

(1933) 05 CAL CK 0012
In the Calcutta High Court

Mahomed Ali Haidar Khan and Another	APPELLANT
Vs	
Upendra Nath Ghose and Others	RESPONDENT

Date of Decision : 22-05-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Court of Wards Act — Section 51, 64

Citation : AIR 1934 Cal 179 : 150 Ind. Cas. 214

Hon'ble Judges : Mitter, J;Henderson, J

Bench : Full Bench

Judgement

Mitter, J.—A short statement of the facts which have given rise to this litigation will explain the points for determination involved in this appeal.

2. The case as stated in the plaint is that there was a permanently settled estate known as taluk Rai Gourhari Sing in the district of Sylhet, that a separate account was carved out of the same and was known as Kharija Hishya No. 113 and was possessed by the plaintiffs' father Muhammad Ali Amzad Khan, that the residuary Mahal which was described as Mahal No. 47031-1, taluk Rai Gourhari Sing No. 1, was purchased at a sale for arrears of Government revenue on 8th January 1892 by one Kashi Nath Ghose, the father of defendants 1, 2 and 3, now dead; that the said Kashi Nath sold some lands in chaks and four annas share of the rest of the land of the said residuary mahal to one Nobo Kumar Das, defendant 4 in this suit ; that dispute arose between Kashi Nath and Ali Amzad Khan regarding the lands of the residuary mahal ; that the dispute was settled by a Nirupanpatra which was duly executed by the plaintiffs' father and Kashi Nath Ghose and defendant 4 on 19th Bhadra 1302 corresponding to 4th September 1895 ; that the dispute was settled in this way, namely that 350 hals of land of Schedule 2 to the plaint out of the lands of Schedule 1 to the plaint which consists of 1350 hals would be confirmed as appertaining to the separate account No. 113 owned by the plaintiffs and besides this an eight annas share of the thousand hals of lands of Schedule 3 to the plaint which are included in the 1350 hals of Schedule 1 with the revenue of Rs. 15 would be owned and

possessed in absolute right by the plaintiffs' father with, his sons and grandsons in succession, with power to make all sorts of transfer by gift and sale, etc., and the other eight annas share would be owned and possessed in the same manner by Kashi Nath and defendant 4 as appertaining to their auction purchased Mahal.

3. It was further alleged in the plaint that the dispute having been settled between plaintiff's father and Kashi Nath and defendant 4 in accordance with the Nirupanpatra the plaintiff's father continued to possess the land in Schedule 2 and an eight annas share of the land in Schedule 3 while Kashi Nath and defendant 4 possessed the remaining eight annas share of Schedule 3; that while plaintiffs and Kashi Nath and defendant 4 were in such possession of Schedule 3 lands respectively, the Government offered obstruction to their possession in respect of Schedule 3 lands and Kashi Nath and defendant 4 brought a suit numbered 33 of 1904 in the Court of the Subordinate Judge of Sylhet against the Secretary of State for India claiming sixteen annas of the lands of Schedule 3 and impleaded Moulvi Amzad Khan, father of the plaintiffs, as a defendant in the suit; that the plaintiff's father in order to oppose the improper claim of the plaintiffs to eight annas share of Schedule 3 belonging to him took adjournment in the said suit for filing a proper defence, but before he could do so he was attacked with serious illness and after taking several adjournments for filing the written statement he died without being able to file any.

4. It is further stated in the plaint that as the plaintiff's were minors at the time of their father's death the management of the estate which they inherited from their father was placed in the hands of the Court of Wards of the Province of Assam and one Mr. Lidiward was appointed as Manager of the plaintiffs' estate by the Court of Wards ; that the said Kashi Nath Ghose and defendant 4 substituted the present plaintiffs as heirs of their father and applied for the appointment of Mr. Lidiward as guardian ad litem of the plaintiffs who were defendants in the said suit, but the appointment of Mr. Lidiward was unlawful as he did not express his consent to act as , guardian in the said suit for the present plaintiffs; that Mr. Lidiward did not file any written statement on behalf of the plaintiffs in the present suit or take any other steps to protect their interest; that taking advantage of this circumstance Kashi Nath and defendant 4 during the local investigation in the said suit No. 33 secretly and fraudulently pointed out to the investigating Amin 60 hals of land of Schedule 4 appertaining to the present plaintiffs' separate account No. 113 as being included in the land in dispute in the said suit No. 33; that Kashi Nath died during the pendency of suit No. 33 and defendants 1, 2 and 3 were substituted as his heirs on the record of that suit; the said suit was decreed after contest against the Government and ex parte against the plaintiffs in the present suit; that the claim of Kashi Nath and defendant 4 in respect of the land of Schedule 4 to the present plaint was decreed on 18th June 1909 in favour of defendants 1 to 4 upon a declaration that 60 hals of land of dag No. 1 of Schedule 4 and 200 hals and 4 kedars of land of dag No. 2 of Schedule 4 in all 260 hals and 4 kedars of land appertained to the residuary mahal No. 1 taluk Rai Gourhari Singh.

