
(1967) 12 MAD CK 0048
In the Madras High Court

Ramaswamy Gounder, Chinnasami Gounder alias Chinna
Gounder

APPELLANT

Vs

Anantapadmanabha Iyer

RESPONDENT

Date of Decision : 21-12-1967

Acts Referred:

Citation : (1971) 84 LW 176 : (1971) 1 MLJ 392

Hon'ble Judges : M.M. Ismail, J

Bench : Division Bench

Judgement

M.M. Ismail, J.—The lands in S.F. Nos. 24, 25, 30 and 31 in Sekkanur village, Pollachi Taluk, Coimbatore district, originally belonged to a joint family consisting of one Muruga Pillai and his two sons Arunachala and Ramakrishna. On 19th November, 1917, the father and the two sons executed a mortgage over these lands in favour of one Kuppuswamy Chettiar (Exhibit B-2). On the same date, they entered into a partition deed Exhibit B-1. Under the partition deed Muruga Pillai was allotted S.F. Nos. 24 and 25 along with rights in the well in S.F. No. 30 with the two picotahs while Arunachala was allotted S.F. Nos. 30 and 31. It is unnecessary for the purpose of the present appeal to take into consideration the properties allotted to the share of Ramakrishna. In that partition deed, the operative portion in relation to the allotment of the shares as between the three coparceners read as follows:

The document also contained the following clause with reference to the share allotted to Muruga Pillai:

2. On 5th December, 1918, Muruga Pillai mortgaged his share of the properties along with the well in favour of one Ramai (Sounder and Rayakkal reciting therein that the said properties were allotted to Muruga Pillai absolutely under the partition (Exhibit B-3). On the same day, Arunachala mortgaged S.F. Nos. 30 and 31 without the well in favour of the same two persons under the original of Exhibit B-4. Muruga Pillai died in the year 1922. On 21st June, 1924, Arunachala mortgaged S.F. Nos. 30 and 31 along with half rights to the well in S. No. 30 to

one Ramaswamy Iyer, the father of the plaintiff herein with a direction in the mortgage deed to redeem the mortgage under the original of Exhibit B-4. Subsequently, the Town Bank Ltd., Coimbatore, filed O.S. No. 439 of 1925 against Arunachala and Ramakrishna and obtained a simple money decree against them. In execution of that money decree, the Town Bank Ltd., had sold S.F. Nos. 24, 25, 30 and 31 in Court-auction subject to the mortgages under the originals of Exhibits B-3 and B-4. The properties were purchased by Nanjunda Gounder, the Secretary of the Town Bank, Ltd., Coimbatore. Exhibit B-5, the sale certificate in this behalf does not specifically mention about the suit well even though all the four survey fields had been mentioned as the property purchased under the Court-auction. Nanjunda Gounder in turn sold all the four survey fields to Nattuswami Gounder on 3rd September, 1927, under the original of Exhibit B-6. In the description of the property in this document, also, the suit well does not find a place. Subsequently on 14th October, 1927, Rayakkal and her sons filed O.S. No. 235 of 1927 on the strength of the mortgage created in their favour by Muruga Pillai under the original of Exhibit B-3. To that suit, the two sons of Muruga Pillai, Arunachala and Ramakrishna, the Official Receiver representing Ramakrishna and Nanjunda Gounder and Nattuswami Gounder were made parties. On 24th October, 1929, a preliminary decree was passed in that suit. Under that preliminary decree, the Secretary, Town Bank Ltd., namely, Nanjunda Gounder and Nattuswami Gounder were given the option to redeem the mortgaged property, but they did not do so. In that situation Ramaswami Iyer, the plaintiff's father filed O.S. No. 177 of 1930 on 26th August, 1930, on the strength of the mortgage created in his favour under the original of Exhibit A-2. During the pendency of that suit, on 25th January, 1932, Nattuswami Gounder sold S.F. Nos. 30 and 31 along with the entire well in S.F. No. 30 to plaintiff's father, namely, Ramaswami Iyer, retaining S.F. Nos. 24 and 25 to himself. S.F. Nos. 24 and 25 along with the well, were brought to sale in execution of the decree in O.S. No. 235 of 1927 and the same were purchased by Rayakkal and her sons as evidenced by the sale certificate, dated 15th January, 1936, namely, Exhibit B-8. The purchasers took possession of the properties through the Court. Rayakkal sold S.F. Nos. 24 and 25 along with the entire well to one Kandaswami on 7th June, 1937, under Exhibit B-11. Kandaswami in his turn sold the property to the defendants in the suit under Exhibit B-13, dated 3rd June, 1946. Thus, it will be seen that the plaintiff claims title in the property through Arunachala and Ramakrishna, while the defendants claim title to the property pursuant to the mortgage decree obtained in O.S. No. 235 of 1927.

