

**(1956) 04 PAT CK 0029**

**In the Patna High Court**

**Case No : A.F.A.D. No's. 1736 and 1737 of 1951**

Jiut Ram and Others

APPELLANT

Vs

Jagarnath Ram and Another

RESPONDENT

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**Date of Decision : 02-04-1956**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11  
Limitation Act, 1908 — Article 113

**Citation : AIR 1956 Patna 489**

**Hon'ble Judges : Sinha, J**

**Bench : Single Bench**

**Advocate :** Mahabir Prasad, General, Kanhaiyajee and Ramnandan Prasad, No. II, for the Appellant; G.P. Das, Tarkeshwar Nath and M. Varma, for the Respondent

**Final Decision : Allowed**

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## **Judgement**

Sinha, J.—These appeals are by the plaintiffs of Title Suit No. 218 of 1947, one of whom, namely, Thakur Prasad, is the defendant in Title Suit No. 59 of 1948. The suit properties in Title Suit No. 218 of 1947 are two houses and two golas in Sasaram town belonging to Jiut Ram, Thakur Prasad and other members of their family. Mohanlal-Motilal, a firm, had obtained a money decree against Jiut and others on 3-3-1925.

In execution of the said decree, Mohanlal-Motilal purchased the properties in dispute on 11-7-1926. There was delivery of possession in favour of the decree-holder auction-purchaser on 18-1-1927. Jiut and other members of his family executed a mortgage bond in favour of Doma Ram, father of Jagarnath, the plaintiff in Title Suit No. 59 of 1948, for a sum of Rs. 1000/- in respect of other properties. On 24-4-1927, Jiut and others executed another mortgage bond in favour of the said Doma Ram for a sum of Rs. 900/-.

The properties mortgaged were properties other than the properties in suit. On 11-6-1929, Mohanlal-Motilal, who were purchasers at the auction sale in

execution of the money decree executed a sale deed in respect of the two houses and one of the two golas purchased by them in favour of Doma Ram for Rs. 2,100/-. On 9-7-1929, Mohanlal-Motilal executed a mokarrari lease in favour of the said Doma Ram in respect of the remaining one gola. On 20-7-1929, a registered kerayanama was executed by Thakur Prasad in favour of Doma Ram agreeing to pay rent at Rs. 6/- per month for the two houses.

On 30-7-1929, Doma Ram executed a moahda-nama (Ex. 3) in favour of Jiut Ram and other members of his family mentioning therein all the details as to how the properties purchased by Mohanlal-Motilal were acquired by him, and in that moahda-nama it was said that the sale deed, the mortgage bonds and the kerayanama were all farzi transactions; and out of the consideration of Rs. 2,100/- paid by Doma Ram to Mohanlal-Motilal as consideration for the purchase of the houses and the gola, a sum of Rs. 1,500/- was paid by Doma Ram, and Jiut and others had paid Rs. 600/-.

By this moahdanama, which was in favour of Jiut and other members of his family, Doma Ram agreed to reconvey the two golas and the two houses on payment of Rs. 1,500/- by Jiut and others; and further that if it was shown that during his possession Doma Ram had spent Rs. 600/-, as mentioned in the moahdanama, over construction of shops in the sehan of the two golas, then Jiut and others would have to pay Rs. 2100/-, namely, Rs. 1,500/- plus Rs. 600/-, and on payment of this amount whether Rs. 1,500/- or Rs. 2,100/-, as the case might be, these properties, namely, the two houses and the two golas, would be conveyed, after expiry of 12 years but within 18 years from the date of the moahdanama, to Jiut and others.

In 1936, Doma Ram died leaving him surviving his son Jagarnath. In 1942, the said Jagarnath Ram instituted a mortgage suit for recovery of Rs. 900/- plus Rs. 900/- as interest alleged to be due on the mortgage bond dated 24-4-1927. Jiut and others, who were defendants in that suit, contested the suit on the ground that the mortgage bond in suit was a farzi document, mainly relying upon the terms of the moahdanama (Ex. 3).

In that suit, one of the issues, namely, issue No. 4, was as follows : "Is the bond in suit genuine and for consideration"? This was Mortgage Suit No. 156 of 1942. In that suit, it was held that the moahdanama (Ex. 3) was genuine, and, as mentioned in the moahdanama, the bond in that suit was farzi; and the suit was dismissed on 21-7-1943. Jagarnath, the plaintiff of that suit, preferred an appeal (Title Appeal No. 204 of 1945) against the decree dismissing the suit.

