

Mariamnissa Bibi Vs. Joynab Bibi

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Court : Kolkata

Decided On : Jun-11-1906

Reported in : (1906)ILR33Cal1101

Judge : Chunder M. Ghose, A.C.J., ;Bampini and ;Hairington, JJ.

Appellant : Mariamnissa Bibi

Respondent : Joynab Bibi

Judgement :

Rampini, J.

1. This appeal is against a decision of Mr. Deb, the District Judge of Hooghly, dated the 21st January 1895. The facts are that on the death of one Mahomed Mehdi, his two widows Mariana and Joynab Bibi brought suits to recover their dowers from the estate of their deceased husband. Mariam Bibi's suit was No. III of 1903, and Joynab's No. 112 of 1903.

2. In both of these suits there was a contention as to the liability of two houses for the dowers sued for. In Mariam Bibi's suit, she alleged that she had bought these houses with her own money, and that they were not liable for her dower. Joynab Bibi as defendant traversed in that suit that statement. In Joynab Bibi's suit she alleged that these two houses were part of Mahomed Mehdi's estate and sought to have them declared liable for her dower, while Mariam Bibi as defendant

contended that they had been purchased with her money and were not so liable.

3. The question as to ownership of the houses and their liability for the claim for dower was raised in the issues framed in both suits, having been the subject of issue No. 2 in Mariam Bibi's suit No. 111, and of issue No. 3 in Joynab Bibi's suit No. 112.

4. The Subordinate Judge decided both issues in favour of Mariam Bibi. He held that the houses had been purchased with her money and were her property. This decision is dated 30th November 1903. Joynab Bibi did not appeal in Mariam Bibi's suit. The decision of the Subordinate Judge in that suit on the question as to the ownership of the houses accordingly became final. But Joynab Bibi appealed in her suit. The District Judge in appeal set aside the finding of the Subordinate Judge and held that the purchases in Mariam Bibi's name were benami transactions, and that the two houses were purchased with the money of Mahomed Mehdi and belonged to his estate. Now Mariam Bibi appeals. On her behalf it is urged (i) that the District Judge is wrong on the question of the purchases being benami and (ii) that the question as to the ownership of the houses was, when he heard the appeal, *res judicata*, Joynab Bibi not having appealed against the decision on this issue in Mariam Bibi's case, which necessarily became final on the 30th November 1903.

5. It is best to consider the second of these grounds of appeal first, for, if the contention of the appellant as to *res judicata* is correct, the first point as to the correctness of the decision of the Judge on the merits does not arise.

6. It is to be observed in limine that the question of *res judicata* was raised before the District Judge, but overruled by him.

7. In support of the plea that the question as to the ownership of the houses was *res judicata*, the appellant's pleader relies on the cases of *Balkishan v. Kishan Lal* (1888) I.L.R. 11 All. 148 and *Gururajammah v. Venkatakrishnama Chetti* (1901) I.L.R. 24 Mad. 350 in which it has been held that the doctrine of *res judicata*, so far as it relates to prohibiting the retrial of an issue, refers, not to the date of the commencement of the litigation, but to the time when the Judge is called on to

decide the issue. On the other hand, the respondent's pleader relies on the case of *Abdul Majid v. Jew Narain Mahto* (1888) I.L.R. 16 Cal. 233, in which this Court, in circumstances very similar to those of the present appeal, decided that the rule of *res judicata* did not apply.

8. The respondent's pleader further argues that the question of the ownership of the houses was not substantially, but only incidentally in issue in the two suits, and that therefore it cannot be said to have been finally decided within the meaning of Section 13. There appears to me to be no ground for this argument. In my opinion, the question of Mariam Bibi's right to the houses was directly and substantially in issue in the two suits. That being so, it seems to have been finally decided in favour of Mariam Bibi in Joynab Bibi's suit on the 30th November 1903--a decision, which was not appealed against. Hence in my opinion, for the reasons assigned in the two cases of *Balkishan v. Kishan Lal* (1888) I.L.R. 11 All. 148 and *Gururajammah v. Venkatakrishnama Chetti* (1901) I.L.R. 24 Mad. 350, the question was *res judicata* and the District Judge could not interfere with or set it aside in Joynab Bibi's appeal in her own case.