5. The plaint further recites that according to the Nirupanpatra, the sixteen annas of land of dag No. 1 of Schedule 4 appertained to plaintiffs' separate account No. 113 and an eight annas share of the land of dag No. 2 of Schedule 4 appertains to the original mahal to which the plaintiffs as heirs of their father, have maliki right; that in execution of the said decree in suit No. 33 defendants 1 to 4 in collusion with defendant 5 the Alinagar Tea Coy., Ltd., have dispossessed the plaintiffs from the sixteen annas share of dag No. 1 and from eight annas share of dag No. 2 of Schedule 4 and are wrongfully possessing the entire land of Schedule 4; that the decree in suit No. 33 is wholly illegal, fraudulent and deceitful. The plaint next recites that plaintiff 1 attained majority on 10th February 1921 and plaintiffs' estate was released from the management of the Court of Wards on 27th February 1922; that subsequently plaintiff 2 attained majority on 13th January 1924, that plaintiffs first came to know of the said decree in suit No. 33 in the month of August 1923. In para. 18 of the plaint it is stated that the bar of limitation to the suit is removed by the circumstance that plaintiffs came to know of the fraudulent decree in the suit No. 33 in August 1923 and the present suit was instituted on 26th February 1924. On these pleadings the relief sought in the suit against defendants 1 to 5 has been ranged under four heads; (1) that it may be declared that the decree in suit No. 33 is fraudulent and ultra vires and not binding on the plaintiffs; (2) that their title may be declared to the sixteen annas land of dag No. 1 and eight annas share of the land of dag No. 2 of Schedule 4 and khas possession thereof may be given to the plaintiffs; (3) that a decree for mesne profits may be passed; and (4) decree for costs may be given.

6. In addition to the five defendants the Secretary of State for India in Council has been impleaded as defendant 6 and the relief prayed against the Secretary of State is in the alternative that if for any reason the plaintiffs cannot get relief against the other defendants a decree may be passed for recovery of the sum of Rs. 35,676-4.0 as damages. This relief is based on the allegations in paras. 13 and 15 of the plaint. The substance of those allegations is that the plaintiffs believed that it was for the protection of the Government's interest that the Court of Wards conducted by the Government wilfully refrained from taking any steps in suit No. 33 to protect the interest of the plaintiffs and the Government not having taken any necessary step in the said suit to protect the interest of the plaintiffs they are liable in damages. Para. 17 of the plaint states that notice of this suit was given to the Government u/s 80, Civil P.C, within the time prescribed by law.

7. Defendants 1 to 3, defendant 4, defendant 5 and the Secretary of State have filed separate written statements. The defences of defendants 1 to 5 in so far as is material to the controversy in the present appeal are; (1) plaintiffs' claim is barred by res judicata, (2) the land of dag 1, Schedule 4 in suit is not included in the separate Hishya No. 113 or in the boundaries of Schedule 2 of the plaint, (3) plaintiffs' predecessor not having done the acts which he had promised to do as consideration for the Nirupanpatra the contract was not acted upon and the

plaintiffs" predecessor cancelled it by subsequent acts and therefore plaintiffs cannot get any benefit on the basis of the said Nirupanpatra; (4) that during local investigation in suit No. 33 Kashi Nath and defendant 4 did not fraudulently cause any land of separate account of 113 to be included in the lands in dispute in that suit; (5) the suit is barred by limitation; (6) the decree in suit No. 33 is neither fraudulent nor ultra vires; (7) that there was no fraud on the part of the Court of Wards in not filing a written statement in suit No. 33; (8) that in appeal against the decree in suit No. 33, by defendants 1 to 4 the plaintiffs were made respondents and they appeared through the Manager of the Court of Wards; that execution proceedings were taken by the defendants in the presence of the plaintiffs who appeared through the Court of Wards and that in such circumstances it cannot be said that the Court of Wards did not take proper steps to protect the interest of the plaintiffs.

