

(2004) 04 AP CK 0110

In the Andhra Pradesh High Court

Case No : A.S. No. 2348 of 1987 and Tr. AS No's. 1171 of 1990 and 1026 of 1991

The A.P. Wakf Board

APPELLANT

Vs

Syed Jalaludin Sha and Others

RESPONDENT

Date of Decision : 08-04-2004

Acts Referred:

Evidence Act, 1872 — Section 11, 13, 21, 40, 41
Waqf Act, 1954 — Section 4, 5, 6, 66E

Citation : AIR 2005 AP 54 : (2004) 4 ALT 389 : (2004) 3 CivCC 469

Hon'ble Judges : Gopala Krishna Tamada, J; Bilal Nazki, J

Bench : Division Bench

Advocate : S. Satyanarayana Prasad, for the Appellant; M.V. Suresh, for the Respondent

Judgement

Bilal Nazki, J.—Wakf Board filed a suit being O.S. No. 61 of 1980 for declaration and possession of the suit schedule property. It sought eviction of defendants 1 to 17 and also claimed mesne profits. It also sought a decree for permanent injunction. It also sought injunction against Municipality-defendant No.5 not to pay compensation for lands acquired during the road widening. Defendants 1 to 4 in O.S. No. 61 of 1980 filed another suit being O.S. No. 156 of 1975 which was later numbered as O.S. No. 137 of 1978 seeking injunction against the Wakf Board. Both the suits were clubbed together and decided by a common judgment. O.S. No. 61 of 1980 filed by Wakf Board was dismissed, whereas O.S. No. 137 of 1978 filed by the defendants was decreed in part. The Wakf Board filed two appeals being AS No. 2348 of 1987 and Tr. AS No. 1171 of 1990. Tr. AS No. 1026 of 1991 has been filed by the plaintiffs in O.S. No. 137 of 1978. Since all these three appeals arise out of the same judgment of the trial Court, they are disposed of by this common judgment. The parties will hereinafter be referred to as they appeared in O.S. No. 61 of 1980.

2. The facts on the basis of which the suits were filed may be summerised thus, O.S. No. 61 of 1980 was filed by A.P. Wakf Board. They averred in their plaint

that there was an ancient Muslim Wakf in Rajahmundry city which was known as Moula Ali Golusula Panja (Ashurkhana). The Panja building has a vast burial ground all around it. The property is situated near Rajahmundry, Forte gate and adjacent to the main street. Till 1975 there was a row of 11 non-residential shops along side the main road as part of the said wakf. Between the 4th and 5th shops there was a roofed passage which served as the only access from the public road to the burial ground which lay behind the said row of shops. There are compound walls on the other three sides of this wakf property. Pursuant to the master plan scheme settled by the 5th defendant-Municipality, the main road was widened. 5th defendant demanded house owners to either voluntarily demolish portions of their building, required for widening the main road or to face the consequences of demolition work being done by it. Defendants 1 to 4 are ex-Muthawallis of this wakf and were continuing in illegal occupation of the wakf properties which included the plaint A schedule burial ground and Panja building and also the lands described in the plaint B schedule property. The defendants 1 to 4 failed to inform the plaintiff about the proposed demolition and without the plaintiff's knowledge and consent, they demolished the shops and constructed hastily new shops in the left over Panja site and part of the burial ground as depicted in the plaint C schedule property after acquisition. Defendants 6 to 17 were the tenants of the shops. The plaintiff contended that it was a statutory body constituted under the Wakf Act No. 29 of 1965, as such it had a statutory right and duty to administer all wakfs in the State of Andhra Pradesh. This property was notified to be wakf property by a gazette notification dt. 19.4.1962 after due survey. Then the 1st defendant amongst defendants 1 to 4 filed a suit being O.S. No. 303 of 1963 on the file of District Munsif, Raja hmundry for a declaration that the burial ground-cum-Panja building (which is shown as plaint A schedule property in the present suit) was his personal property and not wakf property. After contest by the plaintiff herein the suit was dismissed with costs and the decision has become final. 2nd defendant is the younger brother of 1st defendant. Defendants 1 and 2 and their sister Shamsunnisa were the Mutawallis of this wakf. In later times the defendants 3 and 4 who are the sons of the said Shamsunnisa also acted as Mutawallis along with defendants 1 and 2. It was contended that although the 1st defendant challenged the notification under Wakf Act and failed, and the defendants 2 to 4 who were Mutawallis did not challenge the notification, therefore the notification has become final even as against them. O.S. No. 303 of 1963 was, not only filed with regard to the property which is mentioned as plaint A schedule property, but it included the property which is shown as plaint B schedule property in the present suit. The defendants 1 to 4 are, therefore, liable to be evicted from plaint A and B schedule properties as they acted against the interests of wakf. The plaintiff, by its order dt. 20.5.1974, removed the defendants 1 to 4 as Mutawallis of the wakf. The defendants 1 to 4 filed an appeal against this order and it was dismissed by the Government of A.P. on 14.11.1974. These orders have also become final. Thereafter the defendants 1 to 4 were directed to hand over the possession of all the wakf properties to the plaintiff's Inspector Auditor,

