
(1926) 03 BOM CK 0021
In the Bombay High Court
Case No : O.C.J. Suit No. 393 of 1926

Rajaram Tukaram

APPELLANT

Vs

The Central Bank of India Ltd.

RESPONDENT

Date of Decision : 15-03-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 21
Evidence Act, 1872 — Section 40, 44

Citation : (1926) 28 BOMLR 879

Hon'ble Judges : Fawcett, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Fawcett, J.—In this suit the defendant bank in their written statement admit that paras, 1 to 3 of the plaint are correct; and the point at issue is a purely legal one, which has been argued without the necessity of taking any evidence. The defendant bank brought a suit No. 3965 of 1924 against the plaintiff trading in the same of Section Narayen & Co, to enforce an equitable mortgage created by the plaintiff in their favour, and, on December 9, 1924, by consent, a preliminary decree was passed in favour of the bank. That decree was superseded by a final decree for sale on July 16, 1925. The mortgaged property was situated at Andheri, which admittedly is outside the local limits of the ordinary original civil jurisdiction of this Court, But, at that time, according to the ruling in Holkar v. Dadabhai, ILR (1890) 14 Bom. 353 the Court had jurisdiction, both because according to that ruling a suit on a mortgage was not a suit for land within the meaning of Clause 12 of the Letters Patent of this Court, and also because the mortgagor, the present plaintiff, carried on business in Bombay within the limits of this Court's original jurisdiction, Bolkar v. Dadabhai was, however, overruled by a full bench of this Court on August 21, 1925, in the case of The India Spinning and Weaving Company Ltd. Vs. The Climax Industrial Syndicate, , f. b. Accordingly, the present suit was brought against the bank on February 12, 1926, and it is submitted in para. 4 of the plaint that this Court had no

jurisdiction to entertain the suit No. 3965 of 1924 and that all the proceedings taken under that suit and the decrees passed therein are nullities and are void and of no effect. It is stated in para, 5 that under the final decree for sale the Commissioner for taking accounts had advertised the mortgaged property to be sold by public auction on February 22, 1926, notwithstanding the objection raised by the present plaintiff that in view of the full bench decision the decrees passed in the suit were nullities and the Commissioner ought not to proceed with the sale. The sale has been restrained pending the decision of this suit. The defendants contend that at the time the decrees in question were passed this Court had jurisdiction to entertain the suit in question, and that the said decrees are not void and of no effect. Accordingly, they say that the sale of the mortgaged property in pursuance of the final decree, dated July 16, 1925, should be allowed to be proceeded with ; and the defendants in particular contend that the question of jurisdiction was directly and substantially in issue in Suit No. 3965 of 1924, and should have been raised as a ground of defence by the present plaintiff in that suit. They submit, therefore, that the question of the jurisdiction of the Court over the subject-matter of the Suit No, 3965 of 1924 is res judicata and cannot be tried in this suit. On these pleadings the following issues have been raised:-

1. Whether the decree in Suib No, 3965 of 1924 passed on July 17, 1926, is a nullity ?
2. Whether the present suit is not barred by res judicata ?
3. Whether the plaintiff did not waive want of jurisdiction if any and whether he is not estopped by his conduct from raising the plea of jurisdiction?
4. Whether the plaintiff is entitled to any and if so what relief?

2. In the arguments the main point, of course, was the question of res judicata. But there are two questions which may be treated as preliminary points: and I, therefore, take them up for consideration,

3. The learned Advocate-General said that the full bench decision was made in a case where both the mortgaged property the subject-matter of the suit, and the defendants were outside the jurisdiction of the Court, and that accordingly the decision only applies to cases of that description, whereas, in the present case, the defendants admittedly carry on business within the Court's jurisdiction. This description, however, is not, in my opinion, borne out by the judgment In the case. It seems to me clearly to decide that Holkar v. Dadabhai ILR (1800) 14 Bom. 353 is wrong on two separate grounds. The question that had to be decided is stated at p. 1293 of the report already referred to as follows:-

The question then is whether a suit based on a mortgage of land outside the local limits of the ordinary original jurisdiction of the High Court, claiming the usual mortgage decree for sale of the property in default of payment, is a salt for land within the meaning of that Clause (i. e. Clause 12 of the Letters Patent),

incidentally it may be mentioned that the whole of the property was outside the jurisdiction and the defendants resided outside the jurisdiction.