8. The Secretary of State supported the defence of the other defendants and contended that the Court of Wards never refused sanction to any steps necessary to preserve the interest of the plaintiffs and that Government was not responsible when the manager of the Court of Wards acted bona fide. On these pleadings several issues were framed by the Subordinate Judge. They are to be found at pp. 48 and 49 of the Paper Book. The Subordinate Judge has come to the conclusion that the suit is barred by the principles of res judicata by reason of the decision in Suit No. 33 of 1904. He has also found that there was no fraud in obtaining the decree in suit No. 33 and that the said decree is binding upon the plaintiffs. He has also reached the conclusion that the Nirupanpatra was never acted upon. He finds also that plot No. 1, Schedule 4 of the plaint was included in the Nirupanpatra and was outside the boundaries of separate; account No. 113. He has also found that there was no negligence on the part of Government and the Court of Wards and that the plaintiffs' father deliberately abandoned his claim in the Nirupanpatra as he did not want to throw away any money and that the plaintiffs had no title to any of the two plots in suit. In view of these findings the suit was dismissed against defendants 1 to 5 as also against the Secretary of State.

9. Against this decree of dismissal the present appeal has been brought by the plaintiffs. By a petition put in this Court the plaintiffs have withdrawn their appeal against the Secretary of State and nothing further need be said regarding the claim against the Secretary of State beyond this that the appeal will be disposed between the plaintiffs and the Secretary of State in terms of the said petition. Several contentions have been raised in this appeal on behalf of the appellants. We will notice them in the order in which they have been argued.

10. It has been contended in the first place that the Court below was in error in holding that the suit is barred by the principles of res judicata by reason of the decision in Suit No. 33 of 1904. With regard to this plea a discrimination has been made in argument between the 60 hals of land of Schedule 4 (dag 1) and the 8. annas share of 200 hals of land mentioned in Schedule 4 (dag 2). It is

conceded on behalf of the appellants that the decretal lands of Suit No. 33 of 1901 include the lands of Schedule 4. This is also the finding of the Commissioner who was appointed for local investigation in the present suit as also of the Court below. In suit No. 33 of 1904 the father of the present plaintiffs was the pro forma defendant and the Secretary of State was the principal defendant and Kashi Nath and after his death defendants 1, 2, 3 and 4 were plaintiffs. The suit was for a declaration of title to two plots of land consisting of 150 and 600 hals respectively. The plaintiffs in that suit (Kashi Nath and defendant 4 in the present suit) asked for a declaration of their title to 16 annas of the said 750 hals on the basis of their purchase at the sale for arrears of revenue in 1892. They recited the Nirupanpatra of 19th Bhadra 1302 B.S. in para. 9 of the plaint and stated that defendant 2 (father of the plaintiffs in the present suit) not having done any act in accordance with the Nirupanpatra the said deed had become inoperative and that the plaintiffs of that suit (Kashi Nath and defendant 4 of this suit) were the entire proprietors of the disputed lands: see p. 66, part. 2.

