

(1967) 04 GUJ CK 0006

In the Gujarat High Court

Case No : First Appeal No's. 774 and 939 of 1960

Alimiya Mahmadiya and Another

APPELLANT

Vs

Sayed Mohomed Baquir Eledroos Valde Saued Jaffer El-Edroos and Another

RESPONDENT

Date of Decision : 24-04-1967

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 2(19)
Civil Procedure Code, 1908 (CPC) — Section 11, 92

Citation : AIR 1968 Guj 257 : (1968) 9 GLR 1002

Hon'ble Judges : N.G. Shelat, J

Bench : Single Bench

Advocate : A.H. Mehta for No. 1, A.M. Peerzada and S.H. Qureshi for No. 2, in F.A. No. 774 of 1960 and B.R. Shah, Asst. Govt. Pleader in F.A. 939 of 1960, for the Appellant; S.B. Vakil, (for No. 1) and B.R. Shah, Asst. Govt. Pleader (for No. 2) in F.A. No. 774 of 1960 and S.B. Vakil (for No. 1), A.M. Peerzada and S.H. Qureshi, in F.A. 939 of 1960, for the Respondent

Judgement

(1) On an application made by the appellants, an inquiry u/s 19 of the Bombay Public Trusts Act, 1950, (hereinafter to be referred to as "the Act") was made by the Deputy Charity Commissioner, Ahmedabad. He held the trust known as "Shaikh Din Abdullah Hasrat Bada Edroos Saheb oza, Masjid and Kabrasthan, Ahmedabad," to be a public trust as defined u/s 2(13) of the Act, and that way directed the same to be registered under the provisions of the Act. The properties appertaining to the said trust were also held to be the properties thereof. According to him, the trust was a public Wakf by user. Against that decision passed on 23rd April 1956, the appellant preferred Appeal No. 125 of 1956 before the Charity Commissioner u/s 70 of the Act. By an order passed on 29th May 1957 by Mr. S. C. Bhatt, Charity Commissioner, Bombay, that appeal came to be dismissed with costs. Aggrieved by that decision, Miscellaneous Application No. 149 of 1957 was filed u/s 72 of the Act in the Court of the District Judge at Ahmedabad. By his order dated 29th December 1959 the learned

District Judge allowed the application and set aside the decision of the Deputy Charity Commissioner which had come to the confirmed by the Charity Commissioner, Bombay. He thereby held that the trust was a private trust. Opponents Nos. 1 and 2 were directed to pay the costs of the applicant in one set and bear their own. The Charity Commissioner was directed to bear his own costs. Feeling dissatisfied with that decision, opponents Nos. 1 and 2 have come in appeal before this Court. The Charity Commissioner has also filed an Appeal No. 939 of 1960 against that decision.

(2) Since both these appeals arise out of the common judgment and involve consideration of the same points, they have been heard together and a common judgment is recorded.

(3) In order to appreciate the points raised before this Court, it would be necessary to set out a few facts. Saiyad Mahmad Baquir El-Edroos Valde Saiyed Jaffar El-Edroos, the respondent No. 1, is a member of the Edroos family. The history of their family has been given at length in the judgment Ex. 74 of the District Judge of Surat in Appeal No. 80 of 1921 of his Court. The material part thereof has been set out in the judgment of the learned Charity Commissioner as also by the learned District Judge, Ahmedabad. It appears that the family claims to be descendants of Hajarat Imamli who was the son-in-law as also the cousin of prophet Mohmad. One of the descendants of Hajarat Imamali came over to India in about 1542 A. D. and founded his gadi at Ahmedabad, Broach and Surat. The property in dispute in this proceeding, it appears, was given in gift to one of the holders of the gadi by his disciple. That holder was later on buried in the house and his Durgah is situated there. There is also a place for reciting prayers. That place is, according to the appellants, a mosque, while it is said to be Ibadatagh according to the respondent. According to the respondent, his disciples alone were entitled to come to the property in dispute and saying Fateha as there is a Durgah of one of his ancestors there. For their convenience there is a place for saying prayers. The properties are that way said to be private trust properties as against the case of the appellants that they constitute public trust properties under the provisions of the Act.

