

(1931) 07 BOM CK 0012

In the Bombay High Court

Case No : Cross-Appeal No"s. 465 and 531 of 1928

Keshav Jagannath Dikshit

APPELLANT

Vs

Gangadhar Yadneshwar Dikshit

RESPONDENT

Date of Decision : 08-07-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1931) 33 BOMLR 1443

Hon'ble Judges : Nanavati, J;Baker, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Baker, J.—These are cross-appeals arising out of an order made by the First Class Subordinate Judge of Jalgaon in an execution matter arising out of an award decree. The facts of this case are lengthy, but it is not necessary to go into the past history of the property, because questions relating to this property have been before this Court before, and have formed the subject of various judgments, and there is one reported case, Narayan Jagannath Dikshit v. Vasudeo Vishnu Dikshit ILR (1890) Bom. 247 in which the history of this property has been dealt with. For the purposes of this case it is sufficient to say that we are here concerned with a saranjam property known as the Shendurni estate in Khandesh, This was granted by the Peshwa in exchange for another property known as Dhokani to Narayan Dikshit Patankar, who is the ancestor of the present parties. Narayan had two sons, Vasudeo and Balkrishna. The present plaintiff, who is now the holder of the saranjam since 1900, is a descendant of the elder son Vasudeo, and, therefore, the representative of the senior branch. The defendant, Gangadhar Yadneshwar, is the representative of the junior branch. By a family arrangement which was recognised by the Inam Commission in 1855 the property was divided into two separate mahals. The northern mahal, with which we are not now concerned, was placed in the possession and management of one of the members of the senior branch, although not the

grantee himself. The southern half or mahal with which we are now concerned has been from the beginning in the possession and management of the junior branch now represented by the defendant Gangadhar, but the saranjamdar receives income from the northern mahal, and he is also entitled to a percentage of the net collections of revenue in the southern half, and the present appeal arises out of an order in execution proceedings made on an application by the saranjamdar, the plaintiff, to recover from the defendant, who is in possession of the southern mahal, his ten per cent, of the net collections. The right to receive this percentage of the collections arises from an award decree passed between the ancestors of the parties in the year 1887. The present application was to execute this award decree, and various objections were raised by the defendant, the principal one being that inasmuch as the saranjam was resumed by Government and re-granted to the plaintiff in 1900, the effect of the resumption and the re-grant was to do away with all previous arrangements between the parties, and, therefore, the award-decree is no longer capable of execution after the resumption. The second point taken was that the defendant was not liable to pay to the plaintiff any percentage of collections in respect of the sub-inams which had been granted by the holders of the southern mahal to various other persons. The Subordinate Judge of Jalgaon found that the question as to the award-decree being enforceable was res judicata between the parties by reason of the decision in a previous darkhast of 1904 confirmed on appeal by the High Court in 1905. He further held that the defendant was bound to account to the plaintiff for the rentals of those sub-inams which had been granted by him or his family, but he held that the plaintiff was not entitled to demand the accounts of the village expenses, but was bound to accept the customary estimate of them at twenty per cent. of the gross collections, and he accordingly rejected the plaintiff's claim on that score. Both parties have appealed against this order. The appeal of the defendant, which is the principal appeal, is No. 531 of 1928, in which the same contentions are raised as were raised in the lower Court and which were also raised and found against him in 1904 and 1905, while the plaintiff has made appeal No. 465 of 1928 against the order regarding the deduction of twenty per cent. from the gross collections for village expenses. The plaintiff's appeal being first in point of time, was heard first, but the principal appeal is the other, and if that was successful, then the question of the amount to be deducted for village expenses would not arise, inasmuch as the plaintiff would not be entitled to receive anything out of the collections realised by the defendant from the southern mahal, I shall accordingly address myself first to the points which arise in the appeal of the defendant, which are, first, whether it is open to the defendant, in view of the decision of 1905, to re-open the question of whether the award decree is binding upon him; secondly, if it is so open, whether the decree is binding on him or not; thirdly, whether the defendant is entitled to a reduction in respect of the sub-inams which have been granted by him or his ancestors; and lastly, the question which arises in the plaintiff's appeal, viz., whether the plaintiff is entitled to go into the question of the actual amount of the expenses of village management or whether he is bound to accept

the ratio of twenty per cent. of the gross collections.