Rajahmundry, but instead of doing so, they filed O.S. No. 156 of 1975 on the file of the District Munsiff, Rajahmundry for an injunction to restrain the plaintiff herein from enforcing its order as detailed above. While that suit was pending, an application for grant of temporary injunction was dismissed. The plaintiff further stated that since the land had been taken over by 5th defendant for the purpose of road widening, therefore the plaintiff was also entitled to adequate compensation from 5th defendant. The plaintiff also claimed that the defendants 1 to 4 had stopped rendering accounts to the plaintiff in regard to the income realized by them from the wakf properties. The defendants 1 to 4 had stopped paying wakf fund to the plaintiff and the arrears now amount to more than Rs.4,000/-. The plaintiff also submitted that the non-residential shops which existed till 1976 as a part of the Golusulapanja property fetched not less than Rs.500/- per month by way of rents and the present structures which were constructed were fetching not less than Rs.1,000/- per month. The defendants 1 to 4 have also derived an income of not less than Rs.700/- per year from the said lands. Therefore the plaintiff sought a decree for settling of accounts also. It was further pleaded that the defendants 1 to 4 intended to demolish the old structures existing along the eastern boundary of the burial ground and in its place they were intending to construct a new structure by trespassing into the tombs existing in the burial ground. Therefore the plaintiff's Inspector Auditor filed a suit being O.S. No. 179 of 1976 before the Court seeking the reliefs which are claimed now in this suit. The Wakf Board had not filed this suit, but had been filed by its Inspector Auditor in an emergency to prevent the possible demolition. But when the Wakf Board was informed, they approved the action of the Inspector Auditor and also applied to the Court that they be allowed to pursue the suit as plaintiff. That application was resisted by the defendants and the application was dismissed on the ground of delay. Therefore the plaintiff filed the present suit afresh in order to ensure that the earlier suit being O.S. No. 179 of 1976 was not dismissed on technical grounds.

3. In their written statement the defendants 1 and 2 contended that the plaintiff had filed O.S. No. 179 of 1976 for the same reliefs which are claimed in the present suit. The earlier suit was decided after three years and finally the plaintiff had withdrawn the suit even without seeking permission from the Court to withdraw it and file a fresh suit. It was contended that the present suit was barred under Order 2, Rule 2 of the CPC and could not be filed as the reliefs are same which were claimed in O.S. No. 179 of 1976. On facts the defendants 1 and 2 contended that Syed Amanulla Shah was the ancestor of the defendants 1 and 2. He was having extensive private property abutting the main road, Rajahmundry on its west along with landed properties also. He has two sons Syed Daha Moinuddin and Hasan Basha. Baba Mohinuddin's sons are Jalaluddin-1st defendant and Syed Rasool Basha. 3rd defendant and 4th defendant are the sons of Syed Rasool Basha. Hasan Basha, the 2nd son of Amanulla, has a son Syed Amanulla Saheb and 2nd defendant-Saifulla Shah is his son. During the life time of Amanulla Shah, the ancestor, two houses were

