Ajai Verma vs Ram Bharosey Lal And Ors. on 28 February, 1951

Equivalent citations: AIR1951ALL794, AIR 1951 ALLAHABAD 794

JUDGMENT

Malik, C.J.

1. This appeal has been filed by Raja Ajai Verma of Pawayan. The appellant, Raja Ajai Verma, filed an application under Section 4, Encumbered Estates Act in the Court of the Special Judge, first grade, Shahjahanpur, on 27-1-1936. At the time when he filed the application there was an appeal pending before their Lordships of the Privy Council relating to the property known as the Pawayan Estate.

2. Raja Fateh Singh, the Raja of Pawayan, died on 28-12-1921, leaving two sons Raja Indra Vikram Singh and Kunwar Vijai Verma. Kunwar Vijai Verma claimed that the property left by his father Raja Fateh Singh was not impartible as was claimed by his elder brother and in the alternative that his father had left a will dated 2-8-1918, under which he had given him half the property. On these allegations Kunwar Vijai Verma filed Suit No. 53 of 1922 against Raja Indra Vikram Singh for partition and possession of half share in the entire properties. Raja Indra Vikram Singh claimed that the properties appertained to the Pawayan Raj were impartible and contested the validity of the will.

3. The first Court decided the suit on 16-9-1926, and held that eight villages were impartible property and the rest partible. The learned Subordinate Judge was not satisfied that the will was duly executed. He, therefore, dismissed the plaintiff's suit as regards the eight villages but decreed it as regards the other property which had belonged to Raja Fateh Singh and which the learned Judge held was partible.

4. There were two appeals in the High Court. Raja Indra Vikram Singh filed First Appeal No. 482 of 1926, while Kunwar Vijai Verma filed First Appeal No. 52 of 1927. During the pendency of the appeals the plaintiff and the defendant both died. Raja Indra Vikram Singh died on 28-5-1928, and Kunwar Vijai Verma died on 12-9-1929. Raja Indra Vikram Singh left two sons, Raja Ajai Verma and Kunwar Kesho Verma. Kunwar Vijai Verma left a daughter Shrimati Vijai Kunwari. On the death of Raja Indra Vikram Singh Kunwar Vijai Verma, the appellant in First Appeal No. 52 of 1927, applied that the names of Raja Ajai Verma and Kunwar Kesho Verma be brought on the record. The High Court, without going into the question whether Raja Ajai Verma was the sole representative of Raja Indra Vikram Singh, directed that the names of both Raja Ajai Verma and Kunwar Kesho Verma be brought on the record as respondents, Kunwar Kesho Verma being impleaded under the guardianship of his mother Rani Indraj Lakshmi Devi, and the question of the rights of the parties was left to be adjudicated upon at the time of the hearing of the appeal. In First Appeal No. 482 of 1926 on the death of Raja Indra Vikram Singh the name of Raja Ajai Verma was substituted as appellant and Kunwar Kesho Verma was impleaded as respondent to the appeal.

5. On the death of Kunwar Vijai Verma the name of his daughter Shrimati Vijai Kunwari was brought on the record in the two appeals as the legal representative of her father though it was pleaded on behalf of Raja Ajai Verma and Kunwar Kesho Verma that there was a custom in the family under which daughters were excluded from inheritance. The decision of the question whether there was such a custom was left for decision by the bench at the time of the hearing of the appeal.

6. The High Court heard the appeals and disagreeing with the judgment of the trial Court came to the conclusion that the entire property belonging to Raja Fateh Singh was impartible. It was, however, of the opinion that the will was proved. The High Court remitted an issue for determination of the question whether there was a custom in the family by which a daughter was excluded from inheritance.

7. The trial Court held that the custom of exclusion of daughters was proved.

8. After the receipt of the finding the High Court went into the question and disagreeing with the view of the lower Court held that the custom was not proved with the result that Kunwar Vijai Verma's suit for a half share in the properties was decreed in favour of his daughter, In the result First Appeal No. 482 of 1926 was dismissed and the First Appeal No. 52 of 1927 was decreed.

9. Raja Ajai Verma appealed to the Privy Council and the two appeals filed by him were consolidated and disposed of by their Lordships of the Judicial Committee by a judgment dated 20-12-1938. Their Lordships agreed with the High Court that the entire property was impartible. They did not go into the question of the will. They agreed with the trial Court that the daughter was excluded. On these findings their Lordships allowed the appeal and dismissed the suit of Kunwar Vijai Verma.

10. In the written statement under Section 8 which was filed on 8-8-1936, after the decision of the appeals by the High Court and while the appeals were pending in the Privy Council Raja Ajai Verma gave in the schedule of debts, separate lists of the debts due from Raja Fateh Singh, Raja Indra Vikram Singh and Kunwar Vijai Verma. He, however, mentioned in the written statement that, in case the Privy Council decreed his appeal, the debts due from Kunwar Vijai Verma will not be payable out of the properties which had been held by the High Court to have belonged to Kunwar Vijai Verma If, however, the appeal failed, then the debts due from Kunwar Vijai Verma will be recoverable from half the estate which would be thus held to have belonged to him.

11. As I have already said above, the Privy Council allowed the appeal and dismissed the suit. The question that has now arisen is whether the creditors of Kunwar Vijai Verma are entitled to claim that the debts due from him are payable from half of the property and whether they are now entitled to claim that a half share in the estate belonged to him. It is asserted on behalf of the creditors that the question of the due execution of the will was not gone into by their Lordships of the Judicial Committee. That they dismissed the suit of Kunwar Vijai Verma because there was no one in whose favour they could give a decree and it is, therefore, open to the creditors of Kunwar Vijai Verma to prove the will and if they can succeed in proving that Raja Fateh Singh executed the will in favour of Kunwar Vijai Verma the creditors are entitled to get their money out of the half share of the property which came to Kunwar Vijai Verma under the will of his father dated 2nd of August, 1918. On the

other hand, it has been urged on behalf of the landlord applicant that the Privy Council having dismissed the suit of Kunwar Vijai Verma it is not open to this Court to go behind the decree of the Privy Council and to declare that Kunwar Vijai Verma was entitled to a half share in the property.