11. In order to avoid the plea of res judicata with reference to the 60 hals of dag 1, Schedule 4 lands the argument for the appellants is put in this way: the schedule to the plaint at p. 71, part 2 clearly discloses that the land of separate account No. 113 was excluded from both the plots claimed, for on the boundaries of both the plots lands of hishya No. 113 of Mauza Tilakpur were mentioned. This plaint was served on one Amzad Ali Khan, father of the plaintiffs, in this suit. He did not file any written statement nor did the Court of Wards which took charge of his estate after his death do so. At the time of the local investigation the plaintiffs in suit No. 33 showed the lands of 113 as being included in the suit and this was done in the absence of plaintiffs' father and the Court of Wards. It is said that as the decree against the plaintiffs' father, or rather the plaintiffs represented by the manager of the Court of Wards, was an ex parte decree, the decree could only be res judicata in respect of the lands claimed in the plaint although the Court may have gone out of its way and declared the plaintiffs in that suit to be entitled to a decree in respect of lands outside the claim, and reference is made in support of this view to a passage in the Rt. Hon'ble Sir Dinshaw Mulla's Commentary on the Civil Procedure Code: see p. 42, under the heading ex parte decree (9th Edn). The accuracy of this statement of the law must be conceded, but there are two answers given by the respondents to this contention of the appellants: (1) that although the decree was ex parte at its inception it lost the ex parte character when the matter was carried in appeal to the High Court and the Court of Wards had opportunity of contesting the appeal and did contest it; (2) that there is no foundation for the argument that lands of separate account 113 were surreptitiously introduced as forming lands claimed in suit No. 33 at the time of the local investigation. As we shall show presently the respondents have succeeded in establishing both these positions.

12. With regard to the first position taken up by the respondents in support of the plea of res judicata with reference to the 60 hals of land of dag 1, Schedule

4, the respondents point out that the decree in Suit No. 33 of 1904 which was ex parte against the Court of Wards at its inception lost its ex parte character as the matter was carried in appeal to the High Court by Kashi Nath's sons and the present defendant 4 against that portion of the decree which went against them and the estate of the plaintiffs was represented by the Manager of the Court of Wards in the appeal, but it did no more than adopt the argument employed on behalf of the Secretary of State who was defendant 1 respondent 1 in the said appeal. The Government filed a cross appeal on the ground that the plaintiffs in that suit had not proved that mouza Ghanashyampur appertained to the residuary estate purchased by Kashi Nath Ghose but the cross appeal was not pressed and was dismissed. The plaint in Suit No. 33 expressly excluded the lands of separate account No. 113 from their claim as on the boundaries of the disputed lands of that suit were described the lands of separate account No. 113: (see schedule of the boundaries at p. 71, part II, Ex. 12). If during local investigation the boundaries of the disputed lands were enlarged by including lands of separate account No. 113 and a decree was given in respect of lands within those enlarged boundaries there was nothing to prevent the Court of Wards from taking a ground to this effect by way of cross objections in the appeal before the High Court and contending that the decree in Suit No. 33 in so far as it included the lands of separate account No. 113 could not be sustained as it was outside the claim of that suit and that the decree was in excess of the claim but nothing of the kind was done. The judgment of the High Court is to be found at p. 163, part II and has been marked as Ex. 10. It would have been much easier for the Court of Wards to prove the fact of the enlargement of the boundaries then than it can be now when twenty years have nearly expired from the date of the decree of the High Court which was passed on 4th August 1913. The decree in Suit No. 33 of 1904 was liable to correction by the High Court and if the plaintiffs or the Court of Wards which represented their estates did not impeach the decree of the first Court in Suit No. 33 on that ground, I do not see how it is possible for the plaintiffs to avoid the plea of res judicata and re-agitate a question which has become final after the decree of the High Court.

13. There is also no substance in the case made by the appellants that plot No. 1 Schedule 4 which really appertained to the plaintiffs' separate account was fraudulently included in the claim of Suit No. 33 at the time of the local investigation. It is true that at the time of the local investigation the defendants pointed out the land up to the corrected eastern boundary of kitta chitlia, i.e., the western thak line on the west as the land in Suit No. 33 of 1904 as they claimed Ghanashyampur lands as appertaining to the residuary estate and Ghanashyampur was bounded on the west by kitta chitlia. They did not however get a decree in respect of this land nor could they get a decree in respect of the land of the separate account which they had not claimed in the plaint, The defendants also attempted to take possession of the land lying between the two thak lines in execution of the decree but they failed to do so on opposition by the Government as well as by the Court of Wards. If one turns to Ex. J-2 the certified