2. The award-decree was obtained by the plaintiff's grandfather against the father of the defendant on August 30, 1867. That award-decree arose out of a suit which was referred to arbitration, brought by the then plaintiff against the representatives both of his own branch who were in possession of the northern mahal of Shendurni, and defendant No. 2, who was the father of the present defendant and was in possession of the southern mahal under the family arrangement already referred to, that arrangement having received the approval of the Inam Commission, and the sanction of the Government, ultimately confirmed by the Board of Directors, as at that time the paramount power was the East India Company. Various contentions were raised by the two sets of defendants. We are not now concerned with any of the contentions raised by the then defendant No. 1 as regards the northern mahal. It will be necessary, however, to refer briefly to the terms of the award-decree and the findings arrived at by the arbitrator, and it is quite clear from this decree that the plaintiff's grandfather was recognised as a saranjamdar of the whole saranjam, his name being ordered to be entered in the Government record, and it being distinctly laid down that the two groups of defendants, who were in actual possession and management of the two mahals, were in possession as his representatives or deputies. The word used in the vernacular is vidyaman. At this distance of time, and on the record which is before us, it is not possible to know what was the reason of this family arrangement, although it occurred to me that inasmuch as the original grantee was the spiritual preceptor of the Peshwa, it may possibly be that he was required to be in attendance at the Court at Poona or elsewhere, and, therefore, would be unable personally to reside on his property or manage it, This is, however, mere speculation, although the matter is of some historical interest. However that may be, the actual possession of the two mahals under this arrangement was, as regards the northern mahal, with the representatives of the branch of the saranjamdar, but not with the saranjamdar personally, and as regards the southern mahal it was with the representatives of the junior branch, i.e., the ancestors of the present defendant. The clause in the award-decree with which we are concerned is at p. 16 of the record, and the translation on the record is not very good. An alternative translation has been put in by the learned counsel for the respondent in the second appeal. The clause runs as follows:--

Moreover an order has been passed that the saranjam has been re-granted in the name of the plaintiff by Government and is ordered to be continued as long as his direct lineal descendants are in existence. And so both the defendants (meaning the holders of the northern mahal and the holders of the southern mahal) should after the revenue of the villages is collected pay to the plaintiff every year at the proper time in addition to the plaintiff's share ten per cent. from the balance which remains over after deducting according to custom Government dues, mokasa, etc. and the expenses of the village after showing accounts.

3. I need not give the remainder of the clause which refers to interest falling due on the amount not being paid punctually. We are not now concerned with the share of the plaintiff except the ten per cent., which under this award-decree he was to receive from the net revenues of the southern mahal after the mokasa which means tribute payable to Government, and the village expenses had been deducted. It has been argued by the learned counsel for the appellant that the saranjam having lapsed to Government and having been re-granted to plaintiff in 1900, the effect of the lapse and the re-grant was to do away with all the previous encumbrances on the land including the award-decree, and, therefore, the plaintiff, who succeeds not as the heir of his father and grandfather, but as a new grantee from Government, loses all right to enforce the award-decree which had been obtained by his grandfather against the father of the present defendant. The terms of the re-grant are on the record. The Government Resolution is at p. 63, Exhibit 17, in which after reciting that the saranjam be formally resumed on account of the death of Jagannath Narayan Dikshit, and be re-granted to Keshav Jagannath Dikshit, and entered in his sole name in the accounts of the Collectorate, it goes on to say:

Regarding possession Government have ordered that the private family arrangement in conformity with the decision of 1885 should continue and that Keshav Jagannath Saran jamdar should be placed in possession only of that moiety of the estate which was under the arrangement of 1885 allotted to his branch of the family.