3. In this situation, the defendants in the present suit filed O.S. No. 740 of 1952 on the file of the District Munsif's Court, Coimbatore, for a permanent injunction restraining the defendants in that suit from trespassing on the plaintiff's land marked A B C D E F N M L K, which were two survey fields Nos. 24 and 25 and a ridge, a channel and the suit well with adjacent ground thereon. By a judgment and decree, dated 15th November, 1954, the learned District Munsif of

Coimbatore, dismissed the said suit. However, he recorded a finding that both the fields, namely, S.F. Nos. 24 and 25 on the one hand and S.F. Nos. 30 and 31 on the other, had been enjoying water from the well and that as such the defendants in this suit could not claim an exclusive right to its water for their field alone. It is on this basis, the suit was dismissed. The learned District Munsif also pointed out that it was unfortunate that the defendants herein had not cared to ask for a declaration. Against that judgment and decree the defendants herein preferred A.S. No. 123 of 1954 before the District Judge, Coimbatore. By his judgment and decree, dated nth May, 1957, he dismissed the appeal affirming the conclusion of the learned District Munsif. While doing so, he recorded as follows:

I am satisfied that the well was enjoyed in common by the owners of both S.F. Nos. 24 and 25 on the one hand and S.F. Nos. 30 and 31 on the other, that the channel and the ridge which admittedly formed part of S.F. Nos. 30 and 31 were used by the plaintiffs and their predecessors for taking water and that they should have enjoyed the same only as an easement and not by virtue of ownership. So far as the portion containing cocoanut plants and plantain trees which lie east of the line connecting S1, S2 and S3 is concerned, the plaintiffs cannot have any title to the same and I am satisfied that they have not been in possession of the same also.

4. Against that judgment and decree, the defendants in the present suit preferred S.A. No. 543 of 1957 on the file of this Court. During the pendency of that J appeal the present suit was instituted by the plaintiff on the file of the Court of the I District Munsif, Coimbatore, for a declaration of the plaintiff's title to all the portion of S.F. No. 30 and the entire well) therein and for a permanent injunction restraining the defendants (appellants) their men, and servants from trespassing into or otherwise interfering with and doing any act with regard to the entire suit well and to any portion of S.F. No. 30 or to the plaintiff's absolute and sole use thereof. In view of this institution of the suit, namely, O.S. No. 598 of 1957, on 16th January, 1957, S.A. No. 543 of 1957 was dismissed affirming the findings of the Courts below with regard to possession as being findings of fact and leaving the question of title open to be determined in O.S. No. 598 of 1957. In the said suit, as" I pointed out already, the plaintiff claimed title to the property tracing it through Arunachala and Ramakrishna and putting forward the contention that under the partition deed of 1917 Muruga Pillai had obtained only a life interest in. S.F. Nos. 24 and 25 and the well in S.F. No. 30, and consequently the mortgage created by him in favour of Rayakkal and; others came to an end with his life, with, the result, the defendants as representatives of the purchasers in execution of the mortgage decree did not obtain and acquire any title in the suit well. As against this contention, the defendants put forward the contention that under partition deed of 1917 Muruga Pillai acquired an. absolute estate to the two S.F. Nos. 24 and 25 and the well in the S.F. No. 30, the decree in the mortgage suit and the sale pursuant thereto having been made and effected in the presence of Arunachala and Ramakrishna, Nanjunda Gounder,