4. Then, at p. 1296, it is said :

The defendant in *Halkar v. Dadabhai* neither resided nor carried on business within the jurisdiction, so it is difficult to see how the Court could have enforced its decree either by arresting his person or by attaching his goods. On that ground alone, in my opinion, the decision in *Holkar v. Dadabhai* was wrong.

5. That is the first ground on which the decision is held to be wrong. Then, at p. 1305, the learned Chief Justice says:

I have not the slightest hesitation in holding that a suit on a mortgage, as this is, is a suit) for land within the meaning of that expression in Clause 12 of the Charter.

6. That is the second ground on which the decision is held to be erroneous. So that there is a clear decision that a suit on a mortgage is not a suit for land within Clause 12 of the Letters Patent; and that is to be taken as the law laid down by the full bench applicable to the present case.

7. The second point that was raised by the learned Advocate General is that Section 21 of the CPC operates to make the decrees in Suit No. 39 of 1924 correct, and that accordingly the contention that those decrees are nullities is one that cannot be availed of by the present plaintiff. Section 21 is confined to the case of an appellate or revisional Court in the case of any particular suit, and no authority has been cited which, in my opinion, justifies its being given any greater effect. If the present question had arisen on an objection taken in proceedings before the Commissioner for taking accounts, then, no doubt, Section 21 might be used to preclude the present plaintiff from raising the objection that he has, But, in my opinion, it does not preclude the objection being raised in a fresh suit, such as the present one : because, clearly, this Court is not in the position of an appellate or revisional Court of the kind referred to in Section 21. The principle underlying that section is, no doubt, important and can, in suitable cases, be given effect to. For instance, the general rule that consent of parties cannot confer jurisdiction upon a Court is subject to some qualifications, An instance of this is afforded by *Joint Committee of River Ribble v. Croston Urban District Council* [1897] 1 Q. B. 251 the substance of which is stated in *Halsbury's Laws of England*, Vol. XIII, Article "491, at pp. 353, 354, as follows:-

The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect *Reed v. Nutt*(1890) 24 Q. B. D, 669but) it is otherwise where the order is good on its face and the court adjudicating has jurisdiction to determine the existence or not of the condition, and the party denying its existence has neglected his opportunity of raising the objection at the hearing. *Joint Committee of River*

8. A similar ruling was given by this Court in Jose Antonio Baretto v. Francisco Antonio Rodrigues (1910) 1 L.R.35 Bom. 24namely, that the general rule does not preclude parties waiving inquiry by the Court of jurisdiction, when that question depends on facts to be ascertained. And, again, we have, of course, expln. 4 to Section 11 of the CPC about what is called constructive res judicata. All that, I think, can legitimately be said with regard to Section 21 in this case is that at any rate it shows that such an objection, if it can be raised, ought to be taken as a ground of defence in a suit, so that when one comes to consider expln. 4 to Section 11 that is a point which is to be borne in mind. Similarly, the decided cases in regard to the question of res judicata under a foreign judgment dealt with in Section 13 of the CPC show, I think, that this question of waiver is recognised as affecting the question of res judicata, because it has been held that a voluntary submission to the jurisdiction of a foreign Court makes the judgment of that Court res judicata, in spite at the fact that Clause (a) of Section 13 says that a foreign judgment is not conclusive "where it has not been pronounced by a Court of competent jurisdiction." Those are the only remarks that I have to make in regard to the question of Section 21. It does not, in my opinion, afford a proper ground for deciding the issues in this case at once on the basis that was put before me by the learned Advocate-General.