4. It is necessary to quote this Government Resolution, because it is on this resolution that the finding of the High Court confirming the order of the Subordinate Judge in 1904 is based. In 1904 the present plaintiff presented a darkhast for the execution of the award-decree. The same contentions were raised in those proceedings as have been raised in the present case. The judgment of the first Court, the Subordinate Judge of Dhulia, is at p. 35 of this record, Exhibit 11, and issue No. 3 was, "Have Government made any change in the nature of plaintiff's tenure of the villages or put him in possession of any part of the same ? If so, does this supersede the decree obtained by plaintiff's pre-dacessor for recovery of the profits payable to him" ? And the finding was, " Government has made no change in plaintiff's tenure. It has placed him in possession of the northern half of the Shendurni jahagir. This does not affect the decree as against defendant No. 2 ". At p. 38, para. 13, of the judgment, it is stated that "defendant No. 2 (i.e., the present defendant) contends that this re-grant to the plaintiff nullifies the award--but this is only true to the extent of defendant No. 1's interest. The Government order expressly reserves in other respects the private arrangements as to the possession of the saranjam in conformity with the orders passed in 1855 by the Board of Directors." He, therefore, overruled this contention of the defendants. There was an appeal to the High Court, First Appeal No. 95 of 1905, where the same contentions were raised. At p. 50 of the record, in the judgment of the High Court it is stated:--

Now seeing that the decree on the award effected an arrangement between the parties thereto such as is contemplated in the original order of 1865, it appears to us that the present defendant Gangadhar Yadneshwar must be taken to hold the south half subject to the arrangement made by that decree, which is, as we have said, that he is to pay ten per cent. of the realization to the plaintiff and that being so, the learned Judge in the Court below has found that the figures come to Rs. 2,388-14-4.

5. It appears, therefore, that the very point which has now been raised by the present appellant-defendant was raised in a suit between the same parties in 1905, and was decided against him by the High Court, and, therefore, it is contended on behalf of the respondent that the matter is *res judicata*, and that it is not open to the present appellant to re-agitate the same question. The case appears to fall clearly u/s 11 of the Code of Civil Procedure, but it has been contended by the learned counsel for the appellant that there cannot be any *res judicata* on a point of law where there has been a wrong decision on a point of law. In the first place this is not a pure point of law. I have given the terms of the award, the terms of the Government Resolution re-granting the *saranjam* to the present plaintiff, and the text of the High Court's judgment on this point, from which it will appear that what was the question in issue was the interpretation of certain documents. No doubt it has been repeatedly laid down by the Privy Council that the interpretation of documents is a matter of law, but it is not a pure question of law in the present case, but rather a question of opinion as to the meaning of the words employed in certain documents. It would be very difficult to say that the view which the High Court took on certain expressions in documents is a wrong view, much less that it is a wrong finding on a point of law. Every document has to be construed on its own terms, and it would not be possible to lay down any rule of law in a case such as the present prescribing that these particular terms should be interpreted in a particular way and in no other. The learned counsel for the appellant has relied on several cases which he has quoted, viz., *Chamanlal V. Bapubhai* ILR (1897) Bom. 669 *Baij Nath Goenka v. Padmanand Singh* ILR (1912) Cal. 848 *Vishnu v. Ramling* ILR (1901) Bom. 25 3 Bom. L.R. 450 *Aitamma v. Naraina Bhatta* ILR (1907) Mad. 504 *Mangalatharnmal v. Narayanswami Aiyar* ILR (1907) Mad. 461 and *Kuppana Kavundan v. Kumara Kavundan* ILR (1909) Mad, 450 The learned counsel for the respondent has relied on *Waman v. Hari* ILR (1906) Bom. 128 8 Bom. L.R. 932 *Rajaram Tukaram Vs. The Central Bank of India Ltd., , and (1881) L.R. 8 I.A. 123* (Privy Council) and has argued that the cases which have been quoted on behalf of the appellant are distinguishable. In addition to these, he has referred to *Tarini Gharan Bhattacharya v. Kedar Nath Haldar* ILR (1928) Cal. 723 which is a full bench case. I will refer briefly to these cases in their order. The general principle is that a decision on an issue of law operates as *res judicata* if the cause of action in the subsequent suit is the same as in the previous suit. That is *waman v. Hari*, and it is immaterial if the decision was erroneous in law. It has been contended that the cause of action in the present *darkhast* is not the same as it was in the