The appeal was remanded to the primary Court; and, against the order of remand, Jiut and others, the defendants in that suit, filed an application, namely, Civil Revision No. 554 of 1947, to this Court. This Court allowed the application, set aside the order of remand, and directed that the appeal should be heard by the Court below and disposed of in accordance with law. On 21-5-1948, the Additional District Judge of Shahabad, who heard the appeal, dismissed the

same, agreeing with the trial Court's finding that the moahdanama was genuine and that the mortgage bond was farzi.

On 14-9-1948, Second Appeal No. 1217 of 1948, filed by Jagirnath, the plaintiff in the mortgage suit, was dismissed by this Court. While the Second Appeal was pending, on 30-7-1947, Jiut and others filed the-present Title Suit No. 218 of 1947 which has given rise to Second Appeal No. 1736 of 1951 for specific performance of the contract embodied in the moahdanama for the sale of the two houses and the two gobs against Jagarnath, son of Doma, and the widow of Doma Ram.

In 1948, this title suit was followed by another Title Suit No. 59 of 1948, giving rise to Second Appeal No. 1737 of 1951, by Jagarnath against Thakur Prasad for his eviction from the two houses and the golas and for rent and damages on the basis of the kerayanama mentioned in the said moahdanama (Ex. 3). Both the suits were tried together and were disposed of by one judgment on 20-9-1949, by which Title Suit No. 218 of 1947, the suit for specific performance of the contract embodied in the said moahdanama, was dismissed, and Title Suit No. 59 of 1948 was decreed in part; there was a decree for eviction and for rent, but the claim for damages was disallowed.

2. The first Court held, so far as Title Suit No. 218 of 1947 was concerned, that the moahdanama was not genuine, that the principle of *res judicata* had no application, and that the suit was not barred by limitation. The Court below has affirmed all the findings of the first Court except in regard to the question of limitation inasmuch as, according to that Court, the suit for specific performance of the contract was premature as it was filed a day too soon. So far as the decree of the first Court in Title Suit No. 59 of 1948 was concerned the appellate Court modified it and allowed a decree for rent only, and disallowed ejectment of the defendant on the ground of want of proper notice, although it held that the kerayanama was a genuine document.

3. Learned Advocate-General, on behalf of the appellants, has submitted that the Court below was entirely in the wrong in holding that the principle of *res judicata* had no application. He submits that when in the former suit, namely, Mortgage Suit No. 156 of 1942, the question about the genuineness or otherwise of the moahdanama was raised and the parties gave evidence and invited the Court to give its decision and decision has been given on that point, the question whether the moahdanama was genuine or not cannot be re-agitated.

He has also submitted that the other findings of the Court below were coloured by the finding which the Court below arrived at in regard to the genuineness or otherwise of the moahdanama; and in that view of the matter, the judgment of the Court below is not sustainable in law. He has further submitted that the finding on the point of limitation was bad inasmuch as Title Suit No. 218 of 1947, for specific performance of contract, should have been held to be maintainable and not premature.

4. Mr. G. P. Das, appearing on behalf of the respondent, has controverted the submissions made by learned Advocate General in regard to the application of the principle of *res judicata*; and has further said that the suit for specific performance of the contract has been dismissed also on the ground that that contract embodied in the *moahdanama* could not be enforced against Jagarnath, son of Dorna Ram, inasmuch as the said contract was not for the benefit of the joint family of which Jagarnath and Doma Ram were the members. He says that, the Court having come to the finding that the properties belonged to the joint family, unless there was legal necessity for conveying the properties to Jiut and others, the contract was not enforceable, as it was not for the necessity of the joint family.

5. I will first consider the question of the application of the bar of *res judicata*, namely, that having once-been held in the previous litigation between the parties that the *moahdanama* was a genuine document, whether it was open to Jagarnath and his mother, the defendants in Title Suit No. 218 of 1947 for specific performance of the contract, to contend that the *moahdanama* was not a genuine document. I have already indicated that one of the issues in the mortgage suit was whether the mortgage bond in suit was genuine or a farzi transaction.

The defendants in that suit contended that, as per terms of the *moahdanama*, the mortgage bond in suit as well as other transactions, mentioned in the *moahdanama* as mere farzi transactions, could not but be held farzi. The trial Court in the mortgage suit after hearing the parties and considering the evidence, came to the conclusion.

