grant of leave and licence set up by present defendant was not proved and the present plaintiff being in possession since 1940 onwards has perfected his title by adverse possession and the appellate Court negatived the plea of adverse possession set up by present plaintiff but by relying on the joint patta came to the conclusion that the parties were co-owners and held that between co-owners, plea of adverse possession cannot be accepted and the decree of dismissal of the suit for eviction of present plaintiff granted by the trial Court was upheld by the appellate Court on the ground that plea of grant of licence by present defendant was not proved and the parties were co-owners under the joint patta in their favour and thus the dispute of title to the suit properties between the parties was an issue directly and substantially involved in the earlier suit and on the principle of res judicata defendant would be estopped in the present suit from questioning the claim of co-ownership urged by plaintiff.

S. A. No. 649 of 1987, D/- 11-7-1996 (Mad), Reversed.

(Paras 16, 19)

(B) Civil P. C. (5 of 1908), S. 11 — Res judicata — Suit for partition — Issue directly involved in earlier suit for eviction filed against present plaintiff was claim of exclusive ownership of plaintiff to whole property left behind by deceased although eviction was sought by defendant from a particular portion of land on which he had built hut for residence — It cannot be held that judgment in earlier suit can be held to operate as res judicata between parties, only in respect of portion of the suit property which alone was subject-matter of dispute in earlier suit — Principle of res judicata under S. 11 — Is attracted where issues directly and substantially involved between same parties in the previous and subsequent suit are same — may be — in previous suit only part of property was involved when in subsequent suit, whole property is subject-matter.

(Paras 18, 20)

IU/JU/S100514/2003/JJS/CSL/23907/2003

Cases Referred: Chronological Paras

Hope Plantations Ltd. v. Taluk Land Board, Peermade (1999) 5 SCC 590 : (1998) 7 JT (SC) 404 11, 16

R. Manicka Naicker v. E. Elumalai Naicker, AIR 1995 SC 1613 : 1995 AIR SCW 2536 : (1995) 4 SCC 156 12, 14

State of Tamil Nadu v. Ramalinga Samigal Madam, AIR 1986 SC 794 : 1985 Suppl (1) SCR 63 12, 14

K. Ram Kumar and B. Sridhar, Advocates, for Appellant; S. Sivasubramaniam, Sr. Advocate, R. Nedumaran and Beno Benugar, Advocates with him, for Respondents.

DHARMADHIKARI, J. :— By judgment dated 11-7-1996 passed in Second Appeal No. 649 of 1987, the High Court of Madras has reversed the concurrent findings recorded in the judgments of the Courts below and dismissed the suit preferred by deceased-plaintiff, K. Ethirajan (now represented in this appeal by the appellants as his legal representatives) for partition of the suit property consisting of a house and land appurtenant to it described as T. S. No. 71/2 area 3.0536 grounds in village-Ayanavaram, Taluk-Madras extended area, District-Madras (Tamil Nadu).

2. It is not in dispute between the parties that the suit properties were owned by widow-Gangammal. Deceased K. Ethirajan (the original plaintiff) was Gangammal's sister's son and was allowed to occupy a portion of the suit properties since before coming into force of The (Tamil Nadu) Estates (Abolition and Conversion into Ryotwari) Act, 1948 (hereinafter referred to as an Act of 1948).

3. The widow-Gangammal died in the year 1939. The deceased-M. Gurunathan, the original defendant (represented in this appeal by his legal representatives as respondents) claimed right to the suit properties by inheritance claiming relationship with Gangammal as son of her husband's brother. Claiming title to the suit properties by inheritance, he had filed a suit O.S. No. 530 of 1948 (decided on 27-6-1949) against the step-brothers of Gangammal describing the latter as in unlawful possession of the suit property. He obtained a decree of possession against the step-brothers of Gangammal in the said suit. The deceased-original plaintiff K. Ethirajan, who was sister's son of Gangammal and in occupation of the portion of the suit property was not a party to the said suit O.S. No. 530 of 1948 which was decreed on 27-6-1949.