former darkhast inasmuch as the cause of action arises from the collections which have been made by defendant No. 2 from the southern mahal during the years in suit. That, however, is not altogether correct. The plaintiff's cause of action to recover the collections of the years in suit may arise partly from the fact that the defendant has collected them, but it is based on the right given him by the award-decree to recover ten per cent. of the net revenue from the southern mahal. It has been argued by the learned counsel for the respondent that, as was pointed out by Mr. Justice Fawcett in *Bajaram v. Central Bank of India*, a very awkward situation would be created if it were open to parties to re-agitate questions which had already been decided against them, even supposing they had been wrongly decided. If it were held in the present case that the decision of the High Court in 1905 was not binding on the parties, and it was open to the defendant to again contend that the award was not binding on him, and that contention were accepted and the Court came to the conclusion that the award was not binding, it might easily happen that in a year or two or even next year when further collections have been made, the plaintiff might again demand his share of the collections, it might be contended that the view of this Court on the binding nature of the award was wrong, the matter would be again re-opened, another bench might come to a contrary conclusion, and so on ad infinitum. This is perfectly true, and it is obvious that there must be some finality to litigation. The first case on which the learned counsel for the appellant has relied is *Ghamanlal v. Bapvhhai* in which it was held that a point of law decided in a suit between the same parties can never be *res judicata*. The circumstances of that case were that the plaintiff sought to recover eleven years' arrears of his share in a Government allowance received by the defendants. It was contended that under the Indian Limitation Act, XV of 1877, only three years' arrears could be recovered. In a previous suit brought by the plaintiff in 1874 against the same defendants it was decided by the High Court that twelve years' arrears could be recovered. The lower Court now held that this decision continued to bind the parties, and that, therefore, the present claim should be allowed. Between that decision and the decision in *Ghamanlal v. Bapubhai* the Indian Limitation Act had been altered, and the judgment began by saying (p. 671):--

We do not think that the decision of this High Court in a suit between the same parties, that arrears for twelve years could be awarded--*Chhaganlal v. Bapubhai* ILR (1880) Bom. 68 is *res judicata* in the sense that this Court is bound ever after to decide that a claim for twelve years' arrears is good. That decision was passed when either Act XIV of 1859 or Act IX of 1871 applied to the claim. The present suit was brought after Act XV of 1877 came into force, and it, therefore, must be applied.

6. It will appear, therefore, that in that case the Indian Limitation Act had been changed in the interval between the first and the second suit. The next case is *Baij Nath Goenka v. Padmanand Singh*, in which it was held that the decision in a previous execution proceeding which merely lays down what the law is, and is found to be erroneous, cannot have the force of *res judicata* in a subsequent

proceeding for a different relief. The facts of that case are different to those of the present. The present application is for the same relief as in the former case. The judgment says (p. 853):--

But when a decision does lay down what the law is and is found to be erroneous, it cannot, in our opinion, have the force of *res judicata* in a subsequent proceeding for different relief. A decision cannot alter the law of the land.