9. The main question, therefore, has to be considered, viz., whether the decree of July 17, 1925, was a nullity or whether the present suit is barred by res judicata. Now, on this question, I have been referred in the course of the arguments to a Jarga number of decisions, but I think that the primary question that the Court should put to itself is: Are there any statutory provisions which can be referred to as the voice of the legislature on this particular matter ? And, of course, there is Section 11 of the Civil Procedure Code, which contains the main provisions on the subject of res judicata in a suit. If that section is looked at, it is rather curious to find that it does not in express words say that the Court which has tried the first suit should be necessarily a Court competent to try that suit. It only refers to the question of that Court being competent to try the subsequent suit, which is of course a different matter. It might not have jurisdiction in the first suit, but might be competent to try the subsequent suit, Of course, I do not, for one moment, contend that, because there are no such express words, the legislature means that the Court trying the first suit need not have jurisdiction to try it. That would be opposed to the corresponding law in England, and the law which has, I think, been invariably laid down in India. For instance, in Halsbury's Laws of England, Vol. XIII, Art, 491, at p. 353, it is said :-

Wherever estoppel by record is said to arise out of a judgment, it is assumed that the court which pronounced the judgment had jurisdiction to do so. The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise Rogers v. Wood(1831) 2 B & Ad 245.

10. And, again, in Rajwant Praead Pande v. Ram Ratan Gir 17 Bom. L.R. 754

which was a case of a suit brought to get rid of the effect of a decree just as the present suit seeks to do, the Privy Council, in laying down very strongly that such a suit did not lie, at p. 494 say:-

The case under vvhich these objections (i. e. objections be the decree) were brought forward was competently before the court; it had jurisdiction to entertain them.

11. So their lordships obviously contemplated the Court having jurisdiction, Going back, again, to my question : What statutory provisious are there with regard to the question ? I think reference should obviously be made (although none of the learned Counsel in the case drew my attention to them) to Sections 40 and 44 of the Indian Evidence Act. Section 40 says :-

The existence of any judgment, order or decree which by law prevenbs any Court from taking cognizance of a auit or holding a trial, is a relevant fact when the question is whether such Court ought to take oognizano of such suit, or to hold such trial.

12. The material part of Section 44 that affects this Says :-

Any party to a suit or other proceeding may show than any judgment, order or decree which is relevant u/s 40,...and which has been proved by the adverse party, was delivered by a Court not competent to deliver it.

13. So that, so far as the Indian statutory law is concerned, the question cannot be put in better words than the legislature has used in Section 44, viz., whether the Court which dealt with Suit No, 3965 of 1924 was competent to deliver the judgment that it did in that case. When I say "judgment" I, of course, include the two decrees that were passed in that suit. And I may in this connection refer to Abdul Kadir v. Doolaribibi ILR (1913) 37 Bom. 663 where a somewhat similar question was dealt with by this Court on those lines, viz, with reference to Sections 40 and 44 of the Indian Evidence Act. It may be said that a, 44 does not say that the party can show that the judgment was delivered by a Court "which had no jurisdiction over the parties or the subject-matter of the suit," but the words "competent to deliver," etc. mint have very much the same meaning; and in this connec tion I accept what Mr, Justice Strachey Bays (p. 212) on this point in Sardarmal v. Aranvayal Sabhapathy ILR (1896) 21 Bom. 205 viz, :-

The competency "of a Court and its " jurisdiction " are thus synonymous terms. They mean the right of a Court) to adjudicate in ft given matter.

14. Then, coming to arguments that were placed before me in a very clear and admirable manner, the contention raised by Mr, Mulla for the plaintiff, as I understood it, may be put briefly as follows. He says that the test in cases of this kind is whether the Court that tried the suit, a judgment in which is alleged to be res judicata, in fact had jurisdiction, and not whether that Court supposed itself to have jurisdiction. On that test, he says that the full bench decision shows that the Court which dealt with Suit No. 3965 of 1924 did not in fact have jurisdiction