12. The point for decision, therefore, is whether it is open to the creditors of Kunwar Vijai Verma to claim the right to prove the will of Raja Fateh Singh.

13. There is a large schedule of creditors, but it has been admitted before us by counsel for such of the creditors as are represented that there was no mortgage debt prior to the year 1927. Raja Fateh Singh died on the 28th of December, 1921. Kunwar Vijai Verma filed the suit on the 7th of March, 1922, within a few weeks of his father's death. All the debts were borrowed during the pendency of the suit. It is admitted that he had not executed any mortgage or created any other interest in the property before he filed the suit. Most of the debts due are simple money debts. Some of the mortgagees have obtained decrees on their mortgages against the landlord applicant. These mortgages, it is admitted, were executed between 1927 and 1929.

14. Kunwar Vijai Verma, we have already seen, filed the suit on alternative grounds. He claimed the property on the basis of inheritance and also on the basis of the will. It is urged by the learned Advocate General, for the appellant, that his suit having been dismissed a fresh suit for the same property on the same cause of action could not be filed by him or by his legal representatives.

15. It is urged by learned counsel for the creditors that their Lordships of the Judicial Committee having left the question of the validity of the will open it must be deemed that their Lordships did not intend to dismiss the suit of Kunwar Vijai Verma and Kunwar Vijai Verma having died during the pendency of the appeals in the High Court and Shrimati Vijai Kunwari not being his legal representative First Appeal No. 482 of 1926 must be deemed to have abated as the respondent's legal representative was not brought on the record, and in First Appeal No. 52 of 1927 Kunwar Vijai Verma, sole appellant, having died and his legal representative not having come on the record the appeal must be deemed to have abated with the result that both the appeals--First Appeal No. 482 of 1926 and First Appeal No. 52 of 1927--must be deemed to have been dismissed and as there was no reason to set aside the decree that had been passed by the learned Subordinate Judge in favour of Kunwar Vijai Verma the Privy Council did not intend to vacate the same. I am afraid it is not open to this Court to go behind the Order in Council. It is true that the Privy Council did not go into the question of the will but they clearly dismissed the suit. The Order in Council dated 20th of December, 1938, is as follows:

> "Their Lordships do this day agree humbly to report, to your Majesty as their opinion (1) that these appeals ought to be allowed, the Decrees of the High Court of Judicature at Allahabad respectively dated the 22nd day of December 1932 and 21st day of February 1933 set aside and the suit dismissed ....."

On the finding that Shrimati Vijai Kunwari was not the legal representative of Kunwar Vijai Verma, being excluded by the custom of exclusion of daughters from inheritance, his nephews Raja Ajai Verma and Kunwar Kesho Verma who were his nearnest collaterals were his heirs and legal

representatives. They were impleaded as parties in the appeals before the High Court and also in the Privy Council. Raja Ajai Verma was, however, claiming the property in his own right adversely to the estate of Kunwar Vijai Verma. Kesho Verma had claimed in the appeals before the High Court that his name should be brought on the record to represent the estate of Kunwar Vijai Verma, in case it was held that Vijai Kunwari was excluded from inheritance, as in that case he would be entitled to half the estate. His name was brought on the record as a respondent in both the appeals in the High Court. But he took no interest in the litigation. Their Lordships of the Judicial Committee say in their judgment :

> "His younger brother (Kesho Verma) was added as a pro forma party and is the second respondent. He takes no part in the present proceedings."

On the dismissal of Kunwar Vijai Verma's suit his claims or the claims of his legal representatives must be deemed to have come to an end. The only remedy open to the legal representatives of Kunwar Vijai Verma was to revive the suit and they could not bring a fresh suit as their Lordships gave no right to the legal representatives to file a fresh suit. The legal representatives, if they want to claim the property, they would have to apply to the Judicial Committee for the amendment of the Order in Council. The Courts in India cannot go behind the order in Council and are bound by the same.

16. The point was considered by a bench of the Oudh Chief Court in the case of Fariduddin Ahmad v. Murtaza Ali Khan, A. I. R. (23) 1936 Oudh 67. In that case the Privy Council having decided the matter it was alleged that the Order in Council was a nullity as it was obtained by fraud and by suppression of the fact that the respondent before the Privy Council was insane and was unable to protect his interest. Their Lordships observed :

> "It is conceded for the appellant that no Court in India could refuse to give effect to an order of His Majesty in Council so as to prevent its being executed. For that very reason it seems that the reliefs regarding possession and mesne profits were abandoned. If the Order in Council must be carried out (as it admittedly must) it seems to us inconsistent and anomalous that any Court in India could grant a declaration that the order was absolutely illegal and void, or even that it was not binding upon one of the parties to the litigation. The grant of such a declaratory decree would in our opinion conflict with the principle that an order of His Majesty in Council is final and conclusive. If an order of His Majesty in Council is under execution and a High Court passes a declaratory decree that the order is illegal and void, the executing Court might well doubt whether such an order should be executed. Granting that the order must be executed by the Courts in India, the necessary implication seems to be that no Court in India can declare that the order is illegal and void."

Reference may also be made to a decision of the Madras High Court in the case of Rahim-un-nissa Begam v. M. A. Srinivasa Ayyanger, 54 I. C. 565. In that case a creditor who had obtained Letters of Administration to his judgment-debtor's estate filed a suit that certain properties belonged to his

debtor. A previous suit filed by the debtor had abated and the question was that a suit having abated, could a second suit by the creditor, who urged that his interest was affected, lie? Their Lordships held that there was no warrant for giving to a stranger a better title than the alleged owner or his legal represetatives and the previous judgment was a bar to the maintainability of the suit.