""These recitals (*Moahdanama*) are so clear and unambiguous that they do not leave any room for doubt that the bond in suit was farzi and without consideration," and further-

"The *Moahdanama* which I have found to be genuine thus makes it clear that there was confidence between the defendants and Doma Ram, that the defendants had fallen in debts, that the bond in suit was executed as farzi in order to save the property subject thereto from the defendants' creditors without any consideration and that the bond had been in the custody of the executants and they were returned to Doma Ram for some other purpose which I have stated above. The *moahdanama* being genuine and having been proved to have been executed by Doma Ram proves beyond doubt that the bond in suit is farzi and without any consideration."

It is true that, after having found the *moahdanama* to be genuine and according to the terms thereof the mortgage bond in suit to be farzi, the trial Court in the mortgage suit held that the plaintiff's evidence on the passing of consideration was absolutely unsatisfactory; and on a consideration of all the oral and documentary evidence, the Court came to the conclusion that the mortgage bond in suit was farzi and without consideration.

The question is whether, the parties having invited the Court in that mortgage suit to give its verdict on the question whether the moahdanama was genuine or not and after the Court gave its verdict to the effect that the moahdanama was a genuine document, is it open to Jagarnath and his mother to contend that the Court should re-consider the matter and come to its conclusion upon fresh evidence in the present case.

I am alive to the fact that the moahdanama was not put in issue, but I am strongly of the view that it was upon the moahdanama and moahdanama itself that in that case defence was raised to the effect that the mortgage bond in that suit was a farzi transaction and no decree could be passed upon such a bond. The parties gave all the evidence that they could, and, on a consideration of that evidence and the terms of the moahdanama, the Court came to the conclusion that the moahdanama was a genuine document.

Section 11, Civil P. C., which embodies the principle of res judicata, has been held to be not exhaustive, and that, even though a matter may not be directly covered by the provisions of that section, the matter may still be res judicata on general principles. In the case of -- "Mr. Lachhmi v. Mt. Bhulli AIR 1927 Lah 289 (FB) (A), Tek Chand J., who gave the majority judgment of the Full Bench has discussed the matter threadbare, and, as said by a member of this Court in another decision, the judgment of his Lordship is "an illuminating judgment." I agree that the facts of that case were different, but I am not concerned with the facts of that case because his Lordship has discussed the principles on which the bar of res judicata is applied. At page 390 of the report, it has been observed as follows:

"The doctrine of res judicata is of universal application and as remarked by Hukam Chand in his well-known Treatise on the subject it is "in fact a fundamental concept in the organization of every jural society. Justice requires that every matter should be once fairly tried, and having been tried once, all litigation about it should be concluded for ever between the parties. It is a rule common to all civilized systems of jurisprudence that the solemn and deliberate sentence of the law upon a disputed fact or facts pronounced after a proper trial by its appointed organs should be regarded as a final and conclusive determination of the question litigated and should for ever set the controversy at rest (Black on Judgments, Vol. II, page 2). This rule which treats the final decision of a competent tribunal as "irrefragable truth" was well understood by Hindu lawyers as well as Muhamadan jurists, and is one of the greatest gifts of Roman Jurisprudence to the modern jural systems of Europe."

And then again-- (p. 292)

"The spirit of the doctrine is succinctly expressed in the well-known maxim "Nemo debet bis vexari pro eadem causa" (no one shall be twice vexed for the same cause). At times the rule worked harshly on individuals (e.g. when the former decision was obviously erroneous) but its working was justified on the

great principle of public policy "Interest rei publicae ut sit finis litium" (it is for the public good that there be an end of litigation)..... (p. 292). In other countries, and notably in England, the doctrine has developed and expanded, and the bar is applied in a subsequent action not only to cases where claim is laid to the same property but also to the same matter (or issue) as was directly and substantially in dispute in the former litigation.

In other words, it is the identity of the issue, which has already been "necessarily tried" between the parties and on which a finding has been given which attracts the operation of the rule .... it must be the identity of the subject matter be borne in mind that the section (present Section 11, Civil P. C.) as even now enacted, is not exhaustive of the law on the subject, and the general principles of res judicata apply to matters on which the section is silent and also govern proceedings to which the section does not in terms apply." (p. 293)

Lastly, his Lordship observed as follows:

"It has already been indicated that the foundation of the rule, as understood both by ancient and modern lawyers is that a question must be once fairly and finally tried by a competent court and after this has been done all further litigation about it must be concluded for ever between the parties. The maxim is, as has been stated above, that "no one shall be vexed twice over the same matter."