and Nattuswami Gounder, the plaintiff herein who is successor-in-interest to those persons is bound by the decree, and consequently, he cannot claim any title to the well in dispute. Certain contentions were put forward with regard to the question of possession in respect of the properties in the suit. The learned District Munsif by his judgment and decree, dated 30th March, 1960, decreed the suit of the plaintiff. He held that under the partition deed of 1917 Muruga Pillai obtained only a life interest in the properties allotted to his share; that being the case, Arunachala and Ramakrishna were in the position of holders of paramount title with reference to the mortgage suit, and consequently, the question regarding that paramount title need not have been raised and could not have been gone into in the mortgage suit; therefore, that decree is not binding on them. There was one other contention that was put forward by the defendants on the basis of the two mortgage documents Exhibit B-3 and B-4. As I pointed out already, Exhibit B-3 was the mortgage created by Muruga Pillai claiming that he had obtained absolute right to S.F. Nos. 24 and 25 and the well in S.F. No. 30 under the partition deed and that mortgage deed among others was attested by Arunachala and Ramakrishna. Exhibit B-4 as pointed out already was a mortgage executed by Arunachala on the same day in favour of the same persons and that document was attested by Muruga Pillai. The argument of the defendants was that in Exhibit B-3 Muruga Pillai had claimed absolute title to the properties covered by the document and the attestation of that document by Arunachala and Ramakrishna, with the knowledge of the contents of the document constituted estoppel against Arunachala and Ramakrishna; therefore, it was not open to them and the plaintiff as successor-in-interest, to put forward the contention that Muruga Pillai did not acquire, under the partition deed, an absolute estate, but only life interest. The learned District Munsif held that mere attestation would not estop Arunachala and Ramakrishna from putting forward the contention. Consequently, he found the title to the well in favour of the plaintiff. As far as the title to the portion of the land to the west of the well and the east of the line connecting Section 1, Section 2 and Section 3 in Exhibit A-1 plan, which fell completely within S.F. No. 30 was concerned, he found that it is with the plaintiff. With regard to possession, the learned District Munsif was of the view that the finding in O.S. No. 740 of 1952 was *res judicata*. It is on this basis that the suit was decreed as pointed out by me already. Against this judgment and decree the defendants herein preferred A.S. No. 5 of 1962 on the file of the Subordinate Judge, Coimbatore, and the learned Subordinate Judge, by a judgment and decree dated 18th July, 1962, affirmed the conclusions of the learned District Munsif and dismissed the appeal. It is against this judgment and decree, the present second appeal has been filed by the defendants.

5. Mr. M.S. Venkatarama Iyer, learned Counsel for the appellants, raised the following contentions : (1) Under the partition deed of 1917, Muruga Pillai obtained an absolute interest in respect of S.F. Nos. 24 and 25 and the well in S.F. No. 30. The clause contained in the said partition deed, which I had already referred to, did not operate to cut down the absolute interest so created. The

subsequent conduct of the parties, namely, the execution of Exhibit B-3 and Exhibit B-4, the two mortgage deeds by Muruga Pillai and Arunachala, the former being attested by Aruchala and Ramakrishna and the latter being attested by Muruga Pillai establish that the intention of the parties, when entering into the partition agreement, was to confer an absolute interest on Muruga Pillai. (2) Even assuming that the relevant clause extracted already, in the partition deed, operated to cut down the absolute estate, created in favour of Muruga Pillai, such clause will be void as being repugnant to the earlier clause conferring absolute interest on Muruga Pillai. (3) Even assuming that under the partition deed of P917, Muruga Pillai obtained only a life interest to S.F. Nos. 24 and 25 and the well in S.F. No. 30, still as Muruga Pillai purported to create a mortgage on the basis of his having an absolute interest, a decree having been passed on that mortgage and the properties having been sold in the presence of Arunachala and Ramakrishna and Nanjunda Gounder and Nattuswami Gounder, the plaintiff is bound by that decree and it is not open to the plaintiff to contend that nothing passed to the purchasers in execution of that decree. (4) In any event, Arunachala and Ramakrishna having attested Exhibit B-3 with the knowledge of its contents, were estopped from putting forward the contention that Muruga Pillai had obtained only a life interest and not absolute interest under the partition deed and consequently, the plaintiff as representative-in-interest of Arunachala and Ramakrishna is also estopped from putting forward that contention. (5) The Courts below erred in their understanding of the scope of the finding in O.S. No. 740 of 1952 with regard to possession.

6. On these points elaborate arguments were advanced before me by the learned Counsel for both the parties. As far as the question of title is concerned, in view of the conclusion, I have come to, on the fourth of the contentions above-mentioned, it has become unnecessary for me to deal with the other contentions. Mr. Rajagopala Iyer, learned Counsel for the respondent, frankly concedes that if I decide the point of estoppel in favour of the appellants, that will conclude the title in their favour and as far as the title is concerned, no other argument survives. In view of this, I am not expressing any opinion with regard to the other contentions mentioned by me, namely, contention Nos. 1, 2 and 3 regarding the title.