used as residential house having a passage to the back house from the main road through front house. He was using the vast space behind the two houses on the west partly as garden and partly as family grave yard. His two sons inherited his properties and enjoyed them throughout their lives without partition. Hasan Basha was a religious person and he used to celebrate Moharam festival with his own expense by installing peers temporarily during the days of festival in a northern portion of the back house. The peers were removed after the festival was over. Hasan Basha and his brother enjoyed the property inherited by them from their father and did not even partition the property between them. No portion of the property was ever declared or dedicated by anybody either as public wakf or private wakf. It was denied that the plaint A and B schedule properties were public wakf properties. It was denied that the present existing building is a Panja building and the site around it was a burial ground. The old Manduva building abutting the main road was converted and rebuilt into a terraced building in 1908 by the owners. They also constructed shops on either side of the building abutting the main road. The passage into the terraced building was provided for as a matter of convenience into the back building between the shops on the main road closing the previous passage. The shop rooms on either side were let out and the owners for the time being had been enjoying the rents in their own right. They contended that even if there was any dedication of any portion of plaint A schedule property by a single co-sharer, it could not be a valid dedication without the consent of other co-sharers. The place where Hasan Basha used to temporarily install peers during Moharam days acquired the name of "Golusula Panja" in popular parlance as the way to the place where peers were installed used to be enclosed by iron chairs to prevent undesirables and non-invitees from entering the place. Referring to the gazette notification declaring the property to be wakf property, they contended that the notification was in violation of the fundamental rights and the defendants were not barred from contending and establishing their personal rights to the suit property in spite of the notification which had no legal effect either in law or on facts. The relationship between the defendants 1 to 4 has been disputed and it is contended that 2nd defendant is not the younger brother of 1st defendant and Shamshunnisa Begum is not their sister. Shamsunnissa Begum is the mother of defendants 3 and 4 and she is the elder brother's wife of 1st defendant. 2nd defendant is the brother's son of 1st defendant. The mother of defendants 3 and 4 was not a Muthawalli.

4. Defendants 3 and 4 have also filed their written statement almost taking the same pleas which were taken by defendants 1 and 2. 5th defendant filed a written statement in which it was contended that the Municipality is not a proper and necessary party. No compensation was paid for road widening after demolition. Defendants 6 to 9 and 11 to 17 filed their written statement stating that they were not aware whether the property was wakf property. It had been let out to them by the defendants 1 to 4 and they invested money for construction of shops. They were bona fide lessees and they were entitled to

continue in the premises.

5. O.S. No. 137 of 1978 was filed by the defendants 1 to 4. This was also laid on the same ground which have been taken by them in their written statement filed in O.S. No. 61 of 1980. They sought permanent injunction against the defendants therein restraining them from interfering in the property and from enforcing the orders dated 20.5.1974 and 23.5.1974 in proceedings No. GS No. 2520, dt. 20.12.1968.

6. Defendant No.3 filed a written statement which was adopted by defendants 1 and 2. They also took the same pleas which they have taken in their suit and stated that the notification issued under Wakf Act had become final in view of the judgment in O.S. No. 303 of 1963.

7. In O.S. No. 61 of 1980 which was filed by plaintiff-Wakf Board the following issues were framed,

- 1) Whether the plaint A and B schedule properties or any of them are public wakf and whether defendants 1 to 4 or any of their predecessors prior to them are hereditary trustees thereof?
- 2) Whether A and B schedule properties are private properties of the ancestors of the defendants and the defendants have enjoyed them as such?
- 3) Whether the survey and report of the Commissioner appointed by the Wakf Board are in accordance with law and natural justice and the Gazette notification pursuant thereof is legal, valid and binds the defendants?
- 4) Whether the decision in O.S. No. 179/76 binds the defendants as res judicata or whether it was collusively obtained and does not bind defendants 3 and 4 or their interest in the suit property?
- 5) Whether the suit is barred under Order 2, Rule 2 C.P.C. by reason of the withdrawal of O.S. No. 179 of 1976?
- 6) Whether Wakf Board can remove hereditary trustees and appoint strangers in their place and recover possession and profits in respect of wakf properties or any of them are held to be wakf properties?
- 7) Whether the reconstruction by the defendants of the shops in A schedule is illegal and whether the 5th defendant's permission granted is invalid and untenable?
- 8) Whether the plaintiff is entitled to the compensation payable by the Municipality for the site acquired for widening the main road?
- 9) Whether the plaintiff is entitled for injunction prayed for?
- 10) Whether the defendants are liable to render account to plaintiff and if so in what respect and for what period?

11) Whether D-5 is a necessary party to the suit?

12) Whether D-6 and D-9 and D-11 to D-17 are statutory tenants entitled for protection under the provisions of A.P. Rent Control Act?

13) To what relief?

8. In O.S. No. 137 of 1978 which was filed by the defendants 1 to 4, the following issues were framed,

1) Whether the plaintiffs have cause of action to file this suit?

2) Whether the plaintiffs are entitled to the injunction as prayed for?