4. It is also not in dispute that in proceedings taken in accordance with Section 18(4) of the Act of 1948, the Director of Settlement recognised the joint ownership and possession of deceased-plaintiff K. Ethirajan and deceased-defendant M. Gurunathan on the suit property and granted a joint patta (marked as Ex. A-7 in this suit) in their favour. This order of Director, Settlement under the provisions of Section 18(4) read with Section 5(2) of the Act of 1948 granting joint patta to the parties was passed on 28-8-1970. The grant of the said joint patta to the contesting parties was upheld by all the higher authorities under the Act of 1948. The claim of deceased-defendant for recognition of his exclusive right to the suit properties, being nearest heir of Gangammal was rejected by all the authorities concerned under the Act of 1948. It is on the basis of this joint patta (marked in the suit as Ex.-A7) that the suit for partition filed by the plaintiff was decreed by the trial Court as well as by the First Appellate Court.

5. The trial Court and the first appellate Court in granting decree of partition in favour of the plaintiff, apart from relying on the joint patta (Ex.A-7), relied on the judgments passed in the previous litigation with regard to the suit properties between deceased-plaintiff (K. Ethirajan) and the deceased-defendant (M. Gurunathan). The deceased-defendant (M. Gurunathan) had filed Original Suit No. 9003 of 1973 against deceased-K. Ethirajan, seeking his eviction and delivery of possession of a portion of suit land of the dimension 37' x 20' with a superstructure thereon used for residence. Deceased-K. Eithirajan as defendant in the said earlier suit resisted his eviction on grounds inter alia that he is in possession of the disputed land and the superstructure, being the adopted son of Gangammal and had been granted a joint patta in the proceedings which concluded in his favour under the Act of 1943.

6. The earlier Original Suit No. 9003 of 1973 seeking eviction of deceased-plaintiff (K. Ethirajan) from suit property was dismissed by the Court of 12th Assistant Judge, City Civil Court, Madras by judgment dated 6-10-1976, a copy of which has been produced and marked in the proceedings of the

trial Court in the present suit as Ex.A-22. The trial Court in the said suit held that the deceased-K. Ethirajan cannot be held to be in possession of the suit property as a mere licensee of the deceased-M. Gurunathan. He was held to be in possession of the suit property as owner since 1940 as evidenced by various documents of possession filed by him and the joint patta granted by the authorities under the Act of 1948. The trial Court also held that deceased-K. Ethirajan having remained in continuous possession of the suit property as owner had perfected his title by remaining in adverse possession for more than the statutory period of 12 years.

7. Aggrieved by the dismissal of his suit for eviction, deceased-M. Gurunathan filed Appeal Suit No. 389 of 1977 to the Principal Judge of City Civil Court. The said appeal was also dismissed by judgment dated 24-4-1979. The judgment of the appellate Court in Appeal Suit No. 389 of 1977 decided on 24-4-1979 has been exhibited in the present suit and marked as Ex. A-23. The appellate Court by its judgment rejected the plea of deceased-M. Gurunathan that deceased-K. Ethirajan was his licensee and held that K. Ethirajan was in possession since much prior to the grant of the alleged licence or permission to him. It was also held that grant of joint patta under the proceedings of the Act of 1948 in favour of deceased-K. Ethirajan belies the case of deceased-M. Gurunathan of grant of any leave or licence to him for constructing a hut for his residence on the suit property. The appellate Court did not consider it necessary to go into the plea of adverse possession set up by K. Ethirajan in view of the findings in favour of deceased-K. Ethirajan on other issues arising from grant of joint patta to the contesting parties in the proceedings under the Act of 1948. The plea based on adverse possession set up by K. Ethirajan was, however, negatived on the ground that if he was basing his claim of ownership and possession on the basis of joint patta (Ex.A-7), the question of adverse possession inter se between co-owners could not arise. The litigation initiated by deceased-M. Gurunathan against deceased-K. Ethirajan challenging the latter's right and title to remain in possession of the suit property came to an end with the judgment of the appellate Court dated 24-4-1979 passed in Appeal Suit No. 389 of 1977. Deceased-M. Gurunathan who had lost his suit did not carry the matter further in appeal to the High Court.