(4) In 1928, Civil Suit No. 201 of 1928 was filed in the Court of the First Class Sub Judge at Surat by Saiyed Mustafa Valde Saiyed Sakkaif Sahab El Edroos and another against the father of the respondent No. 1 u/s 92 of the CPC after obtaining the necessary sanction of the Collector of Surat. The plaintiffs in that suit prayed for a declaration that the defendant was not a Sajjadnashin or Mutawalli of the Edroos Shrines of Surat, Broach and Ahmedabad or the Wakf properties attached thereto, and also for a permanent injunction restraining him from acting as such. They had further prayed for the framing of a scheme and for the appointment of a Board of trustees to manage the properties mentioned in Schedule A attached to the plaint. The properties in dispute in this proceeding were shown at serial Nos. 24 and 25 in that Schedule attached to the plaint Ex. 72 in the case. That suit, however, came to be dismissed on 6th October 1931.

Against that decision Civil Appeal No. 90 of 1931 was filed by the plaintiffs in the Court of the District Judge at Surat.

(5) Of the various issues raised in the appeal, issue No. 8 was as under: --

"Is this a private Wakf as contended by respondent No. 1 or a public Wakf?

The finding recorded by the learned District Judge in that respect was this:--

"This is a private wakf."

It may be incidentally stated here that issues Nos. 6 and 7 related to the removal of respondent No. 1 from his office as Sajjadanashin or Mutaawalli for misconduct etc., and as to whether a scheme should be framed for the administration of Wakf property. These issues were decided in the negative. There were also cross-objections filed by the other side in that appeal. Those cross-objections filed by the other side were allowed and the appeal came to be dismissed. Aggrieved by that decision passed on 21-11-38 by Mr. D. V. Vyas, District Judge, Surat, it appears that an appeal was filed in the High Court but later on it came to be withdrawn. In other words, that decision passed in Appeal No. 80 of 1931 stands.

(6) Thereafter in the year 1950 the Bombay Public Trusts Act came in force, and on an application made by the present appellants, an inquiry u/s 19 of the Act was held in respect of the said property and therein amongst other questions the point was raised by the opponent that in view of the previous decision just referred to hereabove in suit No. 201/28 the properties in question were found to be private wakf properties and that, therefore, the same question cannot be reagitated by the applicants in these proceedings. That point was, however, negatived and the same point was raised in appeal before the learned Charity Commissioner. He considered the plea and in his view the matter directly or substantially in issue in that suit cannot be said to be the same which was directly and substantially in issue in the inquiry before the Deputy Charity Commissioner, Ahmedabad, and since that material ingredient was wanting, there was no bar of res judicata to the said inquiry. In the application filed under S. 72 of the Act before the District Judge, Ahmedabad, the same plea was raised and the learned District Judge disagreed with the view taken by the learned Charity Commissioner and found that it is barred by the principles of res judicata. In that view of the matter, he allowed the application by holding that the decision in Appeal No. 80/31 passed by the District Judge, Surat, as per Ex. 74 held good and that bound all the parties - it being a representative suit u/s 92 of the C. P. C. It is that point that again arises to be considered before this Court.

(7) It is well settled that where section 11 of the CPC in terms may not apply, the principles contemplated therein govern the subsequent proceedings provided the conditions set out therein are fulfilled. The provisions of section 11 of the CPC are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent

regular suit and on the general principles of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide, it will operate as res judicata in a subsequent regular suit, and, as laid down in *Gulabchand Chhotalal v. State of Gujarat*, AIR 1956 SC 1153, it is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceedings is immaterial. Thus, whether section 11 applies or the principles contemplated therein apply would be immaterial but the fact remains that if anything has been decided between the same parties and fulfil the other conditions set out in section 11 of the Code, the same matter if arises to be considered and decided before any other authority in any proceeding later on would be barred by principles of res judicata.