to pass the judgments and decrees which it did, and, therefore, the two decrees in question are nullities. On the other hand, the contention of the learned Advocate General may be summed up as follows. He says that the present case is not one where the first Court clearly had no jurisdiction, and that, on the contrary (according to the rulings of this Court in *Holkar v. Dadabhai* and the cases that followed it), the law as then understood allowed the Court in Suit No. 3965 of 1924 to pass the decrees that it did. In any case, he says, the Court was competent to construe Clause 12 of the Letters Patent and decide the question of jurisdiction that arose, and its decision, whether right or wrong, binds the parties to that suit. Accordingly, he says, the decrees that were passed in that suit are not nullities, Mr. Mulla in support of his contention relied mainly on the cases of *Rajlakshmi Dasee v. Katyayani Dasee* I.L R (1910) Cal. 639; *Krishna Kishore De v. Amarnath Kshetty* I.L. R. (1920) Cal. 770 ; and *Kunja Mohan Chakravarty v. Manindra Chandra Roy Choudhuri*. 27 C. W. N. 542 The last-named case in effect merely follows *Rajlakshmi Dasee*'s case and therefore may be left out of consideration. The judgment in *Rajlakshmi Dasee*'s case was considered by the full bench in *The India Spinning and Weaving Company Ltd. Vs. The Climax Industrial Syndicate*, , F. B at pp. 1307 to 1309, and that criticism has naturally been strongly relied on by the learned Advocate General. I do not think it necessary to reproduce in this judgment the remarks that have been made by the learned Chief Justice in his judgment upon this particular case. But undoubtedly he says at p. 1308 that none of the cases which were cited for the broad proposition laid down in *Rajlakshmi Dasee*'s case directly assisted the proposition that was relied upon; and the head-note of the full bench decision in *India Spinning & Weaving Co. Ltd, v. Climax Industrial Syndicate* summarises his conclusion as follows (p. 1281) :-

The principle, as stated in *Rajlakshmi Dasee v. Katyayani Dasee* ILR (1910) Cal. 639 that where a Court has no jurisdiction over the subject-matter its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they were rendered but be declared void in every Court in which they are presented is too wide and is not applicable to Courts of superior jurisdiction Their judgments and orders can only be questioned in the ways provided by the law.

15. I think that is the effect of the view taken by the full bench, and I certainly agree with Mr. Kanga's observation that the remarks of Mookerjee, Acting Chief Justice, in *Rajlakshmi Dasee v. Katyayani Dasee* I. L.R. (1910) Cal. 639 must be read subject to some reservation, and in particular to the reservation which the same learned Judge mentions in *Hriday Nath Roy v. Ram Chandra Barna Sarma* ILR (1920) Cal 48 There he says :-

A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought

before it.

16. Again, at the bottom of p. 149 of the same report, he says :

The boundary between an error of judgment and the usurpation of power is this : the former is reversible by an Appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect.

17. That reservation is, I think, of considerable importance in the present case, and the mere fact that the full bench has held that *Holkar v. Dadabhai* was an erroneous decision does not, in my opinion, make the decrees in Suit No. 3965 of 1924 nullities, as they would have to be held, if full effect is given to the wide language used in *Rajlakshmi Daeer's* case. It may also be mentioned with reference to that case that Mookerjee, Acting Chief Justice, confines his remarks at p. 668 to the case of a stranger to the decree who is interested in the property affected by the decree, and says that the Court was not called upon to consider what the effect of such lack of jurisdiction would be upon the decree in so far as the parties thereto were concerned, The remarks must, therefore, obviously refer primarily to a case of that kind and not a case like the present where a party to a decree seeks to get it declared a nullity. Then, in *Krishna Kishore De v. Amarnath Kshdtry* I L.R. (1920) Cal 770 a similar reservation is, I think, to be read into the judgment. That is a case which is, no doubt, one about *res judicata* in regard to persons who were parties to the previous suit ; but, on the other hand, the learned Judge, Mookerjee J., says at pp, 780, 781 :-

In this case, as already abated, the question of jurisdiction was neither raised nor decided ; the position might have been different if the question had been raised and decided, for where a Court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remains a decree without jurisdiction and cannot operate as *res judicata*.