8. It is on the basis of the judgment of the trial Court in previous litigation between the parties in Original Suit No. 9003 of 1973 dated 6-10-1976 (Ex.A-22) and the appellate judgment in that suit dated 24-4-1979 (Ext.A-23) coupled with joint patta (Ex.A-7), the trial Court and the first appellate Court in the present suit, granted a preliminary decree of partition of the suit properties in favour of deceased-plaintiff K. Ethirajan.

9. In the Second Appeal No. 649 of 1987 preferred by the LRs of deceased-M. Gurunathan, the High Court has upset the concurrent findings and judgments of the two Courts below and dismissed the suit of partition filed by deceased K. Ethirajan.

10. The High Court held that the joint patta (Ex.-A7) cannot be treated to be a foundation to claim joint ownership to the suit properties. It held that dehors patta (Ex.A-7), deceased-plaintiff K. Ethirajan was required to prove that he is co-owner of the suit property in question. According to the High Court even on the basis of the judgments in previous litigation between the parties the plaintiff is not entitled to seek a decree of partition as in previous litigation he had based his case merely on adverse possession and never set up a case of co-ownership. In the opinion of the High Court, since the plea of co-ownership was not set up in the previous suit between the parties (that is Original Suit No. 9003 of 1973), it bars the present suit of partition filed by deceased K. Ethirajan on the basis of joint ownership of the suit properties. The aforesaid reasoning of the High Court on two separate issues recorded separately deserves reproduction to appreciate the rival contentions raised by the learned counsel for the parties in this appeal :—

"It is settled law that co-ownership cannot be created by a judgment or on order under an enactment. The plaintiff's name was also entered in that register only when he was found to be in possession of a portion of the property. A person in possession need not be a co-owner. Both the Court's below failed to note that even in Ex.A-7 the claim of ownership was not decided and the parties were directed to settle their dispute

through Civil Court. Dehors Ex.A-7, there is no evidence to prove the claim any right under Gangammal, all his case of co-ownership will have to go.

. . . . . .

The learned counsel for the appellant also brought to my notice the statement in para 9 of the judgment, in the appeal filed against OS No. 9003 of 1973. That is Ex.A-23. In that judgment, we find that the present plaintiff wanted exclusive title over the entire 3½ grounds and he never admitted that the first defendant is a co-owner along with him. It is worthwhile to take note of Exs. A-22 and A-23 judgments, Ex.A-22 is the judgment in OS No. 9003 of 1973, which was a suit for ejectment. The plaintiff claimed that as against deceased-defendant, he has perfected title. In that case the plaintiff never alleged that deceased-defendant is a co-owner. He succeeded in his contention that he has perfected title. If the present contention of co-ownership was put in that case, the result might have been different. According to me, the contention of co-ownership which is not put forward in the earlier suits evidenced by Exs. A-22 and A-23, is a bar for the present suit. I hold that the plaintiff has miserably failed to prove co-ownership and his right to get partition in the plaint item. The Court's below have not properly understood the legal issue involved in the suit and they have committed grave illegality in passing a preliminary decree."

(Emphasis added for pointed attention)

11. Learned counsel appearing for the LRs of deceased-K. Ethirajan in this appeal contends that the joint patta (Ex.A-7) granted in proceedings under the Act of 1948 followed by the judgments (Exs.A-22 and A-23) in the previous litigation between the parties conclusively establish the co-ownership of plaintiff-K. Ethirajan to the suit properties and the High Court in Second Appeal clearly committed an error of law and jurisdiction in interfering with the concurrent finding of the two Courts below. It is further contended that the judgments in the previous litigation between the parties evidenced by Exs.A-22 and A-23 operate as res judicata against the defendant. Reliance is placed on para 26 in the case of Hope Plantations Ltd. v. Taluk Land Board, Peermade and another (1999 (5) SCC 590).