copy of the thak map of mouza Tilakpur, part 2, one would see at a glance the land about which there was dispute between the parties in the course of the execution. That land is between the corrected thak line which is shown between station No. 54 to station No. 78 and northwards towards the west and the cancelled thak line between station 54 passing through station Nos. 64, 103, 130 141, 159, 165 to 169, towards the east. In execution of that decree the defendants who were the decree-holders in Suit No. 33 were claiming lands between the corrected that line to the west and the cancelled that line towards the east of the corrected line. It will appear from Ex. L a certified copy of objection filed on behalf of the Court of Wards in execution case No. 38 of 1914, that their objection was that the plaintiffs decree-holders in Suit No. 33 had not got a decree for the lands situate between the two that lines in the Commissioner's map and that their claim in respect of the said land had been dismissed and that therefore they could not get possession of the. This objection was allowed by the Subordinate Judge who stated in his order dated 9th December 1926 that

the west boundary line is the line which demarcates the two mouzas Tilakpur and Ghanashyampur and this line had been definitely fixed by the judgment and decree of the original Court which has been upheld by the Hon'ble High Court and that is the line which has been shown in the map prepared by the civil Court Amin in the suit.

14. In order to understand as to why the that line of mouza Tilakpur, touzi No. 47031 was corrected, reference must be made to a few documents. It would appear from a comparison of the certified copy of the wazibularz of mouza Tilakpur (pp. 16 and 20, part II) and map No. 7, Ex. Z (2) that the boundary of mouza Tilakpur, second part, towards the east was mouza Ghanashayampur from stations 54 to 179 in the thak map Ex. Z-(2). There is a note in the wazibularz

that the boundary of the hill adjoining the mouza was given by guess and on inquiry at the time of fixing the mounds the said boundary was not found and there being dense jungle, the possessors having stated that they were unable to identify the said boundary after cutting the jungle, therefore according to the order of the Superintendent of Survey dated 24th September last the map has been corrected by excluding some land i.e., the inaccessible jungle land as part of the hill.

15. This accounts for the corrected that line of mouza Tilakpur, part II. It has already been pointed out that the dispute in the course of execution was not regarding the inclusion of any lands of separate account Chittier (Ex. 7, p. 21, part. 2) but with regard to the lands between the two that lines; it was no where stated in the proceedings regarding execution that any lands of the separate account Chittier had been included in the decree. It has been said on behalf of the appellant that this point could not be raised in execution proceedings as the execution Court could not go behind the decree but one fails to understand why the fact could not be mentioned in the said execution petition that the decree-

holders were claiming possession of lands between the two that lines contrary to the decree but, further the decree itself has given more, lands to the decree-holders than were claimed in the plaint. It is true that, they might have been told that the Court in execution could not consider this objection but there was nothing to prevent them from stating the same in the execution petition if in fact the lands of the separate account had been included in the decree which was sought to be executed. The decree-holders claimed lands up to the corrected thak line towards the west between mouzas Ghanashyampur and Tilakpur, but as a result of the execution they got delivery of possession up to the cancelled thak line. So the decree holders got something less than they were entitled to on the basis of the corrected thak line as shewing the boundary between Ghanshyampur and Tilakpur so that far from getting possession on the basis of the decree of any land of mouza Tilakpur, which consisted of chittas Chitley and Bhanubil, they get something less of the lands of Ghanshyampur as bounded by the corrected thak line. It is also a circumstance of very great significance that the idea of introducing the allegation in para. 9 of the plaint to the effect that during local investigation in Suit No. 33 the defendants secretly and fraudulently pointed out to the investigating Amin sixty hals of land of Schedule 4 was conceived after notice u/s 80, Civil P.C, was given to the Secretary of State prior to the institution of the suit.

16. In that notice (which is to be found at p. 212, part 2) it was stated that the plaintiff's were interested in eight annas share of the entire 260 hals of land and not a sixteen annas share of the 60 hals of dag No. 1, Schedule 4 on the footing that they were separate account lands. It has been rightly pointed out on behalf of the respondents by Mr. Chakravarty that things grow as time goes on and this idea of surreptitious inclusion of separate account lands in Suit No. 33 has grown after the issue of notice u/s 80. We are of opinion therefore that the allegation in para. 9 of the plaint has not been established. It follows that the special ground on which the appellants sought to avoid the plea of res judicata with reference to dag No. 1, Schedule 4 to the plaint must fail. Now to take the common ground on which the appellant sought to avoid the plea of res judicata with reference to both the dags of Schedule 4: It is said that although it was asserted in Suit No. 33 of 1904 that there was an agreement with Moulvi Ali Amzad Khan, the ancestor of the plaintiffs, that he would get eight annas share of the land of Schedule 3 to the plaint which include the lands of Schedule 4 now in dispute in the event of his paying the costs of the suit and also performing other acts, the agreement had become inoperative and the father of defendants 1 to 3 and defendant 4 had become sixteen annas owner of Schedule 3 lands. Yet as there was no issue joined on the same and there was no finding with reference to this agreement the question of the validity of agreement or Nirupanpatra cannot be said to have been finally decided in Suit No. 33. It is now however firmly established that in order to sustain a plea of res judicata it is not necessary that an issue should have been expressly framed on the question.