3) To what relief?

9. Both the suits were tried together and decided as the subject matter was same and parties were same. O.S. No. 61 of 1980 was dismissed. Against this judgment and decree, AS No. 2348 of 1987 has been filed by the plaintiff-Wakf Board. O.S. No. 137 of 1978 was decreed and permanent injunction was granted restraining the defendant Wakf Board from interfering with the property covered by T.S. No. 396 and enforcing its proceedings. Against this judgment and decree, Tr.A.S. No. 1171 of 1990 has been filed by the plaintiff-Wakf Board. The plaintiffs in O.S. No. 137 of 1978 were restrained from obstructing the muslim public for burying dead bodies in T.S. No. 397 and using the existing passage from the main road through the shops in T.S. No. 396. The trial Court also held that since T.S. No. 397 was found to be wakf property, the Chinna Mosque Committee shall have control over it for its management. Against this part of the judgment and decree, Tr.A.S. No. 1026 of 1991 has been filed by the defendants 1 to 4.

In the light of the pleadings of the parties the following questions would arise for consideration in these appeals,

(1) Whether the suit filed by the defendants was barred by res judicata in view of the dismissal of the suit being O.S. No. 303 of 1963.

(2) Whether the suit filed by the plaintiff-Wakf Board was barred under Order 2, Rule 2 CPC, as the earlier suit being O.S. No. 179 of 1976 was withdrawn without permission to file a fresh suit.

(3) What would be effect of the judgments in O.S. No. 22 of 1960 and O.S. No. 303 of 1963.

10. We would first deal with the objection taken by the defendants with regard to maintainability of the suit filed by the plaintiff-Wakf Board under Order 2, Rule 2 CPC. According to the learned counsel for the plaintiff, there is no evidence on record to show as to what was the nature of the earlier suit and what is the nature of the present suit, but the learned counsel for the defendants submits that it is contended in the plaint itself by the Wakf Board that a suit had been filed for the same relief on the same cause of action which was withdrawn, therefore the fresh suit was filed without permission of the Court. The learned

counsel for the plaintiff contends that earlier suit had been filed by Inspector Auditor, Rajahmundry because of the urgency in the matter as the property was being encroached upon, thereafter the Wakf Board had approved the action of the Inspector Auditor and had moved an application before the trial Court in O.S. No. 179 of 1976 for being including itself as a plaintiff. The application was dismissed, therefore this would not be a case under Order 2, Rule 2 CPC. The earlier suit had been filed by Inspector Auditor, Rajahmundry who was not competent to file a suit on behalf of Wakf Board. After the Wakf Board failed in becoming the plaintiff in the suit, the Inspector Auditor had withdrawn the suit and the Wakf Board filed the present suit.

11. Order 2, Rule 2 CPC lays down,

"(1) Suit to include the whole claim: - Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim:- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs:- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

12. The plaintiffs are altogether different. The first suit, as has been pointed out hereinabove, was filed by an Inspector Auditor of Wakf Board and not Wakf Board. The present suit has been filed by Wakf Board. The learned counsel for the plaintiff submits that it is not sufficient for succeeding in raising a plea of bar under Order 2, Rule 2 (3) CPC to say that the controversy in the earlier suit could be inferred from the assertions made in the plaint in the subsequent suit. He submits that a bar under Order 2, Rule 2 (3) CPC in respect of claiming relief in a subsequent suit would not be applicable if the second suit is based on continuous acts, of the defendant till the filing of the second suit, since the cause of action in both the suits would be different. In this connection, he relies on a judgment of the Supreme Court reported in *Bengal Water Proof Limited Vs. Bombay Waterproof Mfg. Co.*, 1. Specifically the Supreme Court held that a plea of bar under Order 2, Rule 2 (3) in respect of the claim/relief in a subsequent suit would be maintainable only if the defendant files in evidence before the trial Court, pleading in the previous suit to prove identity of cause of action in the two suits. Inference about the bar cannot be called merely from the plaint in the second case. For these reasons we think the trial Court was wrong in holding that the suit was barred under Order 2, Rule 2 CPC.