18. That, no doubt, refers to the reservation about the Court being competent to decide the question of jurisdiction, which was mentioned in *Hriday Nath Roy v. Ram Chandra Barna Sarma* I L.R. (1920) Cal. 138 but the learned Judge says that in order to bring in that reservation the question must have been raised and decided; and that, where there is no such adjudication, the decree being without jurisdiction cannot operate as *res judicata*. As far as the latter conclusion is concerned, I think the learned Judge clearly takes a view, which, no doubt, has been taken by the Calcutta High Court in *Kailash Mondul v. Baroda Sundari Dasi* I. L. R.(1897) Cal 711 and *Woomesh Chandra Maitra v Barada Bai Maitra* ILR

(1900) Cal. 17 but which has not been followed by most of the other High Courts, at any rate those of Bombay, Allahabad and Lahore, and which is also opposed to another ruling of the Calcutta High Court in *Jamadar Singh v. Serazuddin Ahamad Chaudhuri* I L.R. (1903) Cal. 979. The decisions in question will be found cited in Mulla's Commentary on the Civil Procedure Code, 7th Edn. p. 39. In addition to the Bombay cases there cited, I may refer to *Chhaganlal v. Bai Harkha* ILR (1909) 33 Bom. 479 and *Bhaishamlcer Sana-bhaiv. Morarji Keshavji & Co.* ILR (1911) 36 Bom. 283 : 13 Bom. L. R. 950 which are supported by the Privy Council decision in *Raja of Mamnad v. Velueami Tevar* (1020) L R. 48 IndAp 45 : 23 Bom. L.R. 70: cf. my remarks in *Gadigappa v. Shidappa* ILR (1921) 18 Bom. 688 These decisions all go upon the view that, where a matter has been constructively in issue so as to bring it under expln. 4 to Section 11, it could not, from the very nature of the case, be heard and decided and it will be deemed to be heard and decided against the party who might and ought to have alleged it. That is a view which binds me and which seems to me to be the sounder of the two views. So that I do not consider that Mookerjee J.'s conclusion in *Krishna Kieliove Be v. Amarnath Kshettry* I.L R. (1920) Cal. 770 is correct, so far as regards the question of resjudicata under expln. 4 to Section 11.

19. Coming back to the main question, I respectfully agree with what is stated in the learned Chief Justice's judgment in *The India Spinning and Weaving Company Ltd. Vs. The Climax Industrial Syndicate*, that in cases like *Holkar v. Dadabhai*, and the cases which follow that judgment, including the Suit No. 3965 of 1924, it is not the case of an inferior tribunal arrogating to itself the jurisdiction of a superior tribunal, or of the Courts of one country being asked to pass a decree on a judgment of the Courts of another country. this Court construed its Charter in order to decide whether it had jurisdiction, and on that question it had jurisdiction to decide right or wrong. After very careful consideration I am clearly of opinion that that is the proper view in a case of this kind. This being a Court of superior jurisdiction, the ordinary principle applicable is that nothing shall be intended to be out of the jurisdiction of that superior Court but that especially appears to be so, and the question whether a suit on a mortgage was a suit for land was certainly not so absolutely clear that the Bombay High Court in taking the view, that it did, did anything absurd or unreasonable. A further consideration, which is, I think, of very great importance, is this, namely, that the Original Side Courts, which subsequently had the question before them, at any rate at the time that Suit No. 3965 of 1924 was adjudicated upon, were bound to follow the ruling in *Eolkar v. Dadabhai*, because that decision was by a Division Court; and the case was also followed by another Division Court in *Venhatrao Sethupathy v. Khimji Assw Virji* (1916) 26 Bom. L.R. 635. The Court, therefore, in adjudicating on the Suit No. 3965 of 1024 was bound to follow that ruling, unless and until it was overruled by proper authority, whether by a full bench or by the Privy Council, or until it was superseded by some legislative enactment or amendment of the Letters Patent.