17. It is enough if the matter in contro versy in the subsequent suit has been

decided in the previous suit either expressly or by necessary implication; Kashi Nath and defendant 4 could not have obtained a decree for the sixteen annas share of the 260 hals of lands now in dispute, unless the Court reached the conclusion that the Nirupanpatra had become inoperative and that Moulvi Amzad Ali Khan had no title to the eight annas share as the Nirupanpatra was not acted on. Neither the plaintiffs' father Amzad Ali nor the Court of Wards which managed the estate of plaintiff's father ever controverted the allegation regarding the Nirupanpatra made in the plaint. The plaintiffs' father took several adjournments for filing the written statement in the suit of 1904 but died before he could file any. The decree in favour of the plaintiffs for the entire sixteen annas share could not be sustained unless the question with regard to the Nirupanpatra not having been acted on was decided in favour of the plaintiff's in that suit and against Amzad Ali Khan, defendant 2 in that suit. It has been laid down by their Lordships of the Judicial Committee, in the case of Soorjomonee v. Sadananda (1874) IA Sup Vol 212, that it is not necessary to constitute a matter " directly and substantially" in issue, that a distinct issue should have been raised upon it; it is sufficient if the matter was in issue in substance. It has also been recently pointed out by their Lordships of the Judicial Committee of the Privy Council that the application of the rule of resjudicata 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: see Sheoparsan Singh v. Ramnandan Prasad Narayan Singh AIR 1916 PC 78.

18. The matter of the Nirupanpatra has once been decided and cannot be agitated again. Amjad Ali Khan by failing to deny the allegation that the Niraupanpatra had not been acted on could not have successfully claimed that it had not been litigated and determined against him, nor can his successors do so now. Another minor ground was taken for the purpose of avoiding the plea of res judicata and it was said on behalf of the appellant that the plaintiffs were minors at the time of their father's death during the pendency of Suit No. 33 and they were represented in the suit by Mr. Lidi-ward who was not described as Manager of the Court of Wards as the statute requires and therefore there was no proper representation of the minor plaintiffs in that Suit No. 33. In support of this view reference is made to Sections 51 and 64, Court of Wards Act, and it is said that the notice of suit should have been served through the Collector and if that had been done the manager would have appeared to defend the suit. There is no real substance in this objection. It seems to us that the manager of the Court of Wards did not appear in the suit apparently because Amzad Ali who was alive for a long time after the institution of the suit and took several adjournments to file a written statement and did not tile any. A certain amount of discretion is given to managers of Court of Wards to defend a suit and in view of the fact that Amzad Ali did not file any written statement during his life-time the manager might have thought that there was no necessity to controvert the allegation regarding the Nirupanpatra made in the plaint in Suit No. 33. We are of opinion that there was proper representation of the minor by the manager of the Court

of Wards and although the manager did not appear in the suit he appeared in the course of the proceedings in the appeal, this ground also fails.

19. In view of our finding that the suit is barred by the principle of res judicata it would have been sufficient to dismiss plaintiffs' suit on the ground of res judicata and to affirm the judgment of the Court below but as the question regarding the merits of the plaintiffs' suit has also been debated before us we propose to record our findings on the same, in view of the frequent pronouncement of their Lordships of the Judicial Committee that fragmentary decisions are most inconvenient and tend to delay the administration of justice. In the case of AIR 1933 33 (Privy Council) , Sir George Lowndes in delivering the judgment of the Privy Council said this:

It has been repeatedly pointed out by this Board that it is a duty of the Courts below to pronounce their opinion on all the important points in an appealable case and that a failure to do so not infrequently necessitates a remand with the consequence of heavy additional costs.