7. Now if that pronouncement is applied to the facts of the present case, it would be seen that it has no application. What the High Court did in the present case was to construe a clause in a grant by Government as not affecting an award-decree which had been previously entered into between the parties. That in no sense lays down what the law is; or alters the law of the land, and, therefore, the decision in *Baij Nath Goenka v. Padmanand Singh* has, in my opinion, no application. The next case, which has been quoted by the learned counsel, is *Vishnu v. Ramling*, in which the facts were that the plaintiff, a khot, sued to recover rent in kind from the defendants for the year 1898-1899, and also claimed rent for the betel-nut trees growing on the land. The defence was that under the both that the plaintiff was not entitled to claim any rent in respect of the betel-nut trees. In a previous suit between the same parties the plaintiff had claimed *inter alia* rent in respect of the same betel-nut trees, alleging that the defendants were liable to pay rent in kind to the plaintiff according to practice. The defendants appeared and applied for time to put in their written statement, but their application was refused. The only issue raised in the case was whether the estimated produce was proved. The Judge held it proved, and decreed the claim. It was contended that the decision in that suit operated as *res judicata*. It was held by the High Court that the decision in that suit did not operate as *res judicata*, and the mere fact that in the former suit the produce of betel-nuts may have been wrongly awarded could not alter the provisions of the law. It was held by Chandavarkar J. that the question of defendants' liability in respect of betel-nuts for all years was not alleged, and was, therefore, not directly and substantially in issue in the previous suit. All that the former suit decided was that that was payable in respect of betel-nuts for the year 1897-98 as alleged and claimed in the plaint and not according to practice. That is an entirely different state of facts from those in the present case where we are dealing with an interpretation of a document. The next case is *Aitamma v. Narain Bhatta*, where it was held that an erroneous decision on a question of law in a previous application for execution of a decree directing payment of future maintenance from the date of plaint till death of recipient at a certain rate does not operate as a bar in a subsequent application to recover arrears which accrued subsequently. The point was one under the Indian Limitation Act. In *Mangalathammal v. Narayanswami Aiyar* it was held that an erroneous decision on a question of law in a previous suit is no bar in a subsequent suit between the same parties to the Court deciding the same question, provided the decision in the latter suit does not in any way question the correctness of the former decree or in any way affect its operation. This latter decision is really in favour of the respondent, because if

this Court were to hold that the decision of the High Court in the appeal of 1905 was not binding on the parties, we should be questioning the correctness of the former decree, and affecting its operation. All these cases, as I think I have already said, presuppose that the finding in the former suit was wrong on a question of law, whereas in the present case it cannot be said that the interpretation to be put on a document by the Courts in the previous proceeding was wrong in law. The next case quoted is *Kuppana Kavundan v. Kumara Kavundan* in which it was held that an erroneous appellate order in the previous proceeding that no appeal lay did not operate as *res judicata*. That was a wrong decision on a point of law, and the same remark applies as those made in relation to the case immediately preceding. On the other hand, it has very recently been held by the Calcutta High Court in a full bench case in *Tarini Charan Bhattacharya v. Kedar Nath Halder* that the correctness or otherwise of a judicial decision has no bearing upon the question whether it does or does not operate as *res judicata*. A party taking a plea of *res judicata* has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided; the principle of *res judicata* is not to be ignored on the ground that the reasoning, whether in law or otherwise, in the previous decision can be attacked on a particular point. In this connection, I may refer to the remarks of Rankin C.J. at p. 735, where he says:--

The question whether a decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata*. The doctrine is that in certain circumstances the Court shall not try a suit or issue, but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances, it must necessarily be wrong for a Court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that, therefore, it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party.

8. Then, at the bottom of p. 736, omitting two paragraphs:--

In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attacked on a particular point. On the other hand, it is plain from the terms of Section 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se*, but to ascertain their rights and the facts upon which these

rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or recontesting that which has been finally decided.