For the Court to say that, in such circumstances, the decrees passed by that Court are pure nullities, though the Court, according to authority by which it was bound, was authorised to take the view it did, is, I think, a proposition which cannot be acceded to. In my opinion the fact of the Court having jurisdiction to decide the question whether or not it had jurisdiction includes the power to decide that question rightly or wrongly, as laid down in the well-known case of *Malkarjun v. Narhari* ILR (1900) 25 Bom. 337. The remarks about that decision in *Khiarajmal v. Daim* (1904) L R 321. A. 23 do not affect the present case, because all that was there said was that the jurisdiction to decide rightly or wrongly could not apply to a case where the Court had never applied its mind to the particular question, which in that case was whether a certain person properly represented another. No doubt, it might be said in this case that the Court never applied its mind to the question of jurisdiction, but that was because the defendants in Suit No. 8965 of 1924 did not raise any objection to the Court's jurisdiction and the Court assumed jurisdiction in the ordinary course in accordance with rulings by which it was bound. The question, therefore, resolves itself into whether such consent operates under 9, 11 and in particular expln. 4 to that section. Then, again, I have been referred by counsel to the judgment of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (1880) L.R. 26 I. A 113. There their lordships remark at p. 152 :-

A Court of Justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it.

20. That, no doubt, is a remark which shows that the full bench could not themselves decide that any title obtained under previous decisions, or under a different view of the law, would not be affected by the decision of the full bench in that case ; and the full bench did not assume such jurisdiction. The judgment expressly says that that is a question which is left open to be decided, if anybody interested disputes the validity of the previous decisions as having been passed without jurisdiction. But it does not affect the exact question that I am now considering. Then, again, lower down on the same page their lordships say :

Whereas, in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few.

21. It is, I think, noteworthy that their lordships do not say that the law now pronounced will invalidate those titles. They merely say that the law will tend to invalidate those titles. Naturally it would give ground for objections being taken and to that extent it would tend in that direction ; but there is no express pronouncement that a decided case, under which a person had acquired a certain title, would not operate as res judicata, if that decision was contested in another proceeding.

22. For these reasons I hold that the Court in passing the decrees in question

was competent to deliver the judgment it did within the meaning of a 44 of the Indian Evidence Act; and also that the Court had sufficient jurisdiction to bring the case within Section 11 of the Civil Procedure Code. The question, therefore, whether that judgment is *res judicata* u/s 11 is one that must almost necessarily be answered in the affirmative, Under expla. 4 to Section 11, the point of jurisdiction was one that certainly might have been raised by the defendant as a ground of defence to the suit that was brought against him in this Court on the mortgage, and, as I have already remarked, Section 21 shows that, if he wanted in the course of that suit to rely upon that contention, he ought to raise it at the earliest possible opportunity. So that at any rate it was a matter which ought to have been made a ground of contention in the former suit; and that being so the present plaintiff cannot, I hold, raise it again as he seeks to do in this suit. I think this is clearly a case where the ordinary principle of finality of litigation should be enforced. In *Jamadar Singh v. Serazuddin Ahamad Chau dhuri* I.L.R (1908) Cal 979 the following quotation is given about this principle at p. 986 :-

Justice requires that every cause should be once fairly tried and public tranquillity demands that having been tried once, all litigation about that cause should be concluded for ever between those parties.

23. And I think that there is a clear general principle that decided cases 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. The contrary view would obviously lead to inconvenient results against the principle of finality to litigation. Suppose, for instance, the plaintiff succeeds and the suit is decreed; then, suppose, that in another case, may be two or three years hence, the same question arises and the same view is followed, but in that case an appeal is made to the Privy Council, and suppose, although I do not think it probable, that the Privy Council differed from the view taken in the full bench decision and held that *Holkar v. Dadabhai* was still good law, then the defendant in this suit could bring another suit to have it declared that the decree in the present suit was a nullity and that things should revert to the position in which they were at the time this suit was brought, and so on ; you might go on almost *ad infinitum* having cases of that kind.

24. The general principle that I have referred to is clearly laid down, at any rate with regard to the case of a question of law being decided one way by a Court and that decision being subsequently upset not by a superior Court but by the legislature. It is very analogous case and I think it is, therefore, of considerable importance in deciding the present suit. The point is thus stated in *Hardcastle on Statutory Law*, 3rd Edn, at p. 863, viz. :-

Acts of this kind, like judgments, decide like oases pending when the judgments are given, but do not reopen decided cases see *All.-Gen. v. Marquis of Hertford*.

