

Under these circumstances I am clearly of opinion that Rao Saheb Manaji Rajuji is not entitled to maintain this suit in *forma pauperis*.

I find on the issue that the present plaintiff is not entitled to maintain or to continue the suit in *forma pauperis*. Plaintiff must pay defendant's costs incurred by him from the 17th of June 1910 up to date.

Attorneys for the plaintiff: *Messrs. Dadachanji & Pocha.*

Attorneys for the defendant: *Messrs. Mulla & Mulla.*

B. N. L.

1911.

MANAJI
RAJUJI
(RAO SAHEB)
v.
KHANDOO
BALOO.

ORIGINAL CIVIL:

Before Mr. Justice Beaman.

BHAISHANKER NANABHAI AND OTHERS, PLAINTIFFS, v.
MORARJI KESHAVJI & Co., DEFENDANTS.*

1911.

July 24.

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Consent decree amounts to res judicata—Consent decree between predecessors-in-title of parties in suit—Injunction granted in former suit—Res judicata and estoppel distinguished.

A consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum* and this notwithstanding the words in section 11 of the Civil Procedure Code "has been heard and finally decided."

In re South American and Mexican Company⁽¹⁾, followed.

A consent decree come to between the predecessors-in-interest of the present parties touching matters now substantially and directly in issue between them is *res judicata*.

Res judicata ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over.

THE plaintiffs in this suit were the officiating Trustees of the Goculdas Tejpal Charities and as such were entitled to a certain immoveable property situated at Dady Sett Agiary.

* Suit No. 46 of 1911.

(1) [1895] 1 Ch. 37.

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Lane known as the Goculdas Tejpal High School Building which building was being used for the purposes of a school and consisted of a ground floor and an upper floor.

The plaintiffs had purchased this property on the 17th September 1892 from the General Assembly of the Church of Scotland for the promulgation of the Gospel in foreign ports.

The property to the north of the school buildings consisting of land and a house therein formerly belonged to one Ramji Bhagwan, the predecessor-in-title of the defendant, and in 1890 consisted of a ground floor and one upper storey.

In the year 1890 Ramji Bhagwan made preparations to make alterations in his house and for erecting an additional storey to his premises. A suit thereupon was filed in the High Court of Bombay being Suit No. 102 of 1890 by the then owners of the school buildings against Ramji Bhagwan to restrain him from carrying out the intended alterations and additions and for a declaration as to their rights to light and air received through the doors and windows in the north wall of the school building. An interim injunction was granted against the defendants in that suit on the 18th July 1890 and the suit was decided by a consent decree passed on the 2nd December 1890. By that consent decree the then plaintiffs were declared entitled to free and uninterrupted access of light and air to and through the windows in the upper floor on the north side of their premises and to access of light and air through the ground floor windows on the north side obstructed and hindered only so far as had hitherto before been the case by the house which then stood on the premises belonging to the defendant and as defined in the Engineer's report, and the Court further ordered with the like consent that the defendant be perpetually restrained from building or maintaining erected any building so far as to interfere with the free access of light and air to and through the plaintiff's said windows on the upper floor or with the access of light and air hitherto enjoyed to and through the plaintiff's ground floor windows as defined in the Engineer's report.

The property of Ramji Bhagwan on the north of the school premises was subsequently acquired by the present defendants who in October 1910 commenced building operations a plan of which indicated that the defendant intended to erect, in place of the building which originally consisted of a ground floor and one upper storey, a building consisting of a ground floor and two upper stories which the plaintiffs alleged would have the effect of materially affecting and diminishing the quantity of light and air enjoyed by the windows in the north wall of the school building.

The plaintiffs therefore filed this suit for a declaration that the defendant was not entitled to erect or maintain erected any building on his premises save and except of the kind and on the terms mentioned in the consent decree in Suit No. 102 of 1890 and that he might be restrained by a perpetual injunction from erecting or maintaining erected any building except on the terms of the said decree, and in the alternative that the defendant might be restrained by a perpetual injunction from erecting or maintaining erected any building on his premises in accordance with the plan of which he had given inspection to the plaintiffs so erecting or maintaining erected any other building so as to materially affect and interfere with the light and air as enjoyed by the school buildings through the ancient windows on the ground and the first floor or so as to make any portion of the said school buildings unfit for being used for the purposes of a school.

At the trial of the suit the following issue was raised and tried as a preliminary issue:—

Whether the defendant is bound by the consent decree of 2nd December 1890 or the injunction therein contained.