16a. The learned Civil Judge was of the opinion that the Privy Council had dismissed the suit of Kunwar Vijai Verma only because they could not give a decree to Shrimati Vijai Kanwari who was not his legal representative, the custom of exclusion of daughters in succession having been established. Though their Lordships did not go into the question of the validity of the will, the fact, however, remains that the suit of Kunwar Vijai Verma was dismissed. The suit having been dismissed, neither Kunwar Vijai Verma nor any person claiming title to the estate as his legal representative could bring a second suit for possession or claim an interest in the property. In Fateh Singh v. Jagannath Bakhsh Singh, 47 ALL. 158 where a suit had been dismissed on the basis of an inheritance but the Court had, while dismissing the suit observed that the plaintiffs were at liberty to file a fresh suit for possession, it was held that a second suit would not lie and that a second suit could only be brought where a suit had been withdrawn under Order 23 with permission to bring a fresh suit. The creditors did not take out any letters of administration to the estate of Kunwar Vijai Verma, nor could they claim to be his legal representatives and they have no right to set up the rights of Vijai Verma, Vijai Verma having filed a suit and having lost it: (See Krishnan Nair v. Kambi, A. I. R. (24) (1937) Mad. 544 and Guda Kueri v. Adnath Pande, 1938 A. L. J. 860 at p. 863.)

17. One other point that has caused me considerable anxiety is the question of the effect of their Lordships' order in dismissing the suit filed by Vijai Verma after his death. It is, however, clear that Vijai Verma's legal representatives were Raja Ajai Verma and Kunwar Kesho Verma. They were both parties to the appeal before their Lordships of the Judicial Committee. Neither of them took any steps to have the decree of their Lordships of the Judicial Committee amended or the point made clear. We are bound by the order of the Judicial Committee dismissing the suit of Vijai Verma and in view of that decision it is not possible to hold that the estate of Vijai Verma had any subsisting interest left in the property even though the question of the validity of the will may not have been gone into.

18. One case that was strongly relied upon was Parsotam Gir v. Narbada Gir, 21 ALL. 505 (P. C.). In that case a suit was filed against one Prasad Gir for possession and for accounts. Prasad Gir died during the pendency of the suit and his chela, Narbada Gir, was impleaded. The suit failed as it was held that it had not been proved that Prasad Gir had committed any breach of trust, or, at any rate, that may be said to have been the decision as the ground on which the suit was dismissed is, as remarked by their Lordships of the Judicial Committee, not very clear from the judgment of the High Court. A second suit was filed for possession of the property by dispossession of Narbada Gir, and the only point argued was whether there was a final decision in the previous case which operated as res judicata. Their Lordships held that the plea could be barred by res judicata, only if the point had controverted and the matter had been finally decided in the previous litigation. The question of the maintainability of the second suit was not gone into. As already said, the point is, however, covered by the later decision of the Privy Council in Fateh Singh v. Jagannath Bakhsh

Singh, 47 ALL. 158.

19. Coming to the cases of the individual creditors, we have been informed by learned counsel that respondents 1 to 18 are the creditors of Kunwar Vijai Verma. Only some of them are represented.

20. Respondent 7, Raja Umanath Bux Singh, who was claimant set No. 31 before the lessor Court, had a large claim outstanding against the assets of Kunwar Vijai Verma. The decree passed in his favour by the learned Special Judge was for Rs. 54,693/10/-. He died during the pendency of this appeal on 27-7-1946. No application for substitution of names was made within time. On 19-11-1947, an application was made for setting aside abatement and for bringing the names of the legal representatives of the deceased on the record. The. application was supported by an affidavit by the Mukhtar-i-am. In the affidavit it was stated that the appellant did not know of the death of Raja Umanath Bux Singh till 6-11-1947, when the information was given to Mukhter-i-am by Mohan Lal, clerk of Mr. S.N. Katju, advocate, and thereafter he went to Rae Bareili and on the inspection of the mutation record on 10-11-1947, came to know of the date of death of the deceased and the names of his legal representatives. The application was, however, filed on 19-11-1947. Notice of this application was issued to the legal representatives and it has been put up before us for disposal. The application is contested on behalf of the legal representatives and in an affidavit filed by the Mukhtar-i-am of Raja Sheoamber Singh, son of the deceased, it is mentioned that the news of the death of the deceased, who was a Taluqdar of Oudh, appeared in the 'Leader' and the 'Pioneer' and that the appellant himself had gone on a condolence visit to the residence of the deceased at Lucknow and had met his son, Raja Sheoambar Singh. In a rejoinder affidavit filed again by the Mukhtar-i-am, Kashi Prasad, it is said that the appellant did not read the news in the 'Pioneer' or the 'Leader' and further that the appellant did not meet Raja Sheoambar Singh in Lucknow. It is not specifically denied that the appellant had gone on a condolence visit to the house of the deceased at Lucknow. It is not unlikely that the appellant subscribes the daily papers, the 'Leader' and the 'Pioneer'. The deceased belonged to the same class of landed aristocracy to which the appellant belongs and it is very unlikely that the appellant did not know of the death of the deceased. We do not see any sufficient reason for the condonation of the delay. The application was a belated one and a valuable right had accrued in favour of the legal representatives of the deceased, Raja Umanath Bux Singh. We, therefore, dismiss the application dated 19-11-1947, for setting aside abatement and bringing the legal representatives of the deceased, Raja Umanath Bux Singh, on the record. The appeal as against him has abated.