9. This latter case, it is to be observed, has not yet been finally decided. It is still pending before us in the appeal we are now hearing.

10. The learned pleader for the respondent relies on the case of *Abdul Majid v. Jew Narain Mahto* (1888) I.L.R. 16 Cal. 233, which is certainly in point. I cannot, however, consider that the reasons given by the learned Judges, who decided that case, are sufficient for holding that the rule of *res judicata* does not apply. The reasons they assign are : (i) that the two suits were not brought on the same cause of action; (ii) that the Appellate Court when hearing the appeal was not holding a trial of the issue; and (iii) on general principles the decision of the issue in the first suit should not be held to be a bar to its decision in the second suit.

11. But the words 'same cause of action' do not occur in Section 13. It is sufficient, if the issue decided was directly and substantially in issue in the first suit and has been finally decided before the decision of the same issue in the second suit. If so, the trial of that issue in the second suit is barred,

12. In the second place, an Appellate Court in deciding an appeal holds trial of an issue, just as much as the first Court does. It has to decide the issue after considering the evidence adduced with regard to it. The only difference between its functions and those of the first Court is that it does not record, but only reads, and considers the evidence.

13. In the third place, the argument of the Judges in *Abdul Majid v. Jew Nerain Mahto* (1888) I.L.R. 16 Calc. 233 on the basis of general principles is, in my opinion, sufficiently answered in the passage in Mr. Justice Mahmood's judgment in *Balkishan v. Kishan Lal* (1888) I.L.R. 11 All. 148, in which it is said:

It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immorlales essent, dum litigantes mortales sunt*. This saying of Yet is in accord with the maxims *nemo debet bis rearm pro mm et eadem causa*, and the broader maxim *interest reipublicoe ut sit finis litium*. This being-so, the doctrine, so far as it relates to prohibiting the retrial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue, which is also an issue in a pending litigation, a final judgment pronounced meanwhile in such previous litigation by a competent court (the identity of parties and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. If this is not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated. So far as the justification of this view from the provisions of the Civil Procedure Code is concerned, I may say that the rule contained in Section 13 is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second Appellate Courts by reason of Sections 582 and 587 respectively, and, indeed, even to miscellaneous proceedings by reason of the general provisions of Section 647 of the Code.

14. It has also been said that the word 'former suit' in Section 13 cannot relate to Mariam Bibi's suit, as both suits were tried simultaneously and disposed of by one

judgment. But there were two distinct suits, two sets of pleadings and issues; and though the two suits were decided by one judgment, this is an irregular procedure sanctioned only by consent, but not expressly allowed by any section of the Code of Civil Procedure. In the eye of the law there were two judgments, one in each suit, though the Subordinate Judge may have delivered the same judgment in both suits. Hence there were necessarily two appeals. Mariam Bibi's suit was certainly the one first instituted, but be that as it may, as laid down in *Gururajammah v. Venkatakrishnama Chetti* (1901) I.L.R. 24 Mad. 350, it is the date of the decision, which determines which is the 'former' and which the 'second suit,' and Mariam Bibi's suit was certainly finally decided on the 30th November 1903, while Joynab's suit is still pending final decision in this appeal. I therefore consider that *Abdul Majid v. Jew Narain Mahto* (1888) I.L.R. 16 Calc. 233 was wrongly decided, and I would accordingly refer the question of the correctness of the decision in it to a Full Bench.

15. The questions I would refer for the consideration of the Full Bench are:

(i) Whether the question of the ownership of the two houses in dispute in this case was not *res judicata*, when the appeal of Joynab Bibi was heard by the District Judge of Hooghly on the 21st January 1905; and

(ii) Whether the case of *Abdul Majid v. Jew Narain Mahto* (1888) I.L.R. 16 Calc. 233 was rightly decided.