25. Here, it will be seen that the learned author refers to judgments as on an equal footing in regard to the possibility of reopening decided cases. A similar statement is made in Halsbury's Laws of England, Vol. XXVII, Article 308, at p. 162, and there are various decisions which support that statement. Some of these are: *Eyre v. Wynn-Mackenzie* [1896] 1 Ch. 135; *Day v. Kelland* [1900] 2 Ch. 745 and *Poulton v. Adjustable Cover and Boiler Block Company* [1903] 2 Ch. 43. In the first of those two cases a statute had altered the law, but it was held that the statute could not operate in a decided case. The third case is one where a decision had been given that a certain patent was a valid one. The party who opposed that view then applied to the proper authorities and obtained a revocation of that patent, and on the strength of that revocation he contended that the damages that had been awarded before the revocation of the patent could not be allowed. The question of the amount of damages had been referred to the Commissioner and was pending when the revocation of the patent was obtained; yet it was held that the contention that the patent was invalid was *res judicata* and damages should be awarded in spite of the revocation of the patent. A still stronger authority, which, I think, is of very great weight in the present case, is afforded by the decision of the Privy Council in *Lemm v. Mitchell*. [1912] A. C. 400. In that case, a party brought a suit for damages for what is called criminal conversation. The defendant pleaded that the Court had no jurisdiction to entertain the suit. The Court upheld that contention on the ground that there was no jurisdiction under certain ordinances in force in Hongkong, where the suit was brought. Then an Ordinance was passed declaring that the Courts had jurisdiction in such suits, and further enacting that this legislation should have retroactive effect to the extent of enabling actions to be brought in respect of criminal conversation during the period when the right of action had ceased to exist in the Colony because of the view taken on this point of jurisdiction; that is to say, it gave a clear right to bring an action in regard to something that had happened while that view of the law was effective; yet the Privy Council held that without explicit words to that effect it did not avail the respondent, whose cause of action was barred as *res judicata* by a final judgment prior to the ordinance and founded on the then existing law. Their lordships in one passage say (p. 406) :-

The law applicable to the case is shortly and sufficiently stated by Tindal C.J. in *Kay v. Goodwin* (1839) 6 Bing. 576 where he says : I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law.

26. Therefore, concluded actions are outside the principle there mentioned; and their lordships further say (p. 406) :-

It would require language much more explicit than that which is to be found in the Ordinance of 1908 to justify a Court of law in holding that a legislative body

intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting.

27. I think that that is very clear authority in favour of the conclusion I have come to. No doubt, the Court could not make a reservation as regards titles acquired under a different view of the law, as I have already mentioned; but at the same time, so far as there may be a question of intention, it is quite dear from the remarks in the learned Chief Justice's judgment in the full bench decision that they did not, so far as they could help, want to interfere with decisions given in accordance with the view taken in *Holkar v. Dadabhai*. The case is the same as if an Act had been passed to say that, in spite of the decision in *Holkar v. Dadabhai*, a suit on a mortgage should be deemed to be a suit for land within the meaning of Clause 12 of the Letters Patent. That would not operate so as to affect decided cases to the contrary ; and I think the same principle is obviously applicable to that decision being upset by a superior Court.

28. There is one point which was not argued by the learned Counsel before me, but which might possibly be raised in the appellate Court, and, therefore, I may briefly note my views upon it. There is authority for contending that an erroneous decision on a point of law cannot be *res judicata*, That is a statement made by Parsons J, in *Chamanlal v. Bapubhai*. I.L.R (1897) 22 Bom. 669 But it is opposed to various other rulings such as *Waman v. Hari* I L.R (1936) 31 Bom. 128 : 8 Bom. L.R. 932 where it is said 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. That is a view which, in my opinion, has very clear authority to support it; and the remark of Parsons J. has been commented upon by the learned Chief Justice in *Sitaram Salcharam v. Laxman Vinayak* I.L. R.(1921) 45 Bom 1260. The learned Chief Justice there came to the conclusion that a distinction can be drawn between a decision on an abstract question of law, such as the proper construction of an enactment, and a decision on a concrete question, such as the construction of a document entered into between the parties to a suit, Shah J, disagreed on that point at pp. 1281 and 1282 and held that questions of law cannot be treated as outside the scope of Section 11. I dealt with the question at pp. 1283 and 1285, and paid I felt some doubt whether the distinction drawn by the learned Chief Justice could be rightly drawn, I further stated (p. 1284) :-

There can, I think, be no doubt that such a distinction cannot be drawn in cases where parties seek to litigate again the very same cause of action as has been decided against them in a prior suit.