21. Most of the other creditors, who are represented before us, have simple money decrees against the assets of the deceased and their money can, therefore, be recoverable only if the deceased had left any assets which are in the hands of the landlord-applicant. Respondent 1, Ram Bharosey Lal, claimant set No. 32 before the lower Court, is represented by Messrs. Jagdish Sahai and Sheo Charan Lal. Respondent 9, Arjun Singh, claimant set No. 30, is represented by Mr. N.C. Sen. Respondent 10, Sarup Narain, claimant set No. 36, is represented by Mr. S.N. Katju. Respondent 11, Atma Ram, claimant set No. 37, is represented by Mr. N.C. Sen, respondents 12, 13 and 14 and 24, Chandra Datt and others and Sunder Lal, and claimants sets No. 39 and 3 respectively, are represented by Messrs Jagdish Sahai and L.M. Pant, and respondent 15, Haji Mohammad Shafiq Khan, claimant set No. 34 is represented by Mr. L.M. Pant. Respondent 8, Balmukund Gupta,

claimant set No. 5 before the lower Court, is a creditor of the appellant's father, Raja Indra Bikram Singh, and has a decree in Suit No. 13 of 1936 of the Subordinate Judge's Court Bareilly in his favour. The learned Special Judge decreed the claim for Rs. 3288. This item is not disputed. The second debt due to him is on the basis of a decree Ex. E2, dated the 18th October 1930, against the assets of Kunwar Vijai Verma in the hands of the defendant appellant. The amount due under the decree on the date of application was Rs. 21,614-8-0. The question whether the creditor Balmukund Gupta can claim this money from the appellant would depend upon the decision of the question whether the appellant has any assets of the deceased Kunwar Vijai Verma in his hands. Balmukund Gupta was an unsecured creditor. Respondent 16 Mt. Ram Kali was claimant set No. 33 before the lower Court and respondent 18, Manohar Lal Shah, was claimant set No. 29 before the lower Court. They are not represented before us. Mt. Ram Kali has a simple money decree against the assets of Kunwar Vijai Verma and Manohar Lal Shah has got two claims, one upon a debt due from Raja Fateh Singh, ancestor of the appellant, and for that a decree for Rs. 748-15-0 has been passed by the lower Court. This decree cannot be challenged by the appellant. He has a second claim against the estate of Kunwar Vijai Verma under a decree dated the 16th April 1926. This amount is realisable from the assets of Kunwar Vijai Verma in the hands of the appellant. Lachman Prasad, respondent 17 was claimant set No. 2. He has also two claims. The first is a mortgage decree on the basis of a mortgage executed by Raja Indra Bikram Singh, father of the appellant. The appellant is bound to pay that amount and there is no dispute about it. The other is a simple money decree against the estate of Kunwar Vijai Verma. This was due under a simple money decree and the amount is realisable only from the assets of Kunwar Vijai Verma, if any, in the hands of the appellant. This respondent is also not represented before us.

22 It is urged on behalf of the creditors that they have a right to set up under Section 11 of the Encumbered Estates Act the title of their debtor and to prove that he had left assets which belonged to him and not to the appellant. It is not denied that a creditor, even though he may be a simple money creditor, has the right to set up the title of his debtor to a property on the ground that it is one of the assets of the debtor from which the debt is payable. The title to be set up must, however, be a subsisting title and if the debtor has himself fought and lost, the creditor; will have no right to claim a readjudication of his debtor's title. This is obviously based on the principle that where a defendant has no title in himself but wishes to defend an action by putting forward the title of another, he should not be allowed to do so if that other has either admitted the plaintiff's title or has lost against the plaintiff. A legal representative of such third party would be bound by a decision against him and there is no reason why a stranger should be in a better position. In Guda Kueri v. Adnath Pande, 1938 A. L. J. 860 the plaintiff had filed a suit for possession against defendants 1 and 2, who were in possession of the property, on the ground that they were strangers and the plaintiff, as a surviving member of the family, was entitled to get possession of the same. He had impleaded the widow of the deceased owner. The widow had appeared and supported the plaintiff's title. A decree was passed against all the defendants. The decree against the widow became final and she was not impleaded in the subsequent proceedings. Later it was held that the plaintiff was not a co-parcener. The plaintiff had, in the alternative, claimed that, even if there was no coparcenary, he was the heir to the deceased. The defendant set forward the plea, that if the deceased was separate, the widow would preclude the plaintiff's claim being the nearer heir. It was decided by the learned Judge that before the defendants could be allowed to set up a jus tertii they had to prove that the

person whose rights they wanted to set up in defence had a subsisting title. The learned Judge relied on the cases of Gangayya v. V. Satyanarayana, A.I.R. (12) 1925 Mad. 1021 and Krishnan Nair v. Kambi, A.I.R. (24) 1937 Mad. 544. Kunwar Vijai Verma's Suit having therefore been dismissed, it is not open to his creditors to set up his title to the property. In Fateh Singh v. Jagannath Bakhsh Singh, 47 ALL. 158 where the plaintiffs' suit had been dismissed but leave had been granted to them to file a second suit on the basis of custom, their Lordships held that, the suit having been dismissed, a second suit on the basis of custom would not lie and a second suit could only be brought if a suit had been allowed to be withdrawn under Order 23 with liberty to bring a fresh suit.

23. Ram Bharosey Lal, respondent 1 and claimant set No. 32 had a mortgage decree against the appellant. The mortgage in his favour was dated the 7th September 1927, for Rs. 14,000 executed by Kunwar Vijai Verma. On the basis of the mortgage, a suit No. 9 of 1933 was filed against Raja Ajai Verma and others as the legal representatives of Kunwar Vijai Verma and a preliminary decree was obtained on the 11th July 1933, and a final decree on the 19th March 1934. In accordance with the provisions of Section 14 (4) (a), Encumbered Estates Act the lower Court granted a decree for Rs. 28,000 plus costs and pendente lite interest against the appellant. Raja Ajai Verma had pleaded in the said suit that the entire property appertained to the Powayan Raj and Kunwar Vijai Verma had no right to mortgage the same and that, in any case, there was no legal necessity for the mortgage. On this plea, issues 2 and 5 were framed by the learned Subordinate Judge of Shahjahanpur as follows :

> "(2) Whether the mortgage bond in suit was executed for legal necessity and the mortgagor was competent to execute it ?
>
> (5) Whether any cause of action has accrued to the plaintiffs against the defendant 1?"