16. As my learned brother Harington does not agree with me on this point, this appeal must be laid before the learned Chief Justice for reference to a Third Judge

Harington, J.

17. This is an appeal preferred by one Mariam Bibi in a suit, in which she was defendant and Joynab Bibi was plaintiff. Joynab's suit was for dower out of the estate of her deceased husband. She made her co-wife, Mariam Bibi, defendant and alleged that her dower was chargeable on her deceased husband's property, including certain houses, which will be referred to as the property in dispute. Her co-wife, the defendant Mariam, alleged that the property in dispute was hers, and

denied Joynab's right to make it chargeable with her dower.

18. Mariam also brought a suit for her dower claiming it as chargeable on the properties of her deceased husband other than the property in dispute in her defence to Mariam's suit. Joy-nab alleged that Mariam's dower should be charged not only on the properties, on which Mariam claimed to charge it, but also on the property in dispute.

19. The Subordinate Judge did what he had no business to do, i.e., tried both suits together and disposed of both cases in one judgment.

20. In each suit was an issue raised as to the property in dispute, i.e., whether that property had belonged to the plaintiff's deceased husband.

21. The Subordinate Judge held that each plaintiff was entitled to dower, but on the real dispute between them, i. e., as to the title to the property in dispute, he found in favour of Mariam, holding that the houses belonged to her.

22. Joynab appealed and, though in his judgment the District Judge refers to 'these cases' and recites the claims of the two widows, it appears that only one appeal was filed, and that was in the case in which Joynab as plaintiff had unsuccessfully sought to charge her dower on the houses found to be Mariam's.

23. Joynab desired to appeal in forma, pauperis in the case in which she had been defendant, but that was not permitted, so no appeal was in fact presented in that case.

24. The District Judge, however, referring to both cases, dealt with the one issue--that was in dispute in both, i.e., the title to the property in dispute, and reversing the decision of the Subordinate Judge held that the property in dispute had belonged to the deceased's husband and not, as alleged, to Mariam.

25. Mariam appeals to this Court. Her contention is that as soon as the time had elapsed within which an appeal could have been preferred against the decision in her favour in the suit in which she had been plaintiff, that decision became final. Joynab is estopped, therefore, in this Court from alleging that the property in

dispute belongs to her; because the decision of the Subordinate Judge in the suit, *Mariam v. Joynab*, to the effect that it belongs to Mariam has become final.

26. I am unable to agree with this view. Joynab had claimed a right to dower chargeable on the property in dispute. The Subordinate Judge held that the property in dispute was Mariam's and disallowed Joynab's claim to charge her dower upon it. Against this judgment Joynab was entitled to appeal, and did appeal and appealed successfully. It could not be said that the question had been 'substantially in issue in a former, suit' and had been finally decided, because the judgment deciding the question was the very judgment against which Joynab was appealing.

27. It appears to me to lead to an anomaly to say that, where one judgment disposes of one issue, which has been raised in two suits, that the party against whom the issue is decided cannot question the judgment, unless he files two appeals against it.

28. Had the cases been separately tried the question as to the title to the houses in dispute could only have been determined in the case first tried. Section 13 of the Civil Procedure Code would have been a bar to the determination over again in the hearing of the other case of the question determined in the first. Then if Joynab had desired to appeal she could only have filed one appeal, in which the question as to the title to the property in dispute could have been gone into, viz., an appeal against the judgment in the first case. The only question, which could have been raised on appeal on the second case would have been--whether the title to the property in dispute had or had not been in issue and been determined in the first case, and whether Section 13 of the Civil Procedure Code was applicable.

29. I do not think she ought to be put in a worse position because of the irregularity due to the joint trial.

30. In the cases cited from the Allahabad and Madras Reports, there had been former judgments. They, therefore, do not touch what is the crucial point in this case.