7. The plea of estoppel has to be considered under the following circumstances. As I pointed out already on 19th November, 1917, prior to executing the partition deed, the father and the two sons had executed Exhibit B-2 the mortgage deed in favour of Kuppuswami Chettiar for the identical properties for a sum of Rs. 3,700. In the partition deed executed later, on the same date, they expressly referred to this mortgage and provided that it was liable to be discharged by the three parties to the document, each one of them bearing one-third share of the liability. Exhibits B-3 and B-4 were executed on the same day, namely, 5th December, 1918, primarily, for the purpose of discharging the shares of liability of Muruga Pillai and Arunachala with reference to that mortgage in favour of Kuppuswami Chettiar. It is important to note that the mortgage executed by

Muruga Pillai is attested by five individuals, two of whom being Arunachala and Ramakrishna the mortgage executed by Arunachala on the same day, namely, Exhibit B-4, has been attested by five persons including Muruga Pillai and Ramakrishna. The other three attestors are common to both the documents and they have been written by the same scribe.

8. In view of these circumstances, the points urged by Mr. M. Section Venkatarama Ayyar are two-fold : one is that, by virtue of the practice prevalent in this part of the country, whereby whenever a person having an interest in the property dealt with in the document attests that document, he does so with the knowledge of the contents of the document, which has been recognised by judicial decisions of this Court, it must be held that, when Arunachala and Ramakrishna attested Exhibit B-3 they did so with the knowledge of the contents of that document and hence were estopped from denying that Muruga Pillai had an absolute interest in the property. The second point is that in addition to the fact of attestation, the attendant circumstances clearly indicate that Arunachala and Ramakrishna signed the document as attestors with full knowledge of the contents of the document. In regard to the first point, the learned Counsel invited my attention to several decisions. The earliest of them is a decision of the Privy Council in *Vadrevu Ranganayakamma v. Vadrevu Bulli Ramaiya* (1880) 5 CL.R. 439, an appeal from a decision of the High Court of Madras. In that case, the Privy Council pointed out:

It is not always that a witness to a document knows what the contents of the document are, or how the parties have been described, but it frequently occurs in native documents that a man signs as a witness to show that he is acknowledging the instrument to be correct.

In *Kandasami Pillai Vs. Rangasami Nainar (died) and Others*, , Sadasiva Ayyar, J., observed:

I am also of opinion that having regard to the ordinary course of conduct of Indians in this presidency, attestation by a person who has, or claims, any interest in the property covered by the document must be treated prima facie as a representation by him that the title and other facts relating to title recited in the document are true and will not be disputed by him as against the obligee under the document.

In a subsequent decision, namely, *Narayana v. Rama* ILR (1915) 38 Mad. 396 : 1915 25 M.L.J. 219, the same learned Judge, after referring to the observation of the Privy Council already quoted, stated:

I may respectfully add that, in my pretty long experience as a Judicial Officer, if the attestor of the document has an existing interest in the property dealt with in the document, it has been always the case that this "attestation" has been taken in order to bind him as to the correctness of the recitals therein.

The learned Judge further pointed out:

On the whole, I see no sufficient reason to recede from the opinion I expressed in Kandasami Pillai Vs. Rangasami Nainar (died) and Others, , that a presumption is raised, when an adult man of full mental capacity attests a deed and when such a man has admittedly a tangible interest in the property affected by the deed, that his attestation has been taken as a proof of his consent to and knowledge of the correctness of the recitals in the deed and it lies upon the person, who contends that such an attestor did not know all the recitals in the deed and did not consent to the alienation made by the deed, to prove the contrary.

9. This observation of Sadasiva Ayyar, J, was followed in Gurudayaldas v. Nathu 50 Ind.Cas. 274, in Nayakammal v. Munnaswamy Mudaliar (1924) 20 L.W. 222, Kumaraswami Sastri, J., stated as follows:

I have little doubt that both the defendant and his father were fully aware of the nature and contents of the documents, which they attested. It has no doubt been held that attestation does not prima facie import knowledge. In Lakhpati v. Rambodh Singh ILR (1915) All. 350, it has been held that the question whether attestation should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case. As pointed out in Gurudayaldas v. Nathu 50 Ind.Cas. 274, where a person, having, a tangible, interest in the property affected by a deed, attests that deed, his attestation should be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed. Having regard to the circumstances that the reversioners in this case contested the right of Gnanasundarammal when she applied for letters of administration and subsequently executed a release in her favour, there can be little doubt that they must have enquired into and known the contents and seen the deeds, which they attested. It is the commonest thing in this country for attestations to be obtained from persons having a possible interest, in the property, with the object of binding them later on and I have rarely come across a case, where a person having an interest present or contingent in the property has attested the deed, without enquiring into its contents.