The learned Judge decided the two issues as follows:

> "Issue No. 2--It is proved by the plaintiff that Kr. Vijai Verma died as a separated member and that the property mortgaged by him was a self-acquired property. In such a case no question of legal necessity arises. The executant being the owner of the property was within Ms rights to mortgage it as he did. The point of separation was determined by the Hon'ble High Court in a judgment, a copy of which is on the record. In these circumstances, I hold that the executant of the mortgage was competent to execute it while no question of legal necessity arises.
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> Issue No. 5--The defendant 1 (Raja Ajai Verma) is absent to-day and no one has appeared before me on his behalf, consequently the point raised in this issue is not pressed. In my opinion the point has no force and I decide the point against the defendant 1."

24. Respondents 2 to 6, Sita Ram, Ram Kishan, Sri Kishan, Gopal Kishan and Gopi Kishan, who were claimants set No. 35 before the lower Court, are not represented before us. We have looked

into their claim. There was a mortgage, dated 19th November 1928, Ex. 259, for Rs. 23,000 executed by Kunwar Vijai Verma in favour of Seth Radha Kishan. A suit on the basis of the mortgage was filed by the mortgagee, Suit No. 65 of 1934--and a preliminary decree for sale was obtained on the 14th May 1935, and a final decree on 28th March 1936. The claim before the special Judge was for a sum of Rs. 41,893-2, but the lower Court gave a decree under Section 14, Encumbered Estates Act, for Rs. 30918-4 only. In Suit No. 65 of 1984 the appellant, Raja Ajai Verma was impleaded as a defendant. In the written statement filed by him on 22nd December 1934, he took the plea that the property in dispute formed part of the impartible Raj and the contesting defendant was the sole owner in possession thereof, that Kunwar Vijai Verma aforesaid had no right to execute the morgage, that the case relating to partition had not yet been disposed of and it was still pending in the Privy Council and that the document sued on was not lawfully executed. This is paragraph 6 of the written statement (Ex. KK5). On the basis of the pleas raised in the written statement the trial Court (Subordinate Judge of Shahjahanpur) framed seven issues, of which issue No. 3 was as follows:

> "Whether the mortgaged property is part of impartible estate of Powayan Raj ?"

The finding on the issue was as follows:

> "No evidence is offered by the defendant and the points involved in these issues (2, 3 and 6) are not pressed at all. Hence I hold and decide the points in favour of the plaintiff."

The judgment has not been included in the printed paper book, but a certified copy thereof (Ex. KK4) is on the record.

25. The question for decision is whether the appellant is bound by the decisions in Suit No. 9 of 1933 in favour of Ram Bharosey Lal, respondent 1, and suit No. 65 of 1934 in favour of Seth Radha Kishan, the predecessor, in-interest of respondents 2 to 6, Sita Ram and others.

26. A defendant is not bound to put forward his independent title at the risk of being barred from setting it up in future, if such paramount title has not been challenged by the plaintiff, but, if the plaintiff has impleaded a person claiming a paramount title to the mortgaged property as a defendant in the suit on the ground that the defendant has no such paramount title and the property is liable to be sold free from any such claim, the question of paramount title can be decided in the mortgage suit and, if the question is decided, there is no reason why the decision should not operate as res judicata. In the case of Bisheshwar Dayal v. Mt. Jefri Begam, 1937 A.L.J. 536, Mt. Jafri Begam, defendant 2, was impleaded on the ground that the transfer of a portion of the property in her favour was not binding on the plaintiff. The suit was decreed, Mt. Jafri Begam filed a second suit in which she claimed that the transfer in her favour was a valid transfer and her claim was not affected by reason of the fact that the mortgage suit for sale had been decreed against her. The contention was repelled and this Court held that she was barred, relying on certain observations of their Lordships of the Judicial Committee in the case of Radha Kishun v. Khurshed Hossein, 47 Cal. 682. In that case their Lordships observed as follows:

> "Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of res judicata it was incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority. '

27. In Girja Kanta v. Mohim Chandra, 35 I.C., 294 (Cal.), one of the mortgagors had died at the commencement of the suit and one of his representatives was a parson interested in his own right in the hypothecated property adversely to the mortgage. The point was not raised by him that he had an adverse claim to the mortgaged property and it was held that such a plea was not only not raised but could not have been raised in the mortgage suit as framed. In Gobardhan v. Manna Lal. 16 A. L. J. 639 one Munna Lal was impleaded as a subsequent mortgagee in a suit on mortgage. The subsequent mortgagee claimed a title to a portion of the mortgaged property as owner. In reference to this plea, an issue was framed as to the right of the mortgagors to mortgage the whole property. The Court held that the mortgagors who had made the mortgage were estopped from questioning the validity of the mortgage. As regards the title of Munna Lal, it made certain observations which in the later decision it was held were nothing more than obiter dicta and could not be treated as a decision on the question of paramount title of Munna Lal and therefore it was held, the previous observations could not operate as res judicata. It was observed, following the decision in the case of Jajneswar Dutt v. Bhuban Mohan, 33 Cal. 425 that if Munna Lal had allowed the question, of his paramount title to be determined in the suit, he might have been precluded from raising that point in the appeal. In the suit filed by Ram Bharosey Lal, respondent 1, and Seth Radha Kishan, the predecessor-in-title of Sita Ram and others, respondents 2 to 6, Raja Ajai Verma, though he was impleaded as a legal representative of the deceased mortgagor, he did raise a plea of paramount title and on the plea raised by him issues were framed in both the suits and, in the suit filed by Ram Bharosey Lal, Raja Ajai Verma having absented himself, the issue was decided against him and in the second suit no evidence was given and the it sue was not pressed and hence the decision was against the appellant. The question is whether, in these circumstances, the decisions operate as res judicata and preclude the appellant now from claiming that he was the owner of the mortgaged property and not Kunwar Vijai Verma, the mortgagor. Though it may not have been necessary for the appellant to put forward his paramount title in a suit on the basis of a mortgage, he having chosen to put the plea forward and join issue on the point, there appears to be no reason why the decision should not operate as res judicata. In Midnapur Zaminadari Co. Ltd. v. Naresh Narayan Roy, 51 I. A. 293 their Lordships held that if a learned Judge had decided an issue which was raised before him and not said that the issue was unnecessary or irrelevant it must be held that the learned Judge had impliedly decided that the issue was necessary and such a decision would operate as res judicata. In Krishna Chendra Gajapati v. Challa Ramanna, A. I. R. (19) 1932 P. C. 50 their Lordships--have held that, where a point is not properly raised by the plaint, but both parties have without protest chosen to join issue upon that point, the decision on the point would operate as res judicata between the parties. The fact that a tithe trial in one case the appellant absented himself and in the other he did not lead any evidence will not make it any the less binding, the point having been expressly raised on the basis of which issues were framed and the learned Judge having