(8) The contention of the learned advocate for the appellants, and supported by the learned Assistant Govt. Pleader for the appellant in the other appeal, is that while the principles of res judicata contemplated u/s 11 applied, the two conditions set out therein cannot be said to have been fulfilled so as to operate the bar in respect of the nature of the trust in the present proceeding as found by the learned District Judge. The first point raised by him was that the former Suit No. 201 of 1928 and the present proceeding cannot be said to have been between the same parties or between parties under who any of them claim. In that respect, it was pointed out that much though the suit was u/s 92 of the Civil Procedure Code, it ceases to have a representative character so as to bind all persons for all time by reason of Explanation VI to section 11 of the Civil Procedure Code. In support thereof reliance was placed by Mr. Mehta on a case of *Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others*, . Another point raised by him was that the matter directly and substantially in issue in the subsequent proceeding cannot be said to be the same matter which was directly and substantially in issue in the former suit inasmuch as the present proceeding is governed by the provisions contained in the Public Trusts Act, 1950, inasmuch as the nature of the subject-matter in dispute in this proceeding stands to be governed not by the same law as it then stood in 1928 when the suit was filed, but by the law as it stood, at the date of the application made in 1952 by the appellants u/s 19 of the Act. According to him, the definition of Wakf has been changed and the inquiry has to be on that basis, as against what was understood in law before 1950.

(8a) Now the fact about the Civil Suit No. 201/28 being filed u/s 92 of the CPC and that way a representative suit for the reliefs already set out hereabove, and on an issue raised in the suit the properties in question in this proceeding were found to be private Wakf properties are not in dispute. That finding was given by a Court after hearing the parties in merits and the decision of the Court in appeal held good as between the parties. The properties in this proceeding formed a part of the properties in that suit and they were, thus held to be private wakf properties and that way not public trust properties. The first attack of Mr. Mehta

is that these appellants are not bound by that decision they being not parties in that suit by reason of the representative character of the suit ceasing in view of the Supreme Court decision referred to above. It does not matter, as stated above, whether the issue arises not before a Court but before an authority competent to decide under the provisions of the Public Trusts Act, 1950. His emphasis, as I said above, was on a decision of the Supreme Court in the case of Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others, . It was urged by Mr. Mehta that a suit u/s 92 of the CPC is a suit of a special nature, and it presupposes the existence of a public trust such as of a religious or charitable character. Such a suit can proceed only on the allegation that there is a breach of such trust or that the directions from the Court are necessary for the administration thereof and it must pray for one or other of the reliefs which are specifically mentioned u/s 92 of the Code. It is only when these conditions are fulfilled that the suit can be brought in conformity with the provisions of section 92 of the Civil Procedure Code. According to him, the sit No. 201 of 1928 was a suit u/s 92 of the CPC and the reliefs claimed therein were also as contemplated under some of the clauses set out there below. When the Court was not satisfied with the breach of those conditions or that in respect of which no relief could be given, the declaration about the said property being either public trust property being either public trust property or private trust property would be meaningless, and so observed in the Supreme Court decision referred to above, would be no more than an obiter dictum and cannot constitute the final decision in the suit. He therefore, contended that the finding on issue No. 8 in that appeal given by the learned District Judge of Surat that the properties in question were private wakf properties was inconsequential and obiter and if that is so, that suit would lose the representative character of the same being u/s 92 of the CPC so as to bind all persons other than those who were parties to the suit. The suit from which that Supreme Court decision arises was commenced by the plaintiffs u/s 92 of the Civil Procedure Code. The allegations were that one Kuberdas, who was a religious teacher and a holy man founded a cult known as Kaivalaya or Jarunasagar Panth, the principal tennet of which is, that the realization of the infinite is possibly only through the medium of Guru or spiritual preceptor. That Kuberdas received money and lands from his followers and disciples and with that fund he built a temple at Sarsa. Kuberdas by will appointed his principal disciple Narayandas to succeed him to the Gadi and that Narayandas built another and a bigger temple wherein he installed an image of Kubersas, with the images of two staff-bearers on two sides. The defendant in that suit was Pragdasji who was appointed by a will executed by his predecessor. The allegations against him were that he was acting in a manner contrary to the usages of the institution and was guilty of incontinence, mismanagement and improper alienation of trust properties. On those allegations the plaintiffs prayed that :--

(1) the properties described in the schedule to the plaint as well as other properties under the management of the defendant be declared to be religious

and charitable trust properties of the Kaivalya or Karunasagar Panath;

(2) The defendant be removed from the Gadi and possession of the properties and a suitable successor appointed in his place;

(3) the defendant be called upon to render accounts for the period of his management; and

(4) a scheme might be framed for proper management of the institution.