10. Relying upon these Judgments, Mr. M.S. Venkatrama Ayyar, argues that the fact that the plaintiff herein contends that Arunachala and Ramakrishna had a vested remainder in the property allotted to Muruga Pillai under the partition deed, and attested Exhibit B-3, is significant as explained in these judgments and consequently acted as estoppel against them.

11. As against this, Mr. Rajagopala Ayyar, the learned Counsel for the respondent, contends that the attestation is only for the purpose of authenticating the signature of the executant, it does not go beyond, and consequently from mere attestation, no inference of estoppel with regard to the contents of the document can ever be drawn. For this purpose, the learned Counsel relied on the decision of the Privy Council in 21 CWN 225 (Privy Council) and invited my attention to the following passage:

But attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions, it could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that he was, in fact aware of the character of the transaction effected by the document to which his attestation was affixed. If it had been quite impossible for either of the widows lawfully to dispose of any interest in the property, and it was shown that the witness knew the nature of the deed, more value might be given to his attestation, but by itself it would neither create estoppel nor imply consent.

12. No doubt this decision lays down a general principle. But it does not take note of the practice said to be prevailing in this presidency as disclosed by the Madras decisions referred to already. Mr. Rajagopala Ayyar then relied on a decision of the Privy Council in Pandurang Krishnaji Vs. Markandeya Tukaram and Others, , where the Privy Council stated as follows:

Before their Lordships consider the circumstances in which that attestation took place, they think it is desirable to emphasise once more that attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, "possible, as was pointed out by their Lordships in the case of 21 CWN 225 (Privy Council) that an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the document, but no such knowledge ought to be inferred from the mere fact of the attestation.

The Privy Council further observed:

If in fact there be a practice, as is suggested from the evidence, that when the consent of parties to transactions is required, it can be obtained by inducing them by one means or another, to attest a signature of the executing parties, the sooner that practice is discontinued the better it will be for the straightforward dealing essential in all business matters.

13. The latter passage, no doubt, emphasises the necessity to discourage any such practice. But certainly that does not negative the inference sought to be drawn by the Madras decisions, when, in fact, the practice is actually in existence.

14. However, for the purpose of this case, I do not propose to rest my conclusion solely on the basis of attestation of Arunachala and Ramakrishna in Exhibit B-3 and the prima facie position and presumption resulting therefrom. I have already indicated sufficiently the attending circumstances; on the same date when the partition deed was executed the mortgage in favour of Kuppuswami Chettiar was executed by all the three. Obviously, the parties were not able to discharge that mortgage except by mortgaging again the very same properties that they

obtained under the partition deed. It was in these circumstances Exhibit B-3 and Exhibit B-4 were executed on the same date by the two sets of parties to the partition deed; the mortgage executed by the father being witnessed by the two sons and the mortgage executed by one of the sons being witnessed by the father and the other son, the other attestors and the scribe being common. This would clearly show that both the documents form part of the same transaction in which the parties attempted to arrange for the discharge of the mortgage executed in favour of Kuppuswami Chettiar in 1917. In these circumstances, it is impossible to state that, when Arunachala and Ramakrishna attested Exhibit B-3, they were not aware of the contents of that document. Consequently, I hold that in addition to the attestation by Arunachala and Ramakrishna all the circumstances of this case clearly point to the "conclusion that Arunachala and Ramakrishna attested the document with the full knowledge of the contents of the document. Such a conclusion is also supported by the ratio in the decision in Janikiram Sital Ram Firm v. The Chota Nagpur Banking Association Ltd. ILR (1936) Pat. 721. Therefore, I hold that Arunachala and Ramakrishna were estopped from contending that Muruga Pillai had only a life interest and did not have an absolute interest in Survey Nos. 24 and 25 and the well in S. No. 30, and therefore, the plaintiff herein, as the successor-in-interest of Arunachala and Ramakrishna, is also estopped from putting forward that contention. If that be the case, under the mortgage decree and the sale that took place pursuant thereto, absolute interest in Section Nos. 24 and 25 and the well in S. No. 30 passed to the purchaser which in turn passed to the defendants-appellants before me. In so far as the appellants claim their title through Muruga Pillai, they will be entitled only to what Muruga Pillai mortgaged under Exhibit B-3 and what passed by virtue of the sale pursuant to the decree in that mortgage suit. The description of the property contained in the mortgage deed Exhibit B-3 and covered by the sale certificate is as follows:

15. Consequently, the title under the sale pursuant to the mortgage decree will be only in respect of the two picotahs and the well, in addition to S.F. Nos. 24 and 25. Neither the mortgage nor the sale certificate contains any other piece of land in S. No. 30. Therefore the finding in the previous suit, namely, O.S. No. 740 of 1952, adopted by the Courts in the present suit that the appellants herein are not entitled to any piece of land to the west of the well and to the east of the line connecting Section 1, Section 2 and Section 3 in the Exhibit A-1 plan will stand, and Mr. M.S. Venkatrama Ayyar does not seriously dispute this position.

16. The next question that arises for consideration is the question relating to possession, since the suit is for declaration of title and for injunction. As I pointed out already, the title of the appellants will be confined only to what is conveyed under the sale in the execution of the mortgage decree. Therefore, with respect to the property in the suit outside the mortgage deed, the defendants will not have any title. But that does not decide the suit itself. I have already extracted the findings of the Courts in O.S. No. 740 of 1952 and A.S. No. 123 of 1954. In those proceedings, it was found that the well was in joint

possession of the appellants and the respondent, that the channel and the ridge which admittedly formed part of S. Nos. 30 and 31 were used by the plaintiffs therein and their predecessors for taking water and that they should have enjoyed the same only as an easement and not by virtue of ownership. The Courts below, in these proceedings, have misunderstood the scope of the findings, when they stated that the defendants, even with regard to the well had only a right of easement. The findings in the earlier proceedings clearly make a distinction between possession of the well and possession of the channel and the ridge. With regard to the well, the finding was that the appellants and the respondent had joint possession and with regard to the channel and the ridge the finding was that they were used by the appellants and their predecessors for taking water and that they should have enjoyed the same only as an easement and not by virtue of ownership. If that finding is to stand in the present suit also, with reference to the well and the channel and the ridge, the plaintiff cannot have an injunction, because with reference to the well the parties have joint possession and with reference to the channel and the ridge, the appellants have a right of easement. The argument of Mr. Rajagopala Ayyar, the learned Counsel for the respondent, is that that finding in O.S. No. 740 of 1952 does not constitute res judicata as against the respondent. His case is that O.S. No. 740 of 1952 having been dismissed any finding in that case adverse to the respondent would not operate as res judicata, since the respondent could not have preferred an appeal against that finding alone. On the other hand, Mr. M. Section Venkatrama Ayyar, the learned Counsel for the appellants, contends that the finding in regard to possession was necessary for the disposal of the suit O.S. No. 740 of 1952, since the appellants had prayed for an injunction in that suit and for the purpose of deciding whether injunction should be granted or not, the Court should decide the question whether the appellants were in exclusive possession of the well or not and consequently if the Court came to the conclusion that the appellants were not in exclusive possession but in joint possession, that finding would be one in relation to a matter which was directly and substantially in issue between the parties in the earlier suit and therefore would constitute res judicata. In my opinion, in view of the conclusion of the lower Courts, I think that I must vacate the conclusion of the Courts below on this point and remand the matter back for fresh disposal in that behalf. The reason is that whether any finding in O.S. No. 740 of 1952 could operate of res judicata against the respondent or not, could not have been decided without having the decree in that suit brought into force, admittedly, the decree in that suit has not been filed as an exhibit in the present proceedings. Therefore that question has to be decided afresh after allowing the parties to produce the certified copies of the decrees in O.S. No. 740 of 1952 and the appeal therefrom. Hence, while declaring the title of the defendants-appellants to the suit well and the 2 picotahs as comprehended by Exhibit B-3 and the sale pursuant to the mortgage decree, I set aside the judgment and decree of the Courts below in other respects and remand the suit to the trial Court for fresh disposal, for the purpose of deciding whether the finding regarding the possession of the well and

the easement right in relation to the channel and the ridge constitute res judicata to any extent against any of the parties to the suit, in view of the fact that the present respondent was only a defendant in that suit and the suit was dismissed as against the present respondent. In the event of the trial Court coming to a conclusion that the finding in the earlier proceedings does not constitute res judicata the Court will have to go into the question of possession afresh, for the purpose of disposing of the suit of the respondent.

17. The second appeal is allowed in these terms, and the suit is remanded to the trial Court for fresh disposal as indicated above. There will be no order as to costs in this second appeal. No leave.