29. And in support of that I referred to the decision of the Privy Council in *Rajwant Ptaaad Pande v. Ram. Ratan Gir* ILR (1913) All. 485 and *Badar Bee v. Habib Merican Noordin*, [1909] A. C. 615 But, on the other hand, I said that, while favouring the view taken by Napier J. in *8ree Rajah Bommadevara Venkata Naraaimha Naidu v. Andavolu Venkataratnam* (1916) 32 M. L. J. 63there was a considerable difference of judicial opinion on the point and that I thought it was

beat to leave it open, as that particular case could be decided on other grounds. However, after further Considering the point, I entirely agree with the view taken in a judgment of Das J, in *Mamlal Malik and v. Deodhari Rai* ILR (1923) Pat. 771 The learned Judge there draws attention to the decision of the Calcutta High Court in *Gowri Koer v. Audh Koer* I.L.R (1884) Cal 1088 where it is said (p. 1091) :-

But although those learned Judges may have made a mistake in point of law, in the decision at which they arrived in 1873, their decision upon the point at issue is nevertheless *res judicata* as between the parties, and it is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which the Court has subsequently disapproved.

30. And the learned Judge also points out that Mookerjee J. in *Aghore Nath Muherjee v. Kainini Debi* (1909) 11 C. L. J. 461 drew a distinction between the application of the rule to two well marked classes of cases (p. 776) :--

In one class parties may seek to litigate again the same cause of action as had been decided between them in a prior suit; in another class, the dispute may relate to matters which have been already in controversy and formed the subject of consideration in the previous suit, although the causes of action in the two cases may be distinct. In the former class of cases, the application of the rule of *res judicata* is obviously justifiable on principle.

31. So that Mookerjee J., who took a contrary view in regard to the other class of cases, holds that the principle is obviously reasonable and applicable to the class of case I am now dealing with. The same exception is made in one of the very first reported cases on the subject, viz., *Parthasaradi v. Chinna-krishna* I. L.R. (1882) Mad 304. There the learned Chief Justice at p. 310 excepts a case like the present. He says :-

Considerations of convenience have established the rule that the final decree of a competent Court is decisive of the rights it declares or refuses notwithstanding it may have proceeded on an erroneous view of the law.

32. Therefore, so far as any argument may be raised that in any case the judgment on a point of law cannot be *res judicata*, I hold that in a case like the present the principle of *res judicata* does apply, although there was an adjudication on a point of law. I fully realize the distinction between cases where an erroneous decision on a point of law may be one which does not affect the Court's jurisdiction and cases where the point of law is one which does affect it, and, no doubt, it may be said that in *Bajwant Prasad Pande v. Ram Ratan Gir* ILR (1915) All 485 and similar cases, the Privy Council was dealing only with the former class of cases. To that extent Mr. Mulla is in a position to contend that notwithstanding the view that an erroneous decision on a point of law can be *res judicata*, yet in view of this distinction the erroneous view taken in *Holkar v. Dada-bhai* is not *res judicata* so the question then comes round to the same point that I have already considered, viz., whether or not it is *res judicata* u/s 11

of the Civil Procedure Code, read with Sections 40 and 44 of the Indian Evidence Act.

33. I, therefore, answer issue No. 1 in the negative, and issue No. 2 in the affirmative.

34. As regards issue No. 3, my answer is that the suit is not barred by waiver, except to the extent covered by Section 11 of the Civil Procedure Code. I refer, of course, to expln. 4 of that section.

35. On issue No, 4 I hold that the plaintiff is not entitled to the relief sought for. The suit is, therefore, dismissed with costs, including costs of the notice of motion,

36. The temporary injunction granted is dissolved.