Desai, with *Jayaker* and *Setalvad*, for the plaintiffs.

A consent decree can operate as a *res judicata*. *Minalal Shadiram v. Kharsetji Jivaji*⁽¹⁾; *Aubhoyessury Dabee v. Gouri Sunkur Panday*⁽²⁾; *Nicholas v. Asphar*⁽³⁾; *In re South American*

(1) (1906) 30 Bom. 395.

(2) (1895) 22 Cal. 859.

(3) (1896) 24 Cal. 216.

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and Mexican Company⁽¹⁾. If it is not *res judicata* the consent decree operates as a covenant: Transfer of Property Act, section 40. The fact that the defendant took possession before he had notice of the decree is immaterial: Transfer of Property Act, section 54. If section 40 does not apply the decree amounts to a grant of an easement.

Strangman, Advocate-General (with him *Bahadurji*), for the defendant.

An injunction does not run with the land:—*Attorney-General v. Birmingham, Tame, and Rea Drainage Board*⁽²⁾; *Dahyabhai v. Bapalal*⁽³⁾. The decree is an injunction and therefore cannot run with the land. If it is a covenant it relates to an easement and therefore section 40 of the Transfer of Property Act does not apply. See section 11 of the Civil Procedure Code. In the former case there was no hearing and final disposal. *In re South American and Mexican Company*⁽¹⁾ relates to estoppel. In India estoppel is confined to the Evidence Act and the Civil Procedure Code. Under the Civil Procedure Code there is no estoppel by judgment unless the case is heard and decided. It is not contended that the decree acts as an estoppel under the Evidence Act.

Desai in reply.

The Bombay case relates to the execution of the decree. We do not seek execution. The Chancery case was to enforce a judgment against successors.

BEAMAN, J.:—Upon this preliminary issue two distinct points arise. First, whether a decree passed by consent be *res judicata* under section 11 of the Civil Procedure Code. As to that there used to be a considerable conflict of opinion but I think I may now take it as settled by the decision in *In re South American and Mexican Company*⁽¹⁾, that a consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum*; and this notwithstanding

(1) [1895] 1 Ch. 37.

(2) (1881) 17 Ch. D. 685.

(3) (1901) 26 Bom. 140.

ing the words in section 11 "has been heard and finally decided." These words give ground for argument upon one point only, I think, that is, whether the matter in issue has literally been heard by the Court. It has been finally decided, indeed much more finally decided by a consent decree than by a decree *per invitum*, for against the consent decree there is no appeal; and although it has often been said that a consent decree represents no more than an agreement of parties, I have always felt much doubt whether that correctly expresses, for the purposes of *res judicata*, the consequences of decrees by consent. For, when a party has raised his defences and has then consented to judgment, it is the same thing as though he had abandoned his defences and admitted them to be untenable. Carrying that one step further, it is the same thing as saying that his case has been heard, for, if a party chooses to admit that he is not in a position to sustain his defences so far as the Court is concerned that is practically the same thing as though he had adduced no evidence and decision had been given against him on all those issues. I have always been of opinion that decrees by consent had the same effect for the purposes of *res judicata* as decrees given in contested suits. That was my view before 1895 when some of the English Courts at any rate seemed to incline the other way. Since the decision of the case I have cited, I apprehend that no further doubt will be thrown upon the correctness of this proposition. *

The second question is whether the decree by consent between the predecessors-in-interest of the present parties is really *res judicata* of the questions at issue in this suit. Here the defendant relies upon the case of the *Attorney-General v. Birmingham, Tame, and Rea Drainage Board*⁽¹⁾, and the two cases decided by Benches of this Court one in *Vithal v. Sakharam*⁽²⁾, and the other in *Dahyabhai v. Bapatal*⁽³⁾. The two latter cases really present no difficulty, for they go no further than affirming, what has never been seriously disputed,

(1) (1881) 17 Ch. D. 685.

(2) (1899) 1 Bom. L. R. 854.

(3) (1901) 26 Bom. 140.