9. This view was concurred in by the other four Judges composing the full bench. With great respect, I entirely agree with them. There is also a decision of this Court in *Rajaram v. Central Bank of India* in which it was held by Mr. Justice Fawcett that a decided case cannot be re-opened merely because the view that was taken on a question of law in that case is subsequently upset, not in that case but in another proceeding between different parties, by a superior Court, or is superseded by some enactment of the legislature, and an erroneous decision on a point of law is, as between the parties to it and no further, *res judicata* to preclude them from re-agitating it, and at p. 891 the learned Judge has made remarks regarding the importance of this principle with a view to finality in litigation inasmuch as its non-observance would lead to subsequent Courts holding different views on the same point, a matter to which I have already referred in my own language at the outset of this judgment. It has been contended by the learned counsel for the appellant that this is a decision of a single Judge by which this bench is not bound in view of the two decisions of a bench already referred to in *Chamanlal v. Bapubhai* and *Vishnu v. Ramling*. I have already referred to those cases as being distinguishable on the facts from the facts of the present case, and there is, moreover, another ruling of a Divisional Bench of this Court in *Waman v. Hari*, in which it was held that an erroneous decision on a point of law may yet, as between the parties to it, but no further, be a sufficient *res judicata* to preclude them from re-agitating it. And it might be argued that that decision is binding upon us. It is true that in that case the appellant had apparently abandoned a point in a previous proceeding. No case of the Privy Council directly in point has been quoted except the decision in *Mungul Perahad Dichit v. Grija Kant Lahiri Chowdhry*, in which it was held that assuming that a decree is barred at the date of some order made for its execution, such order, though erroneously made, is nevertheless valid unless reversed on appeal. In this state of the authorities, I have no hesitation in holding that the decision between the same parties on the same point as the present is *res judicata*. It is not necessary to consider whether it proceeds upon a point of law erroneously decided, because I am clearly of opinion that the construction of the clause in the re-grant by Government to the plaintiff by the High Court in F. A. No. 95 of 1905 is not a pure point of law, and that it cannot be said to be erroneous, and therefore the question is *res judicata*. I hold, therefore, that the question as the right of the plaintiff to receive ten per cent. of the net collections of the southern mahal from the defendant is one which has already been decided between the parties by this Court, and that it is not open to the defendant to re-agitate the question.

10. The remaining point in the defendant's appeal is that he is not liable to account to the plaintiff for the rental of those lands which have been given in inam to sub-inamdars, and it is contended by the learned counsel on behalf of

the appellant that it is not shown that these sub-inams were created after the date of the award. He does not recover the rent, and therefore even on the terms of the award-decree, which provided for payment to the plaintiff out of the net revenues, he is not liable to pay on them, inasmuch as they do not form part of the revenues of the village. The plaintiff in his deposition said that he did not know when these alienations were made. In view, however, of the terms of the award-decree, which clearly shows, as have already indicated, that the possession and management by the defendant's branch of the southern mahal were as representatives of the plaintiff, who is the owner of the whole saranjam, the re-grant being made to him, and the saranjam being entered in his name in the Government records, I have no doubt that the view taken by the Subordinate Judge is correct, inasmuch as defendant's branch had no right to make any alienations at all, and any alienation is not binding on the plaintiff. The property is not liable to alienation, certainly not by a person who is not the saranjamdar, and therefore the order will be upheld in the case of this also. As a matter of fact the amount at stake is very insignificant, I think somewhere about Rs. 14, possibly with interest Rs. 17-8-0 or so.

11. The result is that so far as the appeal of the defendant is concerned, i.e., Appeal No. 531 of 1928, it will be dismissed with costs.