decided the issues against the appellant. In Harekrishna Datta v. Gourhari Setna, 59 Cal. 1250 the plaintiff filed a suit to establish that defendant 1 was not entitled to a certain holding. The defendant relied on a previous judgment in a suit for rent filed by the plaintiff against a tenant in which the tenant had entered into no defence but the defendant had put forward an adverse claim which had been decided by the Munsif in defendant's favour. It was urged that it was no part of the business of the Munsif trying the rent suit to decide whether or not defendant 1 had a good, title to the holding, the only matter in issue being whether the tenant was liable to pay rent, and, if so, how much, and that the question between the plaintiff and the present defendant was a question which was unnecessarily raised, the plaintiff not claiming any relief at all against that defendant. The Court held that the Munsif had decided something that reasonably and properly arose before him and whether the point was absolutely necessary or not to decide, it was quite clear that the parties had joined battle upon that point and the point was decided. In that view, their Lordships held that the point could not be re-agitated. I am, therefore, of the opinion that the appellant having raised the plea as regards his paramount title in the two suits and the issues having been decided against him, the decisions operate as res judicata.

28. Learned counsel for the appellant has urged that the issues in the two suits on the basis of the two mortgages were really decided on the basis of the decision of the High Court and the High Court decision having been set aside on appeal by their Lordships of the Judicial Committee, these decisions are not binding. The point was considered at some length in the case of Haji Mohammad Obed Ullah Shan v. Mohammad Abdul Jalil Khan, 1945 A. L. J. 11 where it was explained that the case of Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery, 10 M. I. A. 203 was decided on its own facts and the principle could not be made applicable to nullify the effect of a decree or decision which had become final merely on the ground that the decision on which it was based had later been set aside by their Lordships of the Judicial Committee, and reliance was placed on a decision o£ their Lordships of the Judicial Committee in Naganna Naidu v. Ravi Venkatappayya, 50 I. A. 301. I do not think there is any force in this contention.

29. Respondents 19 to 27, that is Shyam Behari Saigal and others, are creditors of the landlord-applicant. They are, therefore, entitled to realise the money due to them from the appellant out of the entire property. They have, however, been impleaded in this appeal on the ground that the interest allowed to them by the lower Court was excessive.

30. Except as regards respondent 19 Shyam Behari Saigal, claimant set No. 10 and respondents 25, 26 and 27, Ram Autar Shastri, Ram Kumar Singh and Krishna Kumar Singh, claimants set No. 4, the point as regards the rate of interest was not raised in the lower Court. Respondent 24, Sunder Lal, claimant set No. 3, had claimed Rs. 42,213-12-0. The lower Court found that only Rs. 32,146 was due to him and has mentioned that this amount was not challenged by the applicant. As regards respondents 20, 21, 22 and 23, Raja Mohan Manooch, Raja Bahadur Manoocha, Radhe Lal Manoocha and Kishorei Lal Manoocha, claimant set No. 17, the lower Court came to the conclusion that Rs. 38,973-9-0 was due to them, and from the judgment of the lower Court it does not appear that any objection was taken as to the rate of interest. Similarly, learned counsel for the appellant was not able to show that the point as to the rate of interest allowed to Manohar Lal Shah, respondent 18, claimant set No. 29, was raised before the lower Court.

31. As regards respondent 19, Shayam Behari Saigal, claimant set no. 10, the amount due to him was under several promissory notes which carried interest at Rs. 12 per cent. per annum. The objection taken in the lower Court was that in the compromise decree the future interest was fixed at Be. 1 per cent. per annum. It was urged that 1 per cent. per annum was a high rate of interest. The lower Court, however, held that the rate was fixed in the compromise decree and the rate was allowable under the amended Usurious Loans Act. No arguments have been advanced before us to show that this decision was incorrect.

32. As regards respondents Nos. 25, 26 and 27, Ram Autar Shastri, Ram Kumar Singh and Krishna Kumar Singh, claimant set No. 4, the claim was on the basis of a mortgage which carried interest at Re. 1/2 per cent. per mensem compoundable yearly. In the suit brought on the basis of the mortgage in the year 1929 the rate of interest was reduced by the civil Court under the Usurious Loans Act (X [10] of 1918). It was urged on behalf of the appellant that the lower Court should have further reduced the amount due under the decree by reason of the amendment to the Usurious Loans Act under the Amending Act XXIII [23] of 1984. The lower Court was of the opinion that it would not be justifies, in reducing the interest further. Reliance is placed on curtain observations in Sahi Mal Manohar Das v. Iltifatunnisa Begam, 1941 A. L. J. 366, Baijnath v. Tulshi Ram, A. I. R. (26) 1989 Oudh 184 and Rukunuddin v. Lachmi Narain, 1945 A.L.J. 444. The Amending Act has only provided certain rates of interest, and the Courts are to presume that if the rate is above the rate mentioned therein, the interest is excessive. The necessary papers relating to the loan were not pointed out to us, and we do not know whether this was a first mortgage or not. The lower Court had a discretion in the matter. The amount decreed is only Rs. 1,079-6-6, and in view of the fact that all the materials were not placed before us we would not be justified in interfering with the decision of the lower Court.