13. Coming to the questions whether the suit filed by the defendants was barred by res judicata and what would be the effect of judgments in O.S. No. 22 of 1960

and O.S. No. 303 of 1963, second witness for Wakf Board (D.W.2) stated that 1st defendant filed a suit against the Wakf Board being O.S. No. 303 of 1963 before the District Munsiff, Rajahmundry and in that suit it was held that the property was not personal property, but was wakf property. No appeal was filed. The trial Court misdirected itself by going into validity of the notification which had been issued in the year 1962 and found that the notification was not issued after following the provisions of law. The notification was challenged in O.S. No. 303 of 1963, the suit was dismissed on 21.10.1965 and the notification was upheld. No further appeal was filed. Therefore that judgment had become final. The learned counsel for the plaintiff contends that even if that judgment would not be binding on other defendants, even then it can be presumed that other defendants had the knowledge of the notification. Further the learned counsel for the plaintiff contends that because of judgment in O.S. No.303 of 1963 the legality of the notification issued on 19.4.1962 has become final and there is a decree for that purpose. Therefore that judgment could be at least taken as evidence and that decree having been become final, there could not be two inconsistent decrees which was not permissible in law.

14. The learned counsel for the plaintiff also submits that the suit itself was not maintainable which was filed by the defendants because of the bar created under the Wakf Act, 1954. It is stated that u/s 4 of the Wakf Act, 1954 a survey of wakfs has to be conducted, u/s 5 publication of list of wakfs has to be made in the official gazette and a suit can be filed in terms of Section 6 with respect to notification within one year after notification. A suit being O.S. No. 303 of 1963 had been filed within the time prescribed by the 1st defendant and it was dismissed which has been discussed hereinabove. Any other suit which would not be a suit u/s 6 was barred u/s 66-E. Therefore the suit itself was barred. The learned counsel for the defendants, however, submits that the defendants 1 to 4 were removed from Mutawallis on 20.5.1974 and in appeal it was confirmed by the State Government, therefore they had a fresh cause of action to file a suit. But this suit could not have been filed in view of specific bar u/s 66-E of the Wakf Act, 1954 and also in view of the fact that a decree had become final in a suit filed u/s 6 of the Wakf Act, 1954. For this reason also, we find that the suit filed by the defendants was not maintainable.

15. Then comes the judgment in O.S. No. 22 of 1960. D.W.2 stated that one Kantheti Satyanarayana filed a mortgage suit being O.S. No. 22 of 1960 on the file of District Court, Rajahmundry against the 2nd plaintiff and one Abida Khanam @ Hazara Beebi Saheba w/o Amanullahshah and in that suit it was held that a mortgage could not be created with respect to Wakf property. An appeal was preferred before the High Court where the decree was confirmed. Ex.B23 was the certified copy of the order of the High Court. P.W.3's mother filed an eviction petition against one Suleman Sait and in these proceedings it was also held that no eviction petition was maintainable with respect to Wakf properties.

16. O.S. No. 22 of 1960 was decided on 8.8.1961. It was filed by one Kantati

Satyanaranayamurthy and two others. The plaintiffs averred in that suit that Syed Amanullah Shah before his death had borrowed a sum of Rs.7,000/- from the plaintiffs and executed a simple mortgage bond on 30.6.1947 in favour of plaintiffs 1 to 3 and 1st defendant hypothecated the properties mentioned in the plaint. The entire consideration had been received by late Syed Amanullah Shah. Since he had died, the plaintiffs filed the suit against his wife (2nd defendant), three sons (defendants 3 to 5), three daughters (defendants 6 to 8) and also his sister (defendant No.9). 3rd defendant stated in his written statement that the transaction between Syed Amanulla Shah and the plaintiffs might be true, but the transaction was illegal and the defendants 2 to 9 were not bound by it. Amanulla Shah had died and his properties devolved upon defendants 2 to 9, but the plaint schedule property was Wakf property governed by Muslims Wakf Act. It was a public wakf property belonging to Moulali @ Golusula panja and it was forming part of the burial ground attached to it. It had been dedicated by the Nawabs for the performance of Moharrum ceremonies and for the maintenance of burial ground. The said property was unalienable. He also contended that the matter had been decided even earlier to this suit in O.S. No. 67 of 1931 and O.S. No. 358 of 1934 by the District Munsiff, Rajahmundry that the plaint schedule properties were public wakf properties. The first issue framed in that suit was whether the suit items are wakf properties and therefore inalienable, as contended for the defendants 2 to 5 and 7. The findings on this issue was,

"From this material, it is abundantly clear that the suit properties are wakf properties."

17. The Court also stated,

"When the mortgagor had no right whatsoever, the encumbrance on the property is not legally enforceable. Thus I hold that the suit items are wakf properties, and, as such, they are inalienable."