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that injunctions do not run with the land. In both these cases the point arose in execution proceedings and as the only relief sought to be obtained was by enforcing the injunction upon a person who was not a party to the suit in which it was made, that question could never be answered but in one way. Here it is contended for the defendant that inasmuch as when the predecessors-in-interest of the present parties litigated before, the result of the consent decree was an injunction restraining the defendants then from raising their building so as to diminish or obstruct plaintiffs' ancient lights, this case is exactly on all fours with *Attorney-General v. Birmingham, Tame, and Rea Drainage Board*⁽¹⁾; and I must admit that the cases are very like. In that case it appears as though there were subsequent proceedings and an action to enforce the judgment given against the Birmingham Municipality upon the Birmingham Drainage Board, a body which had subsequently come into existence and taken over the functions of the Municipality touching the matter in suit. It appears, however, the prayer of the action contemplated transferring the whole decree, injunction and all, passed against the Municipality to the Drainage Board and this the Court refused to allow upon the ground principally that the injunction did not run with the land. But it does not appear, as clearly as I could wish, from that case, whether the substantial matter in issue between the parties, irrespective of the relief to be given consequent upon its decision, would have been held, if separated from the prayer to transfer the injunction, *res judicata*. I must admit that on the facts stated in the reports and having regard to the judgment of the Court, it is very doubtful whether this would not have been so. I, however, have to decide the question before me with reference to the language of our own statute, which the defendant thinks strengthens his case rather than weakens it. It is a part of his contention that the matter in issue between the parties now is not the matter which was in issue between their predecessors-in-interest when the consent decree

(1) (1881) 17 Ch. D. 685.

was passed; and this argument may seem to be fortified by what is undoubtedly the law that the relief given consequent upon the determination of the matter in issue in the former suit cannot be carried over as though it too were *res judicata* and made a part of the decree in this suit.

So far as the injunction is concerned, I am quite clear that the plaintiffs cannot have the benefit of that in this suit merely because it was granted in the former, but it is easy to see that a distinction can be drawn between the matters substantially in issue and the particular form of relief granted. What then was the matter substantially in issue between the predecessors-in-title of these parties? Clearly I think, whether the defendants were entitled to raise their building beyond its then height, ground floor and one storey; and that is precisely the matter in issue in the present suit. I cannot myself see any difference between the ground of action in this suit and the defence raised, and the ground of action and defence raised in the former suit.

I should like to observe upon the cases which have been cited on both heads of this preliminary point that great confusion is introduced by treating *res judicata* and estoppel as identical terms. It is only necessary to point out in the first place that a true *res judicata* ousts the jurisdiction of the Court; while estoppel does no more than shut the mouth of a party. In the next place, to put it colloquially and compendiously, estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over. It is particularly with reference to the first part of my decision on this point and to the English cases which have been cited, that I make these remarks. The question I am now considering has, of course, nothing whatever to do with estoppel at all.

For these reasons and influenced chiefly by these considerations, it appears to me clear that the consent decree come to between the predecessors-in-interest of the present parties,

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touching matters now substantially and directly in issue between them, *viz.*—whether the defendant is entitled to raise his building beyond the height at which it stood when that consent decree was passed, is *res judicata*. But it does not follow from this that the Court will necessarily grant an injunction as was done in the former suit by consent of parties, for that is a matter personal to the defendant there, and other considerations may now be found warranting the adoption of a different course.

Attorneys for the plaintiff:—*Messrs. Madhooji, Kamdar & Co.*

Attorneys for the defendant:—*Messrs. Edgelow, Gulabchand, Wadia & Co.*

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911.

September 4.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT),
APPELLANT, v. SADASHIV ABAJI BHAT AND THREE OTHERS (ORIGINAL
PLAINTIFFS), RESPONDENTS.*

Survey and Settlement Act (Bom. Act I of 1865), sections 25, 28, 37, 38 (1)—Land Revenue Code (Bom. Act V of 1879), sections 102, 106—Khoti village in Kolaba District—Survey and settlement—Introduction of “sanctioned” settlement—“Fixed or guaranteed”—Expiration of the period of “sanctioned” settlement—Continuance of the terms of the “sanctioned” settlement after the expiration of the period as still being sanctioned.

A question having arisen as to whether under the settlement of the khoti village in suit, which was sanctioned in 1863 and introduced in 1865 subject to all the

* First Appeal No. 98 of 1905.

(1) Sections 25, 28, 37, 38 of the Survey and Settlement Act (Bom. Act I of 1865) are as follows:—

25. It shall be lawful for an officer in charge of a survey to assess to the land revenue, under such general and local rules as may be in force in the survey under his charge, all lands cultivated or uncultivated, and whether hitherto assessed or not, provided that such assessment shall not be levied for more than one year until the sanction of the Governor in Council shall have been obtained thereto, and