33. Coming to the question of the will of Raja Fateh Singh, dated 2nd August 1918, it was put forward on behalf of Kunwar Vijai Verma in the Suit No. 53 of 1922 filed by him in the Court of the Subordinate Judge of Shahjahanpur. Mr. Maheshwar Prasad, the learned Subordinate Judge, came to the conclusion that the will was not the genuine will of Raja Fateh Singh. On appeal to this Court the High Court did not agree with his conclusions and held that the will was genuine. When the matter was taken further up to their Lordships of the Judicial Committee their Lordships did not express any opinion. The lower Court has now held in favour of the validity of the will. Its finding is challenged by the appellant in this appeal. The original will was filed in the previous litigation of 1922 and from the records of this Court it appears that in 1938 it was sent to their Lordships of the Judicial Committee. From the evidence of Shyam Narain, Sub-Registrar, it appears that the will was summoned in the Court of the Special Judge from the record of suit 53 of 1922 and was put to the witness on 19-11-1940. After that there is no trace as to what happened to the original will. Mr. Gopalji Mehrotra, learned counsel for the appellant, first filed an application to summon it from the record of suit No. 53 of 1922, but the will not being found there, he had it then summoned from the safe of the District Judge of Sitapur. A report has been received from the District Judge that the will is not in his safe. A further search has not resulted in the original will being traced. We are, therefore, placed in this position of disadvantage that we have not had the opportunity of looking at the original will about the appearance of which comments were made both by Mr. Maheshwar Prasad, the learned Subordinate Judge, as well as by this Court in the previous litigation. [After

discussing the evidence regarding the will the judgment proceeds as follows ;

34. In the absence of the original will and by reason of the fact that on other points I am in favour of the appellant I do not want to record a definite finding though I am not prepared at this stage to differ from the finding recorded by the lower Court.

35. The result, therefore, is that the appeal is dismissed against respondents 1 to 6, that is, Ram Bharosey Lal, Sita Ram, Ram Kishan, Sri Kishan Gopal Kishan and Gopi Kishan. The appeal is declared to have abated against the estate of respondent 7, Rana Umanath Bux Singh deceased. The appeal is also dismissed against respondents 19 to 27 Shyam Behari Saigal, Raja Mohan Manoocha, Raja Bahadur Manoocha, Radhey Lal Manoocha, Kishori Lal Manoocha, Sunder Lal, Ram Autar Shastri, Ram Kumar Singh and Krishna Kumar Singh. The decree passed by the lower Court as against these respondents against whom the appeal has been dismissed is confirmed. The respondents will get their proportionate costs from the appellant. The appeal is allowed as against respondents 9 to 18, namely, Sardar Arjun Singh, Sarup Narain, Atma Ram, Chandra Datta, Tribhawan Datta, Ravendra Datta, Haji Mohammad Shafiq Khan deceased (whose estate is now represented by Mohammad Zamin Khan and Mt. Jawaharunnissa Begam), Mt. Ram Kali, Lachman Prasad and Manohar Lal Shah, and it is declared against them that the landlord applicant is the owner of the entire property and Kunwar Vijai Verma did not have a half share in the said property. Respondent 8 Balmukund Gupta, claimant set No. 5, has two claims, one against the appellant for a debt due from his father Raja Indra Bikram Singh, There is no dispute about that debt and the order of the lower Court stands. As regards the decree for Rs. 21,614-8-0 due from the assets of Kunwar Vijai Verma under a simple money decree dated 18-10-1930, we have already held that the amount is not realisable from the property in the hands of the appellant as it does not form part of the estate of Kunwar Vijai Verma. The appeal is allowed against this respondent to this extent only. Manohar Lal Shah, claimant set No. 29 has also two claims; one for Rs. 748-15-0 due from the appellant for money borrowed by Raja Fateh Singh. For that the appellant is liable and the decree of the lower Court must stand. As regards the amount due to the appellant from the estate of Kunwar Vijai Verma under a decree dated 16-4 1926, we allow the appeal and hold that this amount is not realisable from the properties in the hands of the appellant. We have held that this property did not belong to Kunwar Vijai Verma. Similarly, respondent 17, Lachman Prasad, claimant set No. 2, has got two claims, one is due under a decree obtained on the basis of a mortgage deed dated 16-8-1933 executed by the father of the appellant. The appellant is clearly Bound by this decree and we affirm the decision of the lower Court. As regards the claim due to Lachman Prasad under a simple money decree No. 407 of 1929 and realisable from the assets of Kunwar Vijai Verma, the appeal is allowed and it is held that the properties in the hands of the appellant are not part of the assets of Kunwar Vijai Verma. The appellant is entitled to his proportionate costs against the respondents against whom his appeal has been decreed.

Desai J.

36. I regret very much that I am unable to agree with my lord the Chief Justice on the question of the effect of the judgment of their Lordships of the Judicial Committee. It is natural that I do so with considerable hesitation. The facts are as follows :

37. [After narrating the facts of the case, the judgment proceeds thus :] The only ground on which the creditors are said to be debarred from proving that one moiety is Kr. Vijai Verma' estate, is the judgment of the Judicial Committee dismissing Kr. Vijai Verma's suit. The Judicial Committee, however, dismissed the suit only on the ground that Sm. Vijai Kunwari was not an heir of Kr. Vijai Verma. There were only two questions before their Lordships, one about the genuineness of the will, and the other about the custom of exclusion of daughters. The question of impartiality of the estate had already been decided in favour of the Raja by this Court. He failed because this Court held that the will executed by Raja Fateh Singh was genuine. The death of Kr. Vijai Verma brought in issue one more question before this Court, namely, that of the right of Sm. Vijai Kunwari to inherit Kr. Vijai Verma's estate. If she was entitled, she could get a decree for a moiety in the estate. If she was not, she could get nothing and the entire estate would go to Raja Ajai Verma, even if the will was genuine. If the will was not genuine, the entire estate would go to Raja Ajai Verma by direct inheritance from Raja Fateh Singh through Raja Indra Bikram Singh. If it was genuine, he would get one moiety by inheritance from Kr. Vijai Verma. This Court decided both the questions in favour of Sm. Vijai Kunwari. In the appeal before their Lordships of the Judicial Committee, the same two questions were again the only questions for decision. Raja Ajai Verma could succeed in his appeal if either of the questions was decided in his favour. If the will failed nothing passed by inheritance to Kr. Vijai Verma at all, and if the custom exists, even if a moiety passed by inheritance to Kr. Vijai Verma, it reverted to Raja Ajai Verma by inheritance from him. Their Lordships chose to decide the appeal in favour of Raja Ajai Verma only on one ground, namely, that of existence of the custom. There cannot be any doubt on this point. Their Lordships stated at p. 266 :

> "With the consent of the parties their Lordships took up first the question of custom, and having come, some what reluctantly, to the conclusion that the custom is proved, they have not found it necessary to go into the question of the will."