12. In reply, learned counsel appearing for the LRs of deceased-M. Gurunathan as respondents made strenuous effort to support the judgment of the High Court. It was contended that grant of joint patta (Ex.A-7) under the Act of 1948 is not conclusive on the question of title and it is only Civil Court which could take a final decision on the question of title and claim of co-ownership by the plaintiff. It is submitted that the patta proceedings under the Act of 1948 are for the limited purpose of recognising possession of the parties in actual occupation consequent to the abolition of 'estates' and for realising the land revenue. Strong reliance is placed on the decisions of this Court in the cases of State of Tamil Nadu etc. v. Ramalinga Samigal Madam etc. (1985 Suppl (1) SCR 63) and R. Manicka Naicker v. E. Elumalai Naicker (1995 (4) SCC 156).

AIR 1986 SC 794

AIR 1995 SC 1613 : 1995 AIR SCW 2536

13. After considering the rival contentions advanced by the counsel for the parties and on perusal of the record of this case, we find that there was no justification for the High Court in second appeal to reverse the concurrent findings and judgments of the two Courts below.

14. As held by this Court in the two decisions in cases of Ramalinga Samigal Madam and R. Manicka Naicker (supra), orders or decisions of the Settlement Officers granting patta under the Act of 1948 are not conclusive with regard to the dispute of title between parties to the lands in question and Civil Court alone is competent to decide the question of title. In the present case, the question of title to the suit properties, particularly on the plea of claim of ownership by deceased-K. Ethirajan, directly and substantially arose between the same parties in earlier Original Suit No. 9003 of 1973 and the Appeal Suit No. 389 of 1977 arising therefrom. In the aforesaid previous litigation deceased M. Gurunathan sought eviction

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of deceased-K. Ethirajan claiming exclusive title to the suit properties.

15. Deceased-K. Ethirajan as defendant to the previous suit resisted it both on the ground of adverse possession as well as on the alleged co-ownership of the parties recognised by grant of joint patta (Ex.A7).

16. We have perused the contents of the two judgments in Civil Suit No. 9003 of 1973 (Ex.A-22) and appellate judgment dated 24-4-1979 (Ext.A-23). We find that the High Court has clearly erred in observing in the impugned judgment that in the earlier suit, co-ownership to the suit property was not claimed by deceased-plaintiff (K. Ethirajan). In the paper book containing additional documents, copies of the judgments of Exs. A-22 and A-23 have been placed before us. The trial Court dismissed the suit of deceased-respondent (M. Gurunathan) on the ground that the case of grant of leave and licence set up by him was not proved and the defendant being in possession since 1940 onwards has perfected his title by adverse possession. The appellate Court negatived the plea of adverse possession set up by Ethirajan as defendant but by relying on the joint patta (marked as Ex.B-6 in that suit) came to the conclusion that the parties were co-owners. It was held that between co-owners, plea of adverse possession cannot accepted. The decree of dismissal of the suit for eviction of deceased-K. Ethirajan granted by the trial Court was upheld by the appellate Court on the ground that plea of grant of licence by deceased M. Gurunathan was not proved and the parties were co-owners under the joint patta in their favour. The appellate judgment upholding the dismissal of the suit on the finding of co-ownership of the parties was not challenged by any further appeal. The said judgment has thus attained finality. The learned counsel appearing for the respondents is right in his submission that the dispute of title to the suit properties between the parties was an issue directly and substantially involved in the earlier suit and on the principle of res judicata, in the present suit defendant-M. Gurunathan or his L.Rs. are estopped from questioning the claim of co-ownership urged by deceased-K. Ethirajan and his L.Rs. The following observations at para 26 in the case of Hope Plantations Ltd. (supra) relied upon by the counsel appearing for the appellant fully support his argument based on the principle of res judicata and estoppel :—

"26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once on issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher Forum if available. The determination of the issue between the parties gives rise to as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises."