18. The property is same as is evident from the plaint schedule and it is also not disputed. This judgment was challenged by the plaintiffs in O.S. No. 22 of 1960 before the High Court. The High Court decided the matter in A.S. No. 348 of 1962 on 10.6.1968 and approved the judgment of the trial Court. The judgment of the High Court was based on the evidence produced by the defendants before the Court and also based on an earlier judgment passed in O.S. No. 67 of 1931. In O.S. No. 67 of 1931 the plaintiff i.e., Amanulla Shah himself had admitted that the suit property was wakf property. The trial Court, not only relied on the judgment in O.S. No. 67 of 1931, but also relied on the admission made by Amanulla Shah. It was agitated before the High Court that on the basis of admission of Amanulla Shah in an earlier suit the suit could not have been dismissed. But the High Court dismissed the plea in the following words,

"it is relevant to bear in mind the finding given by the District Munsif in O.S. No. 67 of 1931 that the property now in question was held to be wakf property on the admission of the plaintiff himself in that suit. It is true, as pointed out by Mr.

Jagannadaha Rao, that the mortgages were not parties to that suit. But the evidentiary value of that decree cannot be minimized as no person who puts in a claim would give evidence so as to effect his own interests. That suit was decreed as evidenced by the judgment, Exhibit B-3 dated 26.12.1936 and it was confirmed by the Subordinate Judge of Rajahmundry on 31.8.1938. The suit transaction is years later and it is difficult to believe P.W.2 when he says that although he was aware of the earlier suit, he was not aware of the exact result of that suit."

19. Then the High Court referred to Ex.B6 which was a rental agreement dt. 14.7.1924 and reproduced the following portion,

"It is settled that during the time of Moharam every year I shall deliver vacant possession of the said Kottu to you for a period of 10 days from Nela Podupu for the purpose of installing peerlu and that the next day after the festival is over you shall vacate the said Kottu and deliver possession of the same to me again."

20. The High Court found from this agreement that these Kottus were being used as early as in 1924 for installing the Punjas (Peerlu) during the Moharam period. After considering the whole evidence and arguments made, the High Court stated,

"On the material placed, the Court below has rightly held that the property in question is wakf property and as such inalienable. The suit was, therefore, rightly dismissed and I see no grounds for interference. Having regard to the facts and circumstances of the case, I award no costs. The appeal is dismissed without costs."

21. In the light of this judgment it was conclusively proved that the defendants themselves always treated the suit schedule property as wakf property and these issues had been settled by the Courts. Then the question is as to what would be the effect of the judgment in O.S. No. 22 of 1960 and consequent judgment in appeal by the High Court in the present case. Admittedly Amanulla who was the predecessor in interest of the defendants 1 to 4 was party to O.S. No. 67 of 1931. 2nd defendant in O.S. No. 61 of 1980 was a party defendant No.3 in O.S. No. 22 of 1960. The issue related to the same property and it was the admission of Amanulla himself that the property was wakf property.

22. Learned counsel for the defendants would submit that admission of one party cannot be taken as admission of another party. In this connection he referred to various judgments. In a judgment reported in Sirdar Bahadur Sirdar Indra Singh Vs. Commissioner of Income Tax, Bihar of Orissa 2 it was held,

"The principle of estoppel or res judicata would not apply to Income Tax cases. Therefore an admission by the assessee in a particular year that the income sought to be assessed was his individual income cannot debar the assessee from claiming in a subsequent year that the income sought to be assessed is not his individual income but the income of an undivided Hindu family; but the

admissions undoubtedly constitute pieces of evidence in the case which can be considered to determine the status of the assessee."

23. This judgment further held,

"The recitals in a judgment are no evidence whatsoever to prove the exact admission made by a party or a witness unless the whole of the statement is recited therein. This is based on a good principle because it may be that the Court has taken an incorrect view or has misunderstood the admission made."

24. The learned counsel for the defendants would contend on the basis of a judgment of the Supreme Court reported in *Ambika Prasad Vs. Ram Ekbal Raj* 3 that admission made by witness in other litigation is admissible against him alone and not against other defendants. In para-13 of this judgment it was held,

"....Though admission against him as an admission, it is not admissible against the other defendants.."