20. (His Lordship then discussed the merits of plaintiffs' suit and concluded.) It is clear from this reply of Ali Amzad Khan and his subsequent conduct in not filing the written statement in Suit No. 33 of 1904 where it was distinctly assarted in the plaint that the Nirupanpatra had not been acted upon by Ali Amzad Khan, that Ali Amzad abandoned whatever right he had under the Nirupanpatra. With regard to the Nirupanpatra the Subordinate Judge has come to the conclusion that it was not entirely without consideration as Amzad borne the costs of defending the accused in forest cases and that the consideration was not unlawful as the Law of Champerty does not apply to India. But he held at the same time that title never passed to Ali Amzad under the Nirupanpatra as the said document was not acted upon as the intention of the parties was that title should not pass unless the expenses of the litigation were borne by Ali Amzad Khan. The correspondence to which we have referred supports this view of the Subordinate Judge and we agree with him. It is argued that plaintiffs are willing to offer all the expenses now and to get back the property of plot. 2, Schedule 2.

21. The difficulty is that rights of the third parties have intervened and the Allinagar Tea Co , have purchased the property in dispute. The precise nature of the Nirupanpatra was ambiguous and oral evidence was rightly admitted to explain contemporaneous treatment by the parties. On all these grounds the appeal must fail. Besides we have held already that this part of the claim is also barred by res judicata. In this view the plaintiffs have failed to make out the title to dag No. 2, Schedule 4 also. The result is that the appeal fails and must be dismissed with costs payable to the respondents other than the Secretary of State. The costs other than hearing-fee to be paid to defendant 5. The hearing-fee to be divided in the following proportion: 1/6th to defendants 1 to 3, 1/6th to defendant 4, 2/3rds to defendant 5. As against the Secretary of State the appeal will be disposed of in terms of the petition of compromise.

Henderson, J.

22. I agree and have little to add. The appellants' case with regard to plot 1 is briefly as follows: This plot is included in their estate covered by separate account No 113 ; it was not really covered by the plaint in Suit No. 33 of 1904 ; but the plaintiffs in that suit managed to get it incorporated in the decree. In order to establish that this plot forms part of the estate covered by separate account No. 113 the appellants rely upon the map Ex. 3 and the report of the Commissioner. The map is said to have been made by one Swarup Chandra Deb who is dead. I am not at all satisfied that it was made in the ordinary course of zamindari business. It was proved by Ganga Gobinda Dhar, a retired Naib of the estate who was examined on commission. Swarup was not even a regular Amin of the Estate and there is nothing to show why it was thought necessary to have this survey done. Ganga Gobinda merely says that he used it according to requirements. It might have been considered necessary to have a map made in connexion with the execution of the Nirupanpatra. But it is apparent from the deed that this map had nothing to do with that transaction." On the other hand, even if it is admissible in evidence, it has no probative value.

23. The learned Subordinate Judge has rejected the report of the Commissioner for cogent reasons. I would now like to refer to two matters in connexion with the evidence on which the respondents rely to disprove the appellants' claim. In the first place this claim was never asserted in the notice which the appellants served on the Secretary of State as a preliminary to the institution of the present suit. The claim there made was that this plot also is covered by the Nirupanpatra ; this is the most damaging admission and shows that the present case is an afterthought. In the second place the case of the respondents is supported by the map prepared by T.C Nundy, a responsible Government Officer. The disputed plot is included in plot C of that map. That map was prepared in connexion with a dispute pending between Government and the appellants' estate. But the point to be noticed now is that at that time the present claim was not even advanced.

24. Mr. Chakrabarty argued that even if the appellants can establish their title, the present suit is barred because the matter should have been agitated in connexion with an objection made in connexion with the execution proceedings u/s 47, Civil P.C. The learned Subordinate Judge overruled this contention. In my judgment he was right. The objection referred to arose in the following way: The plaintiffs in Suit No. 33 were only partially successful ; but in execution proceedings they attempted to get possession of the land with regard to which they had failed. The Court of Wards on behalf of the appellants' estate objected and were successful. Now that is a matter which was properly dealt with u/s 47. But supposing that the Court of Wards had gone on to say that the plaintiffs in that suit had managed to get a decree for land not covered by the plaint and objected that possession ought not to be delivered, they would have been told that it was not open to the executing Court to go behind the decree.