31. The bar of res judicata could only be raised if by a fiction the one judgment could be regarded as two judgments, i.e., judgment in each suit, because if it is regarded as one judgment it was not final, but was the subject of appeal to the lower Appellate Court. But if by a fiction it is regarded as two judgments, then it must be a judgment on the fact of title in the first case only, and in the second case a judgment that the question in issue as to title had been already determined in the first case, because in the second case the Court is precluded by Section 13, of the Civil Procedure Code, from trying the question of title, which has been already determined.

32. As the appeal is on the question of the title to the property in dispute, it must be taken to be an appeal, therefore, against the first judgment. It is immaterial, in my view, which case was filed first.

33. In my opinion, therefore, there was no bar of res judicata when the appeal was heard in the lower Appellate Court, because the question at issue as to the title to the property in dispute had not been finally decided : the only decision on that question, which had been come to, being the decision in the judgment, which was being appealed against.

34. For the reasons I have stated, I agree with the conclusion come to by the learned Judges, who decided the case of Abdul Majid v. Jew, Narain Mahto (1888) I.L.R. 16 Calc. 233.

35. The other question raised, i.e., as to the benami nature of the transaction, is a question of fact, which cannot be questioned in second appeal.

36. I would, therefore, affirm the judgment of the lower Appellate Court and dismiss the appeal with costs.

37. The appeal was then referred to a Third Judge, under Section 575 of the Code of Civil Procedure, and was finally heard by Sir Chunder Madhub Ghose, acting Chief Justice.

38. Babu Jyoti Prosad Sarvadhikari (Babu Saileshwar Sen with him) for the appellant. The provisions of Section 13 of the Civil Procedure Code are

imperative. If the matter was 'directly and substantially in issue' in a former suit, and was finally decided by a Court of competent jurisdiction, the Code bars~ a subsequent trial of such issue. In this case all the elements are present. The issue, vis., whether the two houses belonged to Mariam Bibi or her deceased husband, was 'directly and substantially in issue' in Mariam Bibi's suit. It arose out of the pleadings upon the written statement of Joynab Bibi, who alleged that the two houses belonged to the estate of her deceased husband, and this was the real dispute between the parties. The decree in Mariana's suit declared that the widows were to get their dowers from the properties of Mahomed Mehdi mentioned in schedule ka to the plaint, i.e., excluding the two houses. Where a decree is vague, the real matters of controversy should be looked into: see *Kali Krishna Tar/ore v. The Secretary of State for India* (1888) I.L.R. 16 Calc. 173 : L.R. 15 I.A. 186, 193, *Amriteswari Debi v. The. Secretary of State for India* (1897) I.L.R. 24 Calc 504, 519. The decree in Mariam Bibi's suit not having been appealed against became final.

39. The next question is--what is the meaning of the expression 'former suit '? It does not mean, I submit, previously instituted suit, but 'former' in regard to the time when a Court is called upon for the second time to decide the suit or issue. The expression 'previously instituted' occurs in Section 12 of the Code, but not in Section 13. The lower Appellate Court could not, therefore, try that issue over again in Joynab Bibi's appeal, when the issue had already been tried and finally decided in Mariam's suit: see *Balkishan v. Kishan Lal* (1888) I.L.R. 11 All. 148, 161 followed in *Gururajammah v. Venkatakrishnama Chetti* (1901) I.L.R. 24 Mad. 350; see also *Chajju v. Sheo Sahai* (1887) I.L.R 10 All. 123 and *Houstoun v. Marquis of Sligo* (1885) L.R 29 Ch. D. 448, 454. The provisions of Section 13 of the Code are as much binding upon Appellate Courts as upon Original Courts: see Section 582 of the Civil Procedure Code.

