

(1917) 07 CAL CK 0032
In the Calcutta High Court

Takarunnessa Chowdhurani

APPELLANT

Vs

Tarini Charan Sarkar and Another and on his death his heir
and regal representative his son Jyotish Chandra Sarkar and
Others
 Tarini Charan Sarkar Vs Takarunnessa
Chowdhurani

RESPONDENT

Date of Decision : 10-07-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : 43 Ind. Cas. 221

Hon'ble Judges : Recharadson, J; N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for a declaration of the plaintiff's right to a jote by purchase and for recovery of khas possession thereof.
2. The plaintiff purchased two jotes, both belonging to one Mr. Bray, on the 21st March 1893 at sales held in execution of decrees for money, and he claims that the land in suit appertains to one of those two jotes situated in Mauza Ram Chandrapur. It appears that the plaintiff had brought another Suit No. 167 of 1901, in which a portion of the land in suit together with certain other lands were claimed as part of the other jote of Mr. Bray situated in Mauza Athna.
3. A question has been raised" in this Court whether the lands in dispute in the present case formed the subject-matter of the previous suit. There is no dispute that these lands were also claimed in that suit. What is contended before us is that although they were originally claimed as part of the jote in Mauza Athna, the plaintiff subsequently confined this claim to such portion of, the jote as was found by the Amin to lie within the Mauza Athna, and that, therefore, it must be taken that the subject-matter of the previous suit was the land of the jote which lay in Mauza Athna only.
4. We are referred to the judgment on the 4th issue in the previous suit, but reading "the decision on the 6th issue along with the decision on the 4th, it is

clear-that the whole land was claimed in the suit and the contention that subsequent to the institution of the suit, the suit was confined to a part of the land claimed, cannot be supported. The judgment shows that the suit was partially decreed. In other words, it was decreed in respect of the lands which lay in Mauza Athna and dismissed with regard to the remaining lands. That the lands in suit were the subject-matter of the previous Suit has been found by the Courts below and does not appear to have been disputed before the point was taken (for the first time) before us.

5. That being so, the question arises whether the decree in the, previous suit operates as *res judicata* so far as the lands claimed in the present suit are concerned.

6. The learned Subordinate Judge holds that the title on which the disputed lands are claimed being different in the two suits, the decree in the previous suit does not operate as *res judicata*. We think that the learned Subordinate Judge was wrong in so holding: we do not think that the titles are different in the two cases. The plaintiff claimed the lands in the present .suit as part of the jote of Mr. Bray which he had purchased. That was also his case in the previous suit. The only question is to which jote do they belong? The plaintiff was the owner of the jote in Mauza Athna as well as the jote in Mauza Ram Chandrapur. It was open to him to claim, we think he ought to have claimed, the land now in suit as part of the jote in Mauza Ram Chandrapur in the previous suit.

7. In the case of *Kashee Kishore Boy Chowdhry v. Kristo Chunder Sandyal Chowdhry* 22 W.R. 464 a suit for a declaration of plaintiffs' right to a chur, which they claimed as an accretion to Mauza L, was held to be barred by a judgment in a former suit in which they had claimed the same land as an accretion to Mauza R, because "whether by accretion to the one estate or to the other the question in both suits was that of title by accretion." Couch, C.J., pointed out that the plaintiff, if was bound to bring forward all the grounds of origin of his right and that a difference in the origin of the right is not a matter which makes a different cause of action-Explanation IV of Section 11 of the CPC expressly lays down that any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

8. We have been referred on behalf of the respondent to a decision of this Court in the case of *Kailash Mondul v. Barcda Sundari Dasi* 24 C. 711 : 1 C.W.N. 565 : 12 Ind. Dec. (N.S.) 1143, in support of the contention that even if the matter ought to have been made a ground of attack in the previous suit, it must have been finally decided in-order that the decision might operate as *res judicata*. The view taken in that case, however, has not been followed in some later cases. We may refer to the. decision in the case of *Jamadar Singh v. Serazuddin Ahamad Ghaudhuri* 35 C. 979 : 12 C.W N. 862 : 8 C.L.J. 82, and to the observations of Sir Lawrence Jenkins in the case of *Guddappa v. Tirkappa* 25 B. 180 : 2 Bom. L.R. 872, where he observed as follows: "But that case is based on the

conclusion that in the former suit the matter was not finally heard and determined. How far this view is reconcilable with the decision of the Privy Council in *Kameswar Pershad v. Rajkumari Ruttan Koer* 20 C. 79 : 19 L.A. 234 : 6 Sar. P.C.J. 241 : 10 Ind. Dec. (N.S.) 53 to which I have already referred but which was not cited to the Calcutta Bench I need not pause to consider. Suffice it to say that in the light of that Privy Council decision, it seems to me impossible to hold, under the circumstances of the case that the matter was not finally heard and decided". Having regard to the decision of the Judicial Committee in that case, we think that the plaintiff "might" have claimed and "ought" to have claimed these lands in that suit, and is, therefore, precluded u/s 11, Civil Procedure Code, from claiming them in the present suit.

9. The case will accordingly be remitted to the Court of First Instance in order that that Court may ascertain the lands which were the subject-matter of the previous suit. The suit should be dismissed with regard to such lands, and decreed with regard to the rest of the disputed land as is situate to the south of the Ichhawati river as it stood at the time of the Revenue Survey map.

10. There will be proportionate costs in all Courts, the proportion depending upon the ascertainment of the lands which were the subject-matter of the previous suit by the lower Court.

11. The cross-objection and Appeal No. 329 of 1914 were preferred on behalf of the respondent in this case. It was contended that the plaintiff ought to get the lands up to the northern bank of the Ichhawati. But it is clearly found that the northern boundary of the jote was the Ichhawati river. There is no doubt, as found by the learned Subordinate Judge, that the plaintiff can get the lands only up to the southern bank of the Ichhawati. There is, therefore, no force in the contention raised on behalf of the respondent.

12. Second Appeal No. 329 of 1914 and the cross-objection are dismissed. We make no order as to costs.