12. Turning to the other appeal, the appeal made by the plaintiff, that may be disposed of fairly shortly. The appeal of the plaintiff is based on the fact that in making up the account of the revenues of the village it has been the practice to set apart one-fifth, i.e., twenty per cent., of the collections for the expenses of village management, and it is contended by the plaintiff that while the revenue of the village has gone up, the expenses of management have not risen, but have remained stationary, and therefore he is entitled to have deducted from the ten per cent. which he receives, only so much as is actually expended by the defendant. The learned Subordinate Judge has pointed out that not only is there no evidence of a custom of rendering accounts of the village expenses, but that the evidence is all the other way. It appears that habitually the plaintiff has allowed this deduction of one-fifth for village expenses, which is shown in all the statements of accounts which accompany the receipts, (there are several of them on record, Exhibits 24 to 80), and that his explanation that he allowed this to be done through ignorance cannot be accepted. Moreover the Government Resolution of 1874 shows that this practice was recognized by Government. Two decrees have been put in, not inter partes, as showing that this custom was not upheld in the case of the northern mahal, and it was therefore contended by the learned counsel for the appellant that it was not possible that there could be two customs within the same family and the same saranjam, and therefore it must be taken that no such custom existed. With regard to the possibility of there being two customs within the same saranjam and the same family, I may point out that there is a great deal of distinction between the manner in which the northern mahal and the southern mahal have been treated, and therefore the question of the invariability of the custom within the same saranjam does not

seem to me to arise. As a matter of fact the plaintiff receives a share of the produce of the northern mahal which is different from the share which he receives in respect of the southern mahal, and there are also differences in the relation in which the original defendant No. 1 and the members of his own branch stand to him as compared with the members of the junior branch represented by the present defendant. I am, therefore, not at all impressed by the argument that the mahals must be treated on the same footing, which as a matter of fact they never have been.

13. Secondly, as to the custom, it is quite clear from the evidence in this case that throughout the plaintiff", who is presumably an educated man, has been allowing one-fifth of the income to be set apart for village expenses. The receipts themselves show that, the amount of one fifth being clearly indicated. It is moreover in evidence of the plaintiff himself that he has a clerk who was in his service for twenty-five years, and was, therefore, presumably familiar with the practice prevailing in this saranjam. No objection was taken either by the clerk or by the plaintiff to this manner of presenting the accounts. Moreover, that such a custom exists is shown by the Government Resolution to which I have already referred, the Resolution of 1874, Exhibit 15 at p. 53. It refers primarily to the Jagir of Bhosawal. It says, " to the free disposal of one-fifth of the revenues of that Jagir village, set apart according to custom, for village expenses," and refers to Shendurni, which is the jagir with which we are now concerned, being treated in the same manner. I may point out that there are advantages in having a customary rule of this character, inasmuch as if every year the expenses actually incurred in the management of the village have to be checked by the plaintiff, there will be a likelihood of continual disputes over petty items, but on the evidence on the record, I am of opinion that throughout it has been the practice for a deduction of one-fifth or twenty per cent. to be made in respect of village expenses, that this practice has been followed to the knowledge of the plaintiff to whose notice it is clearly brought by the very memoranda of accounts themselves, of which there are several on the record of this case, and the plaintiff has never taken any objection to it. Moreover in previous applications for execution the plaintiff has not claimed that only the exact amount expended should be deducted on account of village expenses, but has acquiesced in the deduction of twenty per cent., and although, inasmuch as this point does not seem to have been brought to the notice of the Court and did not form the subject of contention between the parties, I am not prepared to say that the matter is *res judicata*, I hold that the plaintiff must be deemed to have acquiesced in this practice, and must be taken to have waived his right to claim that only the actual expenses should be deducted, assuming that under the award decree he is entitled to make any such claim. I have already given the terms of the particular clause. They are not very clear, and it is not at all clear to me that he is entitled to anything of the sort, The award-decree does not appear to me to distinctly deal with the question of the village expenses, It only says, after deducting village expenses and after rendering accounts. Rendering

accounts does not necessarily mean rendering accounts of the village expenses, but rendering accounts of management of the village, which as a matter of fact has been done. I have already pointed out, Exhibits 24 to 30 are accounts for succeeding years. The right of the plaintiff to see the village accounts has not been disputed in the present case. I think, therefore, the view of the lower Court was right, and the appeal of the plaintiff on this point will fail. Consequently Appeal No. 465 of 1928 will be dismissed with costs.

Nanavati, J.

14. I agree, and have nothing to add.