40. The case of *Abdul Majid v. Jew Narain Mahto* (1888) I.L.R. 16 Calc 233 is not, I respectfully submit, correctly decided. For, it proceeds upon an assumption that 'try' means only trial by the first Court: in other words, it ignores the provisions of Section 582 of the Code. Moreover, the provisions of Section 13 are not exhaustive: see *Ram Kirpal Shukul v. Rup Knari* (1883) L.R. 11 I.A. 37 and *Ram*

Lal v. Chhab Nath (1890) I.L.R. 12 All. 578. The anomaly referred to by Mr. Justice Harington in his judgment is owing to Joynab's own doing, and she cannot complain about it. Joynab Bibi did not follow the proper procedure by not preferring an appeal in Mariana's suit, and she cannot be allowed to reopen the question. That would lead to another anomaly, namely, it would alter the decree in Mariana's suit, although no appeal had been preferred against it.

41. Moulvi Syed Shamsul Huda for the respondent. Both the suits were filed simultaneously, and were tried and decided together; it cannot be said, therefore, that one suit was subsequent to the other. There is, in fact, only one judgment in both the cases. If there was no bar to the trial in the Court of first instance, there could be no bar in the Court of Appeal. The Appellate Court had only to decide whether the decree of the first court was right at the time it was pronounced. I rely on the decision of this Court in Abdul Majid v. Jew Narain Mahto (1888) I.L.R. 16 Cal. 233.

42. The decree passed in the suit of Mariam Bibi was favourable to my client, and although there was an adverse finding upon which the decree was based, the decree itself was to her advantage: it directed that Mariana's dower should be paid out of the properties admittedly belonging to her husband. My client no doubt claimed that there were two other houses, which belonged to her deceased husband, but which the first Court held to belong to Mariam. But the direction that these two houses should not be made liable for Mariam's claim involved no loss to my client. She was only prejudiced by the decree in her case as these two properties were not made liable for her dower, and she appealed against that decree. It is submitted that the question of title to the two properties in dispute was needlessly raised in the suit of Mariam and was not 'directly and substantially in issue' in that suit, and that there was no bar of res judicata, therefore, to the hearing of the appeal.

43. Babu Jyoti Prosed Sarvadhikari, in reply.

Ghose, C.J.

44. This is a reference under Section 575 of the Civil Procedure Code, by reason of a difference of opinion arising between Mr. Justice Rampini and Mr. Justice Harington.

45. The facts, which have given rise to this reference, are shortly these: One Mahomed Mehdi Khan died, leaving two widows, Mariam and Joynab Bibi. These two widows brought two separate suits for recovery of their respective dowers. In each of these two suits, the other widow was a defendant, and each of them claimed to recover Rs. 3,000 as her dower, from what she considered to be the properties left by Mahomed Mehdi Khan. In these suits a question arose between the parties, whether two houses belonged to the estate left by Mahomed Mehdi Khan or they belonged to Mariam as her separate property, and an issue upon that question was laid down by the Subordinate Judge in both the suits. The question arose in this way: Mariam in her plaint sought to recover her dower from the properties other than these two properties, while Joynab Bibi claimed to recover her dower from the entire estate left by Mahomed Mehdi Khan' including these two properties. The suits were instituted in one and the same Court, namely, the Court of the Subordinate Judge of Hooghly; and that Officer, apparently, with the consent of both the parties, tried them together, and decided them by one and the same judgment. He held that the two houses in question belonged to Mariam as her separate property and not to the estate left by Mahomed Mehdi, and accordingly he pronounced judgment affirming the claim of Mariam, and disaffirming that of Joynab Bibi so far as those two properties were concerned. In accordance with this judgment, two separate decrees were drawn up. The decree in the suit of Mariam was to the effect that her dower be recovered from the estate left by Mahomed Mehdi Khan, excluding the two properties in question, and that, upon the sale of such estate, the proceeds thereof should be divided equally between Mariam and Joynab Bibi. The other decree, that is to say, the decree in the suit of Joynab Bibi, was to the effect that she do recover her dower from the estate left by Mahomed Mehdi Khan, excluding the said two properties. Joynab Bibi preferred no appeal against the decree pronounced in the suit of Mariam, but she did so in her own suit; and she appealed upon the ground that the conclusion arrived at by the Subordinate Judge upon the question of title to the two properties in question was not correct, and that she should be allowed to recover her dower