The defendant inter alia contended that the suit was not maintainable inasmuch as no public trust of a religious and charitable character existed in respect of the suit properties which were the private properties of the defendant himself. On the pleadings raised by the parties in that suit several issues were framed by the District Judge, of which the two following were tried as preliminary issues:--

(1) Whether the temple and the properties in suit are public charitable properties? And

(2) if not, whether this Court has jurisdiction to try the suit?

The District Judge decided both these issues against the plaintiffs and dismissed the suit. Against that decision, the plaintiffs took an appeal to the High Court of Bombay. The High Court took the view that the ownership of the suit properties was so restricted by the obligation to maintain the institution for purposes which only could be described as public charitable purposes and that the suit must be regarded as one coming within section 92 of the Civil Procedure Code. Feeling dissatisfied with that order, the defendant applied for leave to appeal and since that application was refused, he filed a petition before the Privy Council praying for special leave. That was also refused on the ground that the matter was still then in an interlocutory stage. They, however, said specially that the order of refusal was without prejudice to the presentation of a fresh petition after all the issues were determined. The case consequently went back to the trial Court, and on the evidence adduced by the parties in respect of the other issues, the District Judge came to the conclusion that the allegations of misconduct and breach of trust made by the plaintiffs were not proved and he consequently dismissed the suit subject to the declaration already given by the High Court that the temple and the properties in possession of the defendant were public, religious and charitable properties. An appeal was filed against that decision to the High Court of Bombay. The appeal was, however, dismissed. That way the matter went up to the Supreme Court. The Supreme Court, however, took the view that in a suit framed u/s 92, Civil Procedure Code, the only reliefs which the plaintiff can claim and the Court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. A suit u/s 92 Civil Procedure Code, is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as

ancillary to the main relief claimed under the section if the plaintiff is held entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declamatory relief under the provision of section 92, Civil Procedure Code. The finding as to the existence of a public trust in such circumstances would be no more than an obiter dictum and cannot constitute the final decision in the suit. Mr. Mehta has taken pains to show that this decision applies to the facts of the present case. It is no doubt true that the reliefs contemplated u/s 92 were not granted in the Suit No. 92 were not granted in the Suit No. 201 of 1928 and that was it came to be dismissed. Just as, according to him, even though it may be necessary to consider and decide the question, if raised by the other side, that the public trust does not exist any decision which leads to a declaration to be given in that respect cannot be of any effect, as the foundation of a suit u/s 92 is found wanting viz., by reason of the fact that none of the reliefs contemplated u/s 92 could be given, the finding on issue No. 8 about the properties being private Wakf property would therefore be on the same lines obiter and cannot be binding on all persons for the simple reason that the suit loses its character of a suit under S. 92 of the CPC and if it so losses its character, it ceases to bind all persons who were not parties thereto by reason of the same being of a representative character. One fact that emerges from this is that if a point about the character of the trust arises to be determined in such a suit u/s 92, Civil Procedure Code, the Court has to decide it. What that decision relates to, is, as to whether any declaration about the nature of that trust can be given as a relief in the suit and if given, what would be its effect i.e., as to whether it would become binding on all persons by reason of the suit being of a representative character. In the matter before the Supreme Court, the properties were held to be public trust properties by the High Court and since the other reliefs claimed u/s 92 of the CPC could not be given, the Supreme Court said that the declaration was of no consequence. Be it said at the same time that this decision nowhere in specific terms says that the original suit loses its representative character. Whether the declaration should be given or not in a suit of that character is the only point that came to be decided by the Supreme Court and no more. This decision of the Supreme Court came to be considered in the case of Chiranjilal Ramachandra Loyalka and Others Vs. Life Insurance Corporation of India, . While considering that decision, it is pointed out that the Supreme Court in a recent decision in Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others, has taken the view that although a suit for a declaration that a certain property appertains to a religious trust lies outside the scope of section 92, still when the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it. That principle was applied to the case before the High Court of Bombay and it was then held that where in a suit filed u/s 92 of the Civil Procedure Code, 1908, the reliefs sought are the reliefs mentioned in the section, the fact that a declaration is also sought for in the suit that the properties in suit are dedicated to religious or charitable purposes, does not change the nature of