17. Learned Counsel appearing for the respondents in his reply to the plea based on res judicata and estoppel contended that if at all the judgments in the earlier suits (Exts. A-22 and A-23) can be held to operate as res judicata between the parties, it would be operative only in respect of a portion of the suit property measuring 37' x 20' with superstructure thereon which alone was the subject-matter of dispute in the earlier suit.

18. The above contention advanced in reply of the learned Counsel appearing for the respondents, cannot be accepted. In the earlier suit, deceased-M. Gurunathan sought eviction of deceased-K. Ethirajan from a portion of the suit property by claiming exclusive title to the whole property involved in the present suit. The case of deceased-K. Ethirajan in that suit was of adverse possession and alternatively co-ownership on the basis of joint patta (Ex. A-7).

Looking to the pleadings of the parties in that suit (copies of which are placed before us in additional paper-book), the ground urged by the respondent that in the earlier litigation, claim of exclusive ownership set up by deceased-M. Gurunathan was restricted only to a portion of the whole property involved in this suit, does not appear acceptable. On the basis of pleadings of the earlier suit, we find that the issue directly involved was claim of exclusive ownership of deceased-M. Gurunathan to the whole property left behind by deceased-Gangammal although eviction was sought of the defendant from a particular portion of the land on which he had built a hut for residence. The suit was resisted by deceased-K. Ethirajan claiming adverse possession and alternatively as co-owner on the basis of joint patta (Ex. A-7).

19. It is true that joint patta (Ex. A-7) granted by Settlement Authorities in proceedings under the Act of 1948 cannot itself be a source of title to claim ownership and right of partition but as has been found by the trial Court and the first appellate Court, the plaintiff's claim for partition is not based on joint patta (Ex. A-7) alone but judgments rendered between same parties [Exs. A-22 and A-23] in the previous suit and appeal, have also been relied wherein the claim of the present plaintiff to remain in possession of the suit property without any interference by deceased-M. Gurunathan and now his LRs had been crystallised by decree of dismissal of suit for eviction against him. Based on the judgment in the previous litigation an indefeasible right to continue to occupy the suit property as owner had been created in favour of the present plaintiff and the said judgment has attained finality between the same parties and their L.Rs.

20. The argument that principle of res judicata cannot apply because in the previous suit only a part of the property was involved when in the subsequent suit the whole property is the subject-matter cannot be accepted. The principle of res judicata under Section 11 of the Code of Civil Procedure is attracted where issues directly and substantially involved between the same parties in the previous and subsequent suit are the same — may be — in the previous suit only a part of the property was involved when in the subsequent suit, the whole property is the subject-matter.

21. In our considered opinion, therefore, the two subordinate Courts were right in granting decree in favour of the plaintiff by relying on the judgments in the previous suit between the same parties and the joint patta (Ex. A-7). The High Court in second appeal was not justified in interfering with the concurrent findings of the two Courts below.

22. In the result, the appeal is allowed. The impugned judgment and decree dated 11-7-1996 of the High Court passed in second appeal is set aside and the judgments of the Courts below are restored. In the circumstances, we, however, leave the parties to bear their own costs in this appeal.

Appeal allowed.

AIR 2003 SUPREME COURT 4300

(From : Punjab and Haryana)*

SHIVARAJ V. PATIL AND D. M. DHARMADHIKARI, JJ.

Civil Appeal Nos. 6605-6606 of 2002, D/- 26-9-2003.

M/s. Mangat Singh Trilochan Singh through Mangat Singh (Dead) by L.Rs. and others, Appellants v. Satpal, Respondent.