from the entire estate left by Mahomed Mehdi Khan, including those two properties. The District Judge, before whom this appeal came on for hearing, differed from the conclusion arrived at by the Subordinate Judge. He held that the two properties did not belong to Mariana, but to the estate left by Mahomed Mehdi; and he accordingly allowed the appeal. At the hearing of that appeal, however, a question was raised on behalf of Mariam to the effect that the judgment of the Subordinate Judge in her suit not having been appealed against operated as res judicata upon the question of title to the said two properties. But this plea was overruled by the District Judge, the result being that Mariam preferred the second appeal, which is now before this Court. The learned Judges, before whom the appeal came on for hearing, differed from each other upon the question of res judicata raised between the parties. Mr. Justice Rampini was of opinion that, though there was but one judgment recorded by the Subordinate Judge, yet in the eye of law it should be taken that there were two separate judgments, one in each of the suits, and therefore the judgment in the suit of Mariam, upon the issue as to the title to the two properties in question, not having been appealed against, was final, and, as such, operated as a bar to the trial of the same issue in the appeal that was preferred by Joynab Bibi before the District Judge; while Mr. Justice Harington was of a different opinion.

46. Section 13 of the Code of Civil Procedure, upon which the decision of the question referred to rests, runs as follows: 'No Court shall try any suit or issue, in which the matter directly and substantially in issue, has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. 'The question here arises whether the issue as to the title to the two properties claimed by Mariam was heard and finally decided in a former suit between the same parties. Before discussing this question, I desire to point out that, when the suits were pending in the Court of the Subordinate Judge, if an application had been made under Section 20 read with Section 12 of the Code, that the trial of the suit instituted by Joynab Bibi be stayed until the decision of the suit of Mariam, probably it would have been allowed, and, if it had been allowed,

the result would have been that the Subordinate Judge, having determined in the suit of Mariam that the properties in question belonged to her and not to the estate left by Mahomed Mehdi, would record in the other suit that the decision in the former suit was a bar to the trial of the issue as to the title to those properties upon the doctrine of res judicata. But that was not the course followed in this case. Both parties apparently consented that the two suits should be tried together, as if they were one suit, the evidence in one suit being considered as equally applicable to the other suit, and the Subordinate Judge before whom the matter came on for hearing delivered one and the same judgment as applicable to both the suits, though no doubt he passed, as he was bound to have passed, two separate-decrees. It will be observed that the Code nowhere provides for an appeal being preferred against a judgment. It is only from a decree that an appeal is allowed under Section 540. Now, if the adjudication of the question that has been raised in this appeal rests upon the consideration of the matter whether, by reason of no appeal having been preferred by Joynab Bibi against the decree pronounced in the suit of Mariam, the decision in that suit upon the issue of title to the two properties became final as contemplated by Section 13 of the Code, I should say that she (Jainab Bibi) was not bound to have preferred any appeal against that decree, because though no doubt the second part of the decree, viz., that the proceeds of the sale be divided equally between the two ladies might be regarded as one affecting her interest, yet the decree that was made upon the claim of Mariam, and which was the true decree made in her suit, was that her dower should be realised out of a limited number of properties, that is to say, the properties other than the two properties, which she claimed, and that she should receive one moiety of the sale proceeds of those properties. No doubt, Mariam obtained a decree such as she desired, but the decree so far as it directed that only certain properties should be made liable for the satisfaction of her claim, and that she should receive one moiety of the sale proceeds was not a decree, which equally affected the interest of Jainab Bibi. What really affected her interest was the decree pronounced in her own suit, in which the Subordinate Judge declared that her dower should be recovered from the estate of Mahomed Mehdi, excluding the two properties in question, To my mind, it is this decree, against which she was bound to prefer an appeal in order to entitle her to raise the question before the

appellate Court, whether those two properties belonged to Mariam as her separate property, or they belonged to the estate left by Mahomed Mehdi. If this be a correct view to take,, one hardly sees how the judgment in the suit of Mariam, supposing it be taken that there was a separate judgment in that suit, could be regarded as a final judgment upon the question of title to the two properties and as operating as a bar to the trial of that question in the appeal preferred by Joynab Bibi against the decree made in her own suit.