the suit and the suit does not thereby cease to be a representative suit u/s 92 of the Code. In other words, the position comes to this that if in a suit u/s 92 of the Code the defendant resists the character of the trust in respect of the property, the question as to whether it is a public trust property has to be gone into. If it is held to be a public trust property and at the same time the reliefs contemplated u/s 92 claimed in the suit are also found to be available to the plaintiffs, there would not be any difficulty in giving a declaration in that respect. If, however, the reliefs arising u/s 92 cannot be given as on facts not established and if the decision as to the nature of the trust raised in the suit was that it was a public trust property, no declaration can be given in respect to that issue in that suit, for, as held in *Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others*, the very cause of action arising u/s 92 no longer exists and, therefore, no declaration can be given. In the case before us, there is a distinction that the properties in question have been held to be a private trust property on the issue raised in the suit. On that point alone, if that were treated as a preliminary issue, as perhaps it should have been, the suit would be liable to be dismissed for the simple reason that the suit for a declaration that a particular property is a public trust property was not maintainable u/s 92 of the Civil Procedure Code. For that the jurisdiction would be of the ordinary Court as held by the Privy Council in *Abdur Rahim v. Mahomed Barkat Ali*, 55 Ind App 96 = (AIR 1928 PC 16). The reliefs claimed in the suit in the Court at Surat arising out of section 92 of the CPC were not available to the plaintiffs in that suit as not established and, therefore, the suit came to be dismissed. There was, therefore, no question of giving any declaration whatever for the simple reason that the property was found to be a private Wakf property. It is, thus, a third type of a case where on both grounds, viz., that it was not a public trust property and that way section 92 not being available to the plaintiffs, and at the same time the other reliefs sought for as arising from section 92 of the Code being not established, the suit was liable to be dismissed. Thus, the Supreme Court case would have no application to the facts of the present case before us and, at any rate, the suit does not thereby cease to be a representative suit u/s 92 of the Code. As I said above, the issue No. 8 arose out of the pleadings of the parties and that was necessary to be decided even in a suit u/s 92 of the Civil Procedure Code. If any such issue was necessary and was required to be decided by the Court and if it came to be decided, that decision obviously stands and binds the parties to the subsequent proceeding provided the other conditions contemplated u/s 11 are fulfilled. It is not only a decision in the suit that matters, but also a decision in respect of any issue raised in the suit that will also matter while considering applicability of the principles contemplated u/s 11 of the Code. In *Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai*, it has been observed thus:--

"Where the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point, each of which by itself would be sufficient for the ultimate decision, the decision on each of these points operates

as res judicata between the parties."

In the suit before the Surat Court, as I said above, the issue No. 8 was by itself an issue the decision on which would non-suit the plaintiffs if it was found against them. Similarly issue Nos. 6 and 7 were also such that if they were held against the plaintiffs, the suit was also liable to be dismissed. The final decision in the suit, therefore, can be said to be based on its decision on more than one points, and therefore the point that came to be decided in respect of an issue raised out of the pleadings of the parties, that finding would operate as res judicata between the parties. Thus, in my opinion, a suit did not lose its representative character and the decision in issue No. 8 about the properties being private wakf properties and that way by implication not public trust properties would govern and operate as a bar to the same issue being raised for consideration and decision in the subsequent proceedings between the same parties or parties such as contemplated in Explanation VI to section 11 of the Code.