25. In *Krishnawati Vs. Hans Raj* 4 the Supreme Court was considering the import of Section 21 of the Evidence Act and it held,

"The respondent relied principally on some previous self-serving statements made by Sohan Singh in other proceedings which could not be used as substantive evidence in the present case."

26. Another judgment relied on by the learned counsel for the defendants is a judgment of the Supreme Court reported in *State of Bihar Vs. Radha Krishna Singh* 5. This judgment was primarily concerned with the provisions contained in Sections 40 - 43 of the Evidence Act. In paras 122 and 123 it was held,

"It is also well settled that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter parties or not. In the instant case, however, all the documents consisting of judgments filed are not judgments in rem and therefore, the question of their admissibility on that basis does not arise. As mentioned earlier, the judgments filed as Exhibits in the instant case, are judgments in personam and, therefore, they do not fulfill the conditions mentioned in Section 41 of the Evidence Act.

It is now settled law that judgments not inter parties are inadmissible in evidence barring exceptional cases which we shall point out hereafter. In *John Cokrane v. Hurrosoondurri Debia* (1854-57) 6 Moo Ind. App. 494, Lord Justice Bruce while dealing with the question of admissibility of a judgment observed as follows:

With regard to the judgment of the Supreme Court, it is plain, that considering the parties to the suit in which that judgment was given, it is not evidence in the present case, . . . We must recollect, however, not only that that suit had a different object from the present, independently of the difference of parties, but that the evidence here is beyond, and is different from, that which was before b1

the Supreme Court upon the occasion of delivering that judgment."

27. Finally in para-127 the Supreme Court referred to a para from the judgment reported in Gadadhar Chowdhury and Others Vs. Sarat Chandra Chakravarty and Others, ,

"Though the recitals and findings in a judgment not inter parties are not admissible in evidence, such a judgment and decree are, in our opinion, admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed.

Then the Supreme Court held that this was the correct legal position regarding the admissibility of judgments not inter parties."

28. This question does not arise as far as suits being O.S. No. 22 of 1960 and O.S. No. 67 of 1931 because Amanulla, the ancestor of the present parties, was a party to O.S. No. 67 of 1931 and 2nd defendant herein was a party defendant No.3 in O.S. No. 22 of 1960.

29. Now all these judgments which have been referred to by the learned counsel for the defendants related either to admissions made by a party in other proceedings or with respect to judgments to which a party in the subsequent suit was not a party. All these judgments had not taken into consideration the import of Section 13 of the Evidence Act as is contended by the learned counsel for the plaintiff. Section 13 of the Evidence Act reads as under,

"S. 13. Facts relevant when rights or custom is in question,-- Where the question is as to the existence of any right or custom, the following facts are relevant:-

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from."

30. This provision of the Evidence Act came to the notice of the Supreme Court in a judgment reported in Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah 6 and the facts of this case need to be mentioned in order to appreciate the law laid down by the Supreme Court. A suit was filed by the plaintiff for grant of permanent injunction against TTD with respect to land measuring Ac.2.29. The trial Court dismissed the suit holding that the plaintiff had neither proved the possession nor title and had only trespassed into the property, therefore he was not entitled to permanent injunction against the true owner that was TTD. The plaintiff filed an appeal, but during the pendency of the appeal and when the injunction order was not in force, the plaintiff was dispossessed on 30.8.1969, therefore he filed an application seeking amendment of the plaint and converted the suit into one for possession. The appellate Court also found that the plaintiff had neither proved title nor possession. The appeal was dismissed by the

appellate Court on 5.8.1982. The defendant i.e., TTD had contended before both the Courts that the title of TTD over the suit property had been established by a judgment of the Sub-Court, Chittoor dated 15.6.1942 in a suit filed by TTD against Hathiramji Mutt in 1937. The Court declared the title of TTD to the property. Subsequent to the decree, the TTD filed an EP and obtained delivery on 12.1.1946 through Court. This had been taken into consideration by both the Courts and the suit and the appeal were dismissed. After failing in both Courts, the plaintiff preferred a second appeal. A learned single Judge of this Court allowed the appeal on 24.4.1987 and passed a decree for possession in favour of plaintiff. The High Court held that the suit had to be treated as one based on possessory title. The High Court also said that the TTD's title in respect of the land which was the subject matter of the suit stood extinguished as the delivery receipt dt. 12.1.1946 showed that some encroachers were in possession of the land. The argument made before the High Court by the plaintiff's counsel was that the earlier judgment in O.S. No. 51 of 1937 by Sub-Court, Chittoor had been rendered in a suit by the TTD against Hathiramji Mutt and the present plaintiff was not a party thereto, therefore any declaration as to title in favour of TTD given therein in respect of suit property was not admissible or binding in the present suit. This is exactly what was argued before this Court by the learned counsel for the defendants. Argument made on Point No.1 which was framed by the Supreme Court for decision was,