This, to mind, presupposes that the issue has been once fairly and finally tried in a former litigation, which was independent of the proceedings in which the same matter is again in dispute. The essence of the rule seems to me to be that the two proceedings should be so independent of each other that the trial of the one cannot be confused with the trial of the other." (pp. 294-295) This case has been referred with approval in the case of -- "Gokaran Prasad v. Chhutey Narayan" AIR 195 Pat 595 (B). In that case, Reuben J. (as he then was) said as follows:

"And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law .....

The conclusion to which I have come is also supported by "the learned and illuminating discourse of Tek Chand J. on the doctrine of res judicata in AIR 1927 Lah 289 (FB) (A)."

It was held in that case that the doctrine of res judicata applied in a subsequent action not only to cases where claim is laid to the same property but also to the same matter (or issue) as was directly and substantially in dispute in the former litigation; in other words, it was the identity of the issue and not the identity of the subject-matter which attracted the operation of the rule.

To similar effect is the judgment in the case of -- Dwijendra Narain Roy Vs. Joges Chandra De and Others, . In that case, in a previous suit u/s 77, Registration Act, the question was whether certain documents were genuine or not, and it

was held that the documents in question were genuine documents. In the subsequent litigation, a suit for recovery of possession of lands covered by the said documents, the defence was that the documents had been materially altered and fraudulent interpolations had been made, and that the documents did not represent the terms settled between the parties.

It was held by the first Court that the defence was barred by principles of *res judicata*. In appeal before their Lordships, it was urged by the appellant that the previous litigation, being u/s 77, Registration Act, was strictly limited in scope and that the decision therein could be treated as conclusive in one respect alone, namely, that the four leases as per separate documents executed in favour of the plaintiff were genuine, and that the finding upon every other point must be deemed an expression of opinion upon a matter either beyond the jurisdiction of the Court or only incidentally in issue. Dealing with this matter, their Lordships held that it was well-settled that an estoppel was not confined to the judgment but extended to all facts involved in it as necessary steps or ground work; in other words, a judgment operated by way of estoppel as regards all the findings which were essential to sustain the judgment, though not as regards findings which did not form the basis of the decision or were in conflict therewith; and their Lordships remarked as follows:

"We must further remember that, as was observed by the Judicial Committee in -- "*Soorjomonee Daycc v. Suddanund Moha Patter*" 12 BLR 304 (D), if both parties invoked the opinion of the court upon the question, if it was raised by the pleadings and argued, the conclusion cannot be supported that the judgment upon it was *ultra vires* merely because an issue was not framed which, strictly construed, embraced the whole of it;..... where a defendant is entitled to set up in the same answer as many defences as he has, if a judgment is entered in his favour, which contains no provision that it shall be without prejudice or any like limitation or restriction, the estoppel raised by it will extend to every matter or fact in issue actually found by the Court in favour of the defendant."

Ultimately, their Lordships decided that the defence was barred by *res judicata* inasmuch as in the previous litigation it had been found that the documents were in the form provided by the contract between the parties and that the *kebala* was a genuine document which supported most strongly the case of the plaintiff, and that all the surrounding circumstances and the evidence suggested that the documents were executed by the defendant.

6. In view of these decisions, I must hold that the Courts below were wrong in going into the question of genuineness or otherwise of the *moahdanama* (Ex. 3). The finding in the previous litigation that the *moahdanama* was a genuine document cannot be allowed to be questioned in the present litigation inasmuch as the parties having adduced evidence on the point and invited the Court to come to a decision on the same must be held bound by the decision arrived at in that litigation,

True it is that the genuineness or otherwise of the moahdanama was not put in issue, but the finding on issue No. 4 about the character of the mortgage bond in suit, whether it was genuine and for consideration, depended chiefly upon the answer to the question whether the moahdanama was a genuine document. In that view of the matter, although the case may not be covered by the language used in Section 11, Civil P. C., I hold that, on general principles governing the doctrine of res judicata, the question about the genuineness of the moahdanama cannot be allowed to be re-agitated in the present litigation.