Civil P. C. (5 of 1908), O. 15, R. 5 (as applicable in P & H), S. 115 — Eviction suit — Striking off defence of tenant for failure to deposit admitted rent — Refusal to exercise discretion by Court — Validity — Refusal to strike defence was for more than one reason namely there was serious question of jurisdiction of Civil Court involved in case, that there was no mala fides in non-deposit of rent in Court as same was deposited in Bank — Refusal held proper — Interference with same by High Court in exercise of revisional jurisdiction — Improper.

C. R. Nos. 863 and 864 of 2001, D/- 25-2-2002 (P & H), Reversed.

(Paras 12, 13, 14)

Cases Referred : Chronological Paras

Sham Lal v. Atme Nand Jain Sabha, AIR 1987 SC 197 : (1987) 1 SCC 222 3, 11

Anandi Devi v. Om Prakash, 1987 Suppl SCC 527 : (1988) 2 All Rent Cas 239 5

*C. R. Nos. 863 and 864 of 2001, D/- 25-2-2002 (Punj & Har).

IU/JU/S100516/2003/ABD/CSL/23909/2003

MULLA

Principles of MAHOMEDAN LAW

by

Sir Dinshaw Fardunji Mulla

20th Edition

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Where a suit, the plaintiffs admit that the defendant is in possession of the suit properties but they assert that he is there as mutawalli and that his possession is on behalf of the Sunni Muhammadan community and for that reason, the plaintiffs say that a declaratory suit will lie and that they need not sue for possession, then the burden lies on the plaintiffs to prove their claim. As the defendant is admittedly in possession and except for the fact that the plaintiffs claim that he is in possession of their behalf (a fact which the defendant denies) the plaintiffs are out of possession, they must prove that the defendant is in possession on their behalf. The only way in which the plaintiffs can do that is by showing that the properties in suit are wakf property.[10]

Suit for possession

A mutawalli is entitled to sue for possession, though the property is not vested in him.[11] Limitation is under Art. 142 from the date of dispossession, Art. 134 does not apply.[12] If the mutawalli's name has been recorded as a co-sharer, he is entitled under s. 226 of the Agra Tenancy Act, 1926, to sue the lambardar for his share of the profits.[13]

Appointment of mutawalli by arbitration

The office of mutawalli of a public wakf, being in the nature of a public office, the question as to which of two persons is entitled to be mutawalli cannot be referred to arbitration.[14] But where *A* claims that certain property is wakf property and that he is the mutawalli thereof and *B* denies that the property is wakf property, an award made by an arbitrator that each shall be entitled to an equal share in the management and profits of the property until the matter is decided by the Court, is perfectly valid.[15]

Superintendent or manager

The functions of a mutawalli are the same as those of a trustee but he is not a trustee either generally or under the Indian Trusts Act.[16]

Although the wakf property is not vested in the mutawalli, he has the same rights of management as an individual owner. He is not bound to allow the use of the wakf property for objects which though laudable in themselves are not objects of the wakf. The Muslim community cannot compel the mutawalli of a mosque to allow a school building to be erected on a site attached to the mosque.[17] Again although a mutawalli is not a trustee in the sense in which the expression is used in English law he has duties akin to those of a trustee and if he wrongfully deprives a beneficiary of the profits he is liable for interest in cases in which, under s. 23 of the Trusts Act, a trustee would be liable.[18] It has even been said that in the case of a private wakf (i.e., a wakf for the family of the founder where only the ultimate benefit is reserved to

10. *Mohammad Shah v. Fasihuddin Ansari* A.I.R. 1956 S.C. 713.
11. See *Jawaharbeg v. Abdul Aziz* ('56) A.N. 257.
12. *Wahid Ali v. Mahboob Ali Khan* (1936) 11 Luck. 297, 156 I.C. 92, ('35) A.O. 425.
13. *Muhammad Qamar v. Salamat Ali* (1933) 55 All. 512, 147 I.C. 926, ('33) A.A. 407.
14. *Muhammad Ibrahim v. Ahmad* (1910) 32 All. 503, 6 I.C. 219.
15. *Moazaam v. Raza* (1924) 46 All. 856, 81 I.C. 851, ('24) A.A. 818.
16. *Hashim Husain v. Ahmad Raza* ('74) A. All. 305 D.B.
17. *Syed Ahmed v. Hafiz Zahid* (1934) 153 I.C. 1095, ('34) A.A. 732.
18. *Kishwar v. Zafar* (1933) 55 All. 164, 146 I.C. 733, ('33) A.A. 186.

charity) the mutawalli is not a mere superintendent or manager but is "practically speaking the owner"[19]—*sed quare*.