(9) The next contention of Mr. Mehta was that that decision cannot have the binding effect for all the time particularly when there has been change in law from the one that prevailed at the time of the earlier litigation. If, therefore, it is established that there has been some change in law governing the same subject-matter in dispute, from what the law was in 1928 when that suit was litigated upon between the parties, then it cannot be said to be the same subject-matter or litigating under the same title in the subsequent proceedings. Mr. Mehta then invited a reference to a decision in the case of Nabin Chandra Saha Poddar and Others Vs. Dudu Mia and Others, . In that case it was held that cases must be decided upon law as it stands when the judgment is pronounced, and not upon what the law was at the date of a previous suit; and if the said law has been altered in the meantime, and the effect of the law has been differently interpreted by the judicial decisions or altered by the statute the decision on a particular question of law in an earlier suit would not operate as res judicata with regard to the same person in a subsequent suit. The same principle appears to have been enunciated by the Full Bench of the Madras High Court in Board of Commrs. for Hindu Religious Endowments, Madras v. Rathaswami Pillai ILR (1937) Mad 504 : (AIR 1937 Mad 232) (FB). It was laid down in that case that an order of the Board declaring a particular temple to be an excepted temple within the meaning of the definition as it then stood in the Act of 1927 was no bar to its holding after the amending Act of 1930 that it was a non-excepted temple according to the new definition. This principle was followed in a case of Raghavendra Swami Mutt v. Board of Commissioners, Hindu Religious Endowments, Madras AIR 1957 AP150 . The observations therein go further to say that the principle also applies to a case of changes of circumstances and is not confined to alteration in law. In that case, the Board has in its previous order u/s 84 as it stood before amendment held that a particular institution was not a "Mutt". That was said to be a bar for raising the same point and deciding otherwise and it was held that it was not precluded from subsequently holding

that it is a "Mutt". They have then said that it is always open to the Board to revise its order in view of subsequent events and circumstances. The previous decision rendered under particular circumstances cannot be regarded as conclusive and final when there is a change of circumstances including the provisions of law. Then I was referred to two other decisions of the High Court of Bombay. In the case of Mahadevappa Somappa Bhusaraddi Vs. Dharmappa Sanna Ningappa Bhusaraddi, it was held that the bar of res judicata did not apply, for the plaintiff could not be regarded as litigating under the same title in both the suits inasmuch as the title that he had sought to make out in two suits, though of the same nature, had been derived from different transaction, and that no Court could presume that the law relating to adoption would remain unaltered for all time or would be excepted to make an unqualified pronouncement as to party's legal capacity to Act in a specific manner on a future date. Then they have said that an earlier decision on the interpretation of the law could not operate as res judicata in cases where the case of action was different. In the other case of Administrator of the Shringeri Math, Jagatguru Shringeri Shankaracharya Shri Abhinav Vidyatirth Swamigal Vs. Charity Commissioner, Bombay, . It was observed that the decision of the Registrar that the Bombay Public Trusts Registration Act, 1935 did not apply to certain property because it was not a public trust does not bar the question whether such property is or is not a public trust in subsequent proceedings under the Bombay Public Trusts Act, 1950. In that case, the contention was that under the Bombay Public Trusts Registration Act, 1935 it was held that the properties at Nasik were held to be not public trust properties. The definition of the "public trust" u/s 3(3) was to mean ".... an express or constructive trust created or existing for public purposes of religious or charitable nature". The powers were given to the Registrar u/s 6 to decide after an enquiry whether a trust is a public trust, whether any property is the property of such trust etc. Enquiry was to be held according to the procedure provided by the rules under the Act and as provided in section 10 the entries made by the Registrar in the Register of Public Trusts in accordance with the provisions of sections 6 and 8 shall, subject to the provisions of section 11, be final for the purposes of the Act. Then in 1950 the definition of "public trust" as contained in the Bombay Public Trusts Act, 1950, if compared to the definition of "public trust" as already given above, was of a wider character than under the old Act as already stated above. It was, however, urged that the order passed by the Registrar under the old Act was a complete bar by the application of the doctrine of res judicata and it was in that respect that it was observed that the decision under Act of 1935 was not of such a nature as to attract the application of the doctrine of res judicata irrespective of future legislation. Then they have observed that "in the present case in view of the disparity between the two provisions it is impossible to give finality to the decision of the Registrar under the Bombay Public Trusts Registration Act, 1935." Such a decision cannot be binding for ever. It would follow from these decisions that if the effect of the law has been differently interpreted by judicial decisions or altered by statute, the previous decision between the same parties cannot have the binding effect for all

time and it cannot, therefore operate as *res judicata* with regard to the same question in a subsequent proceeding. In other words, in order to attract the doctrine of *res judicata*, the law applicable to the subject-matter at both the times must be the same. Not only that, but even different causes of action by reason of change of circumstances can remove any such bar of a previous decision or a finding of the Court, in a subsequent proceeding. It follows, therefore, that there must exist the same subject-matter or that they are litigating under the same title, and for that the same effect of law must prevail at both the times, before the bar of doctrine of *res judicata* can arise in law that governs the subsequent proceeding. If, therefore, there is any change in the effect of law governing the matter, the effect of any such bar of *res judicata* has to be broadly considered before it can be allowed to stand for all time to time.