7. Mr. G. P. Das has drawn my attention to the fact that in the previous litigation the trial Court (in Ex. 8(a)), after finding that "the moahdanama being genuine and having been proved to have been executed by Doma Ram proves beyond doubt that the bond in suit is farzi and without consideration", had added the following observation:

"I may mention here that both the parties have adduced evidence on other points contained in moahdanama. Those points are not germane to the issue of this suit. Parties have adduced evidence only in order to show that the moahdanama is or is not genuine. In fact as regards the other points contained in Ex. A (the moahdanama) there is not much dispute between the parties except this that the transaction between Doma Ram and Mohan Lal Moti Lal in respect of defendant's houses and Golas purchased by Mohan Lal Moti Lal in execution of their decree are alleged by the defendants to have been entered into by Doma Ram really for the benefit of the defendants that is to say in order that the property may be taken away from Mohan Lal Moti Lal so that the defendants may get it back from Doma Ram whenever they arrange for money which had to be paid to Mohan Lal Moti Lal and the plaintiff alleged that Doma Ram entered into those transactions for his own benefit.

That dispute is not relevant in this suit. I do not consider it necessary to give any finding on it or to consider it at length. That dispute must form the basis of different suit if the parties do not settle it outside the court. For the present it is sufficient for me to find that the recital contained in Ex. A in respect of the bond in suit prove it beyond doubt that the bond in suit is farzi. These recitals having been made by Doma Ram they must be held to be correct as against the defendants."

He contends that, because other matters contained in the moahdanama were not the subject-matter of any finding in the mortgage suit, there is no question of res judicata so far as those other matters are concerned. Mr. Das in a sense is correct in his view; what the Courts below should have done was to consider the evidence as regards the matters now involved in the present suits in the light of the finding in the previous litigation that the moahdanama was a genuine document, and further that the recitals made in the moahdanama were made by Doma Ram.

The Courts below thought that they were free to come to any finding upon the

genuineness of the moahdanama: that was wrong. Mr. Das has also drawn attention to the fact that in the present judgment the Court below has held that, as the transaction evidenced by the moahdanama was not for the benefit of the family, the defendant in the suit for specific performance of the contract was not bound by the terms of the moahdanama.

That, again, in my opinion, to a large extent depends upon the finding whether the moahdanama is a genuine document or not. In my judgment, the case (Second Appeal No. 1736 of 1951 -- the suit for the specific performance of the contract) must be sent back to the Court of appeal below for considering the whole matter over again bearing in mind that the moahdanama is a genuine document as was held in the previous mortgage suit.

8. So far as the question of limitation is concerned, the Court below has held that the suit is premature because it was instituted a day too early. According to the court below, the contract was to be performed by the end of the 18th year from the date of the contract, which was 30-7-1929, but after 12 years from that date, and that 18 years from the said date would have ended on 30-7-1947, the date of the agreement being excluded, and that the limitation for specific performance of the contract would have started from 31-7-1947.

The plaintiffs, according to the Court below, had thus no cause of action for filing Title Suit No. 218 of 1947 before 31-7-1947, and the suit having been instituted on 30-7-1947, it was premature. I am unable to agree with the court below on the construction of the document so far as the period of limitation is concerned. The agreement in the moahdanama, Ex. 3, recites "After twelve years from the 30th July 1929 and "within" eighteen years when the claimants and their heirs and representatives shall pay .... I, the executant, shall return both the mortgage bonds."

It is clear to my mind that no suit for specific performance could have been brought within 12 years, but the claimants, Jiut Ram and others, had the right to return the money within 6 years after the expiry of the first 12 years.

In the quotation I have underlined (here, in " ") the word "within", and that shows that, on refusal to accept the money by Doma Ram or his heirs after the expiry of 12 years but within 6 years from the expiry, thereof, the claimants, the present plaintiffs in the suit for specific performance of contract, had the right to pay off, and on refusal to accept the payment, the cause of action accrued to the plaintiffs. In that view of the matter, it must be held that the suit brought within 6 years after the expiry of 12 years from the date of the execution of the document Ex. 3 is maintainable, and the Court below is wrong in holding that the suit is premature.

9. So far as the other appeal, Second Appeal No. 1737 of 1951, is concerned, it is Interconnected, and it depends upon the findings which may be arrived at in the suit for specific performance of contract. In that view of the matter, the judgment of the Court below in both the appeals is set aside.

10. In the result, the two appeals are allowed. the judgment of the Court below is set aside and the two cases are sent back to it for disposal in accordance with law keeping in view the observations made above. There will be only one set of hearing fee, and the costs of these appeals will abide the result.