"8. It was argued by the learned counsel for the plaintiff-respondent that the earlier judgment in OS No. 51 of 1937 dated 15-6-1942 was rendered in favour of the TTD against Hathiramji Mutt, that the plaintiff was not a party to that suit and hence any finding as to TTD's title given therein is not admissible as evidence against the present plaintiff in this suit."

It was answered in paras 9 and 10.

"9. In our view, this contention is clearly contrary to the rulings of this Court as well as those of the Privy Council. In Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, , speaking on behalf of a Bench of three learned Judges of this Court, Venkatarama Ayyar, J. held that a judgment not inter parties is admissible in evidence u/s 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. A contention that judgments other than those falling under Sections 40 - 44 of the Evidence Act were not admissible in evidence was expressly rejected. Again B.K. Mukherjee, J. (as he then was) speaking on behalf of a Bench of four learned Judges in Sital Das Vs. Sant Ram and Others, , held that a previous judgment not inter parties, was admissible in evidence u/s 13 of the Evidence Act as a "transaction" in which a right to property was "asserted" and "recognised". In fact, much earlier, Lord Lindley held in the Privy Council in Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani ILR (1992) Cal 190 (198) (PC) that a previous judgment, not inter parties was admissible in evidence u/s 13 to show who the parties were, what the lands in dispute were and who was declared entitled to retain them. The criticism of the

judgment in *Dinomoni v. Brojo Mohini and Ram Ranjan Chakerbati v. Ram Narain Singh* ILR (1895) 22 Cal. 533 (PC) by Sir John Woodroffe in his Commentary on the Evidence Act (1931, p. 181) was not accepted by Lord Blanesburgh in AIR 1934 157 (Privy Council)

10. For the aforesaid reasons, we reject the contention of the learned counsel for the respondent-plaintiff and hold that the TTD could rely on the judgment in OS No. 51 of 1937 as evidence to prove its title in regard to the suit property, even though the present plaintiff was not a party to that suit. Point 1 is held accordingly against the respondent."

31. Reliance has also been placed on a judgment reported in *Misbahuddin Vs. Vidya Sagar* 7. In this judgment the Lahore High Court not only considered the import of the previous judgments, but also considered what wakf connotes under Mohammedan law and how it is created. It referred to Wilson's Anglo Mohammedan law and said,

"wakf is described as a charitable or religious foundation and applied to all such permanent dedications. With the consent of heirs it can be created even by a will and it is not necessary that this term should be used in the instrument creating it.....The matter of wakf therefore is a matter of public nature within the meaning of Section 42, Evidence Act, and cannot in any circumstances be less public than a right of way mentioned in the illustration to S. 42."

32. Then it held,

"In this way also, it will be permissible under the law to look to this judgment to find out what it decided (previous judgment in previous suit). Similarly u/s 13 this judgment can be admitted as a particular instance in which this right was claimed, recognized or exercised by plaintiff. It can also be urged that as by itself it makes the existence of wakf highly probable it can be used by virtue of the provisions of S. 11, Evidence Act."

33. In a judgment reported in *Mt. Imam Bibi Vs. Abdul Rahman* 8 it was also held that right of public nature claimed in previous suit, that judgment in a previous suit over the right of public nature would be relevant in a subsequent suit involving the same question even if the parties are different. Almost the same principles were laid down in *Maharaja of Kolhapur Vs. Sundaram Ayyar* 9 and *Mt. Subhani Vs. Nawab* 10.

34. For the reasons given hereinabove, O.S. No. 61 of 1980 should have been decreed and O.S. No. 137 of 1978 should have been dismissed.

AS No. 2348 of 1987 is allowed, judgment and decree in O.S. No. 61 of 1980 is set aside and the suit is decreed as prayed for Tr.A.S. No.1171 of 1990 is also allowed and the judgment and decree of the trial Court is set aside to the extent it granted injunction against the Wakf Board. O.S. No. 137 of 1978 is dismissed.

Tr.A.S. No. 1026 of 1991 is dismissed.

35. No order as to costs.