(10) Now the first thing that requires to be considered is about some change in the definition of the term "Wakf" as it then stood viz. in 1928 when the suit was filed u/s 92 of the CPC at Surat which included the property in question before the proceeding from which this appeal has arisen, and the one that we have u/s 2 (19) of the Bombay Public Trusts Act which came into existence so late as in 1950. All public trust properties stand governed by the provisions of this Act and compliance thereof is required of the trustees thereof. Section 2 (13) of the act defines the term "public trust" as meaning "an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a wakf, a dharmada or any other religious or charitable endowments....." Thus, the term "public trust" includes a "Wakf". Now "Wakf" is defined u/s 2 (19) of the Act as meaning "a permanent dedication by a person professing Islam of any movable or immovable property for any purposes recognised by the Islamic law as pious, religious or charitable, and includes a wakf by user, but does not include a wakf such as is described in section 3 of the Mussalman Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any member of his family or descendants." It has to be noted that before this Act came in force, the definition of "Wakf" was to be gathered from the Mahomedan Law. In para 173 of Principles of Mahomedan Law fifteenth Edition, by Mulla, "Wakf" has been defined as meaning the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious pious or charitable. It would, thus, appear that the words "and includes a wakf by user" were not there. In order, therefore, to establish that a particular property was "Wakf" property when the suit was filed at Surat u/s 92 of the CPC in 1928, it was essential to show that there was a permanent dedication in respect of that property for the purpose recognized by the Muslim law as religious, pious or charitable. The dedication was also required to be of a permanent character. It was, however, pointed out by Mr. Vakil, the learned advocate for the respondent, that though such dedication was essential before any property can be called a wakf property, the judicial decisions also recognised wakf by immemorial user. That has been referred to in section 188 of the Mulla's

Mahomedan Law where summing up of some decisions has been made by saying that if the land has been used from time immemorial for a religious purpose, e. g., for a mosque or a burial ground or for the maintenance of a mosque, then the land is by user wakf although there is no evidence of an express dedication. In other words, even though express dedication was not possible to establish, the evidence of immemorial user of any such property for religious purpose was enough to raise an inference of dedication in that respect. Nevertheless the fact remains that the dedication of the property by someone for such a religious purpose has to be found either by express permanent dedication or that the permanent dedication was inferred from the evidence of immemorial user. In the Mussalman wakf Validating Act, 1913, the term "wakf" has been defined exactly in the same manner as referred to hereabove. It recognises private Wakf and for so recognising that Act came to be passed. It was said in this connection that this definition was intended only for the purpose of that very Act and was not exhaustive as held in a case of AIR 1927 22 (Privy Council) . But the fact remains that even if it were to include wakf by immemorial user, it cannot mean the same thing as we have in the definition of "Wakf" given in Section 2 (19) of the Act as "including" a Wakf by user." The difference, however, lies in a two-fold manner. The first is that "Wakf" before 1950 was required to be arising out of a permanent dedication of any property by a Muslim person and that was to be for a pious, religious or charitable purpose recognised by Islamic Law. The judicial decisions also required that permanent dedication has to be there but that can be inferred from the evidence relating to immemorial user of that property for such purpose. That inference would obviously be rebuttable. But if we read the present definition, it keeps intact the first part viz. about permanent dedication for that purpose, but significantly adds by including "a Wakf by user". It does not say "immemorial user" so as to raise any inference of dedication of the property. It speaks of "Wakf by user" only. Thus, in view of the present definition of "wakf" u/s 2(19) of the Act, one can take proceedings under the Act on such material for being able to show any property as Wakf by user. No doubt, it excludes private wakf. He need not think of getting material regarding permanent dedication of any such property and it may well be enough to show public user of that property for some period for being called Wakf or rather public trust property. That makes a very vital difference between the two definitions in respect of term "wakf" as it then stood in 1928 and as it stood in 1950 i.e., when the application came to be filed in 1952 in respect of this property under the provisions of the Act. Even the appreciation of any such evidence while determining such a point would differ having regard to the broad and wide definition that we find in respect of a term "Wakf" u/s 2(19) of the Act.