A *de facto* mutawalli is not unknown in Mahomedan law. A *de facto* mutawalli can sue for rents without establishing his *de jure* character. In this case the owner of a house created a wakf and appointed himself as a mutawalli. He then appointed certain persons as his agents and gave them a power of attorney which included powers of management and bringing suits to evict tenants and to recover rent. The agent brought the suit as agent. It was held that the suit was validly constituted.[20]

Mutawalli not duly appointed

The liabilities of a mutawalli not duly appointed are the same as those of a duly appointed mutawalli.[21]

While it is true that s. 92 of the Code of Civil Procedure applies only when there is any alleged breach of any express or constructive trust created for a public, charitable or religious purpose there is no doubt that it also applies where the direction of the Court is necessary for the administration of any such public trust. Where the defendants have been looking after the suit properties in one capacity or the other and been enjoying the usufruct thereof, they are trustees *de son tort* and the mere fact that they put forward their own title to the properties would not make them trespassers.[22]

Where there is evidence to show that the defendants (Trustees *de son tort*) were guilty of grave mismanagement, it is clear case for formulating a scheme under s. 92 of the Code of Civil Procedure by a suit.[23]

The definition of a Mutawalli includes a person who for the time being manages wakf property.[24]

§203. Who may be appointed mutawalli (1) Subject to the provisions of sub-sec. (2), the founder of a wakf may appoint himself,[25] or his children and descendants[26] or any other person, even a female[27] or a non-Mahomedan[28] to be mutawalli of wakf property.

But where the mutawalli has to perform religious duties or spiritual functions which cannot be performed by a female, *e.g.*, the duties of a

19. *Mohammad Qamar v. Salamat Ali* (1933) 55 All. 512, 147 I.C. 926. ('33) A.A. 407.
20. *Abdul Raheem Khan v. Mamdu* (1970) M.P.L.J. 968.
21. *Jawaharbeg v. Abdul Aziz* ('56) A.N. 257.
22. A.I.R. 1946 Nag. 401; A.I.R. 1942 Cal. 343 and A.I.R. 1940 Pat. 425, approved.
23. *Syed Mohd. Salie Labbai v. Mohd. Hanifa*. A.I.R. 1976 S.C. 1569, [P.K Goswami and S. Murtaza Fazl Ali, JJ.].
24. *Syed Mustafa Peeram Sahib v. State Wakf Board* ('69) A. Mad. 66.
25. Baillie, 601; *Hedaya*, 238; Baillie, II, 214; *Advocate-General v. Fatima* (1872) 9 B.H.C. 19; *Abdul Rajak v. Jimbabai* (1911) 14 Bom. L.R. 295, 14 I.C. 988; *Muhammad Rustam Ali v. Mushtaq Husain* (1920) 47 I.A. 224, 42, All. 609, 57 I.C. 329.
26. Baillie, 601.
27. Baillie, 601; *Wahid Ali v. Ashruff Hossain* (1882) 8 Cal. 732; *Shahar Banoo v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118; *Munnavaru Begam v. Mir Mahapalli* (1918) 41 Mad. 1033, 51 I.C. 489; *Syed Abdul Hameed v. Syed Unnissa Bibi* (1934) 67 Mad. L.J. 907, 152 I.C. 630, ('34) A.M. 692; *Mohammad Bhai v. Waziribi* (1946) Nag. 646, 224 I.C. 338, ('47) A.N. 31.
28. Ameer Ali, 4th Ed., Vol. 1, p. 446.