47. But, as already stated, the two suits were decided by one and the same judgment, the issue as to the title to the two properties being common to them. Which then is the judgment that would operate as a bar to the determination of the question as to the title to the two properties in question in the appeal preferred in Joynab Bibi's case? Could it be rightly said that the judgment pronounced by the Subordinate Judge should be supposed to be two judgments--one in each of the two suits, and that therefore the judgment in the suit of Mariam is the judgment in the 'former suit,' and which finally decided the issue as to the title to the two properties, as contemplated by Section 13 of the Civil Procedure Code? It may be accepted as correct that the expression 'former suit,' as occurring in that section, as the Allahabad High Court has held in the case of Bal Kishan v. Kishan Lal (1888) I.L.R. 11 All. 148, and which has been approvingly quoted by the Madras High court in the case of Gururajammah v. Venkatakrishnama Chetti (1901) I.L.R. 24 Mad. 350, does not relate to the date of commencement of the litigation, but to the time when the Judge is called upon to decide the issue, and 'that the rule contained in Section 13 is not limited to the Courts of first instance, and that it equally applies to the procedure of the first and second Appellate Courts by reason of Sections 582 and 587 respectively, but still the question here is which is the judgment that operates as a bar in this case? To my mind, it is difficult to hold that there was a separate judgment in the case of Mariana upon the question of title to the two properties, such as operates as a bar, for it is the very judgment that was appealed against by Joynab Bibi before the Lower Appellate Court. As pointed out by Mr. Justice Harington, where one judgment disposes of one issue, which has been raised in two suits, it would be an anomaly to hold that the party, against whom the issue is decided, cannot question the judgment, unless he files two appeals against it. For these reasons, I am of opinion that the judgment

referred to was no bar by way of res judicata to the trial of the question of title to the two properties in the appeal that was preferred by Joynab Bibi. This view is supported by the ruling in the case of Abdul Majid v. Jew Narain Mahto (1888) I.L.R. 16 Calc. 233, and though I am not prepared to agree with the learned Judges, who decided that case, as regards some of the grounds given by them for holding that the plea of res judicata did not apply in the case, yet I accept the conclusion that was arrived at by them on general principles. The learned vakil for the appellant has relied upon the two cases referred to in the judgment of Mr. Justice Rampini. I have more or less referred to the principles laid down in those cases, and it is not, therefore, necessary to discuss them. I might, however, as well refer to the observations of Mahmood J. in the case of Bal Kishan v. Kishan Lal (1888) I.L.R. 11 All. 148 as to the main object of the doctrine of res judicata, that being, as stated by that learned Judge, the prevention of multiplicity of suits and interminable disputes between litigants. Now, if the main object of the doctrine is to prevent multiplicity of suits, could it be said that in this case that object has been defeated, the trial being but one, the issue being one common to both suits, and the judgment being one and the same as applicable to both of them. The learned vakil for the appellant has also relied upon the case of Chajju v. Sheo Sahai (1887) I.L.R. 10 All 123, but I do not think that it applies to the facts of the case before us. For these reasons I agree in the opinion expressed by Mr. Justice Harington.

48. Upon the question of title raised in this case, namely, whether the two properties belonged to Mariam Bibi or to the estate left by Mahomed Mehdi Khan, the District Judge came to a clear finding of fact that they belonged to the estate of Mahomed Mehdi, and Mr. Justice Harington accepts that finding as conclusive upon this question. Although Mr. Justice Rampini does not deal with it in his judgment, because he thinks that the decision upon the questions of res judicata should settle the case, it seems to me that there is no ground in law to question the finding of fact that has been arrived at by the lower Appellate Court. Accepting this finding of fact as unassailable in second appeal, the result must be that this appeal should be dismissed with costs. The respondent will be entitled to two sets of costs for the two hearings.