(11) The term "including" as held in the case of A.C. Patel Vs. Vishwanath Chada, is a term of extension. It imports addition. It adds to the subject-matter already comprised in the definition. It cannot, therefore, be said that what judicial decisions laid down before, only came to be added in the definition u/s 2(19) of the Act. But it can mean as enlarging the scope of evidence in that respect by

saying that even a property can be held to be a public trust property by reason of user for such a religious and charitable purpose. It was urged by Mr. Vakil that by this definition the Legislature has not intended to convert private Wakf into public Wakf and has merely defined the term in a codified manner from the various decisions relating thereto by different Courts. While it is true that on a plain reading of that definition it may not be said that the intention of the legislature was to convert private Wakf into the public wakf for obviously it provides that it does not include a Wakf which is described u/s 3 of the Musslaman Wakf Validating Act, 1913. But it would depend upon the circumstances of such case. If on the material it is found, that much though any property was private Wakf property at one time, but was being used by the public in a manner as to say that it would fall within the definition of "wakf" u/s 2(19) of the Act, there is no reason why it should not be so held. Whatever that be, the fact remains that the two definitions have substantial difference and that difference is bound to Act and react on the material that comes up before the Court as also in the appreciation thereof in arriving at the conclusion under the provisions of the Act.

(12) Besides, under the old law, it appears, that a wakf would become void for uncertainty. As stated in para 179 of Mulla's Mahomedan Law "the objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty." If we turn to section 10 of the Act on the other hand, it lays down that notwithstanding any law, custom or usage, a public trust shall not be void, only on the ground that the persons or objects for the benefit of whom or which it is created are unascertained or unascertainable. In other words, it creates a certain distinction between the law in that respect as it stood prior to 1950, and thereafter, with the coming in force of the Bombay Public Trusts Act, 1950. A special machinery is provided for making inquiries with regard to any such trust properties and apart from any person being entitled to make any such application, even the Assistant or Deputy Charity Commissioner as the case may be, is authorised in law to make inquiries in respect of such properties suo motu and that again changes the whole aspect of the applicability of law to trust properties. When such is the position, it can be easily said that the law that governed the properties in dispute in 1928 was fairly different from the one that we have with the coming in force of the Public Trusts Act, 1950 under which the present proceeding stands governed. Any decision, therefore, arrived at in that suit of 1928 cannot stand as a permanent bar to the same from being re-agitated after the coming in force of the Act. The person who filed the application are not the same who were parties in the earlier suit though no doubt they would be covered by reason of the fact that it was a suit of a representative character u/s 92 of the Civil Procedure Code. In this view of the matter, the principles of res judicata would not operate in respect of the proceeding, before the Deputy Charity Commissioner and the Charity Commissioner. The learned Deputy Charity Commissioner as also the learned Charity Commissioner were, therefore, right in holding that there was no bar by reason of the principles of res judicata arising

out of the decision in the earlier litigation decided in a suit filed at Surat. The decision of the learned District Judge is, therefore, not correct in that aspect of the matter and I, therefore, disagree with him. Since there would be no bar by reason of the applicability of the doctrine of res judicata, the matter shall have to be proceeded further by the trial Court in accordance with law.

(13) In the result, therefore, the appeal is allowed and the order passed by the learned District Judge is set aside. The case shall, therefore, be sent back for further disposal in accordance with law. The appeal filed by the Charity Commissioner shall accordingly be allowed. Respondent No. 2 shall pay the costs of the appellants and bear his own. Similarly he shall pay the costs of the Charity Commissioner in the other appeal and bear his own.

(14) Appeal allowed.