At the end of the judgment, at page 273, their Lordships observed :

> "The question of costs in this heavy litigation presents some difficulties. If Vijai Verma had survived and the finding of the High Court as to the validity of his father's will had stood, he would have succeeded in his suit, and have been entitled to his costs throughout. But the question of the will is still open, and his daughter's claim to stand in his shoes has failed."

In the face of these observations, it is impossible to contend that their Lordships decided the question of the will or that their Lordships' judgment operates as res judicata to bar a Court from trying the issue of genuineness of the will. All that their Lordships decided is that under the custom prevailing in the family, Sm. Vijai Kunwari was not entitled to inherit Kr. Vijai's Verma's estate, their Lordships decided nothing more and nothing less. The judgment of their Lordships can operate as res judicata to prevent a Court's trying only this question and not any other question. The question raised by the creditors before the learned Special Judge is not this question. They are not at all concerned with the question whether Kr. Vijai Verma's estate passed by inheritance to Sm. Vijai Kunwari or to Raja Ajai Verma. They are only concerned with the recovery of their money from his estate and it does not matter to them in whose hands it now lies. What they have been allowed to

prove is that a moiety is his estate. Their Lordships did not decide this question at all. They did not say either that Vijai Verma inherited a moiety under the will or that he did not. A point not decided by a Court can never be res judicata unless the matter is covered by exceptions (4) and (5) to Section 11, Civil P. C. If a Court can justify its judgment on either of two findings and justifies it only on one of them, the other finding is not res judicata because it cannot be said to have been finally decided. If the Court justifies its judgment on both findings, both may be res judicata. Venkatasnbba v. Sankaran, A. I. R. (22) 1935 Mad. 977. If in the present instance their Lordships had also held that the will is not genuine, that finding would have been res judicata and it would not have been open to the lower Court to try the issue again. Their Lordships certainly dismissed Kr. Vijai Verma's suit but did so without holding that a moiety did not form Kr. Vijai Verma's estate, and that was the precise question for decision before the learned Special. Judge.

38. There is ample authority in support of the above view. In Abdulla Asghar Ali Khan v. Ganesh Das, 1917 A. L. J. 889. A executed a bond in favour of G, he sued for its cancellation by alleging false representation, the suit was dismissed on the ground that it was not properly framed and the Court expressly refrained from going into the merits, and the dismissal was held by their Lordships of the Judicial Committee not to bar trial of the issue, whether there was false representation on the part of G or not, when raised in a subsequent suit by G to recover his money on the foot of the bond. Though the earlier suit to set aside the bond was dismissed, their Lordships held that it was open to A in the subsequent suit to show that the bond was void. Their Lordships observed:

> "'the matter in issue' in the present suit is no doubt the same as in the defendant's own action. Section 10 of the regulation creates an estoppel by judgment only when the matter in issue has been finally decided. "

Section 11, C. P. C., is in pari materia with Section 10 referred, to above. The genuineness of the will was a matter in issue before their Lordships of the Judicial Committee in 1939, but they did not decide it and, therefore, there is no estoppel by judgment as regards that question. The facts in Shiam Lal v. Radha Ballabh, 48 ALL. 34, were these. G sold a property to R, M sued for possession of it alleging that it was joint family property and could not be sold by G, R denied that it was joint family property, pleaded that he was a bona fide purchaser and claimed that he had spent Rs. 5,000 over its improvement, the suit was decreed for joint possession with R, subsequently M sued for partition of his share and R claimed a decree for Rs. 5,000 on account of the cost of improvement. In the former suit the Court had refused to decide the question of the improvement and consequently it was held that it could be decided in the subsequent suit. Parsotam Gir v. Narbada Gir, 21 ALL. 505, contains another refusal of the Judicial Committee to treat a prior judgment which left a question undecided as res judicata qua that question. In that case N sued to recover possession of a village from his agent P denied the contract of agency and N's title to the village as Mahant. P died during the pendency of the suit and his legal representative R was brought on record, and the claim for possession was decreed but that for accounts was dismissed. The matter was taken up in appeal before the High Court which dismissed the suit but left it open to N to bring a fresh suit against R. Accordingly N broughts a fresh suit against R and the High Court dismissed it on the ground of res judicata. The Judicial Committee held that since the High Court did not intend to decide anything as between N and B in the previous suit and expressly left it open to N to bring a

fresh suit against him, the defence of res judicata by P could not be maintained. In Sheo Sagar Singh v. Sita Ram Singh, 24 Cal. 616 (P. C.), A brought a suit in 1883 to recover possession over her father's property which was usurped by her first cousins and obtained a decree, the cousins filed an appeal during the pendency of which A died, the cousins got the suit treated as abated on the ground that A left no son, in 1885 they instituted another suit for a declaration that A left no issue, that suit was dismissed by the trial Court on the ground that they failed to prove that A left no issue, the High Court maintained the dismissal but on the sole ground that, they did not implead B and H who claimed to be interested in the estate of A's father and they purchased the interest of B and H and sued again for a declaration that S was not A's son. It was contended before their Lordships that the previous dismissal of the cousins' suit by the High Court operated as res judicata. Their Lordships repelled the contention because the matter whether S was A's son or not was not heard and finally decided by the High Court. It was heard and finally decided by the trial Court, but, as observed by their Lordships, " the appeal destroyed the finality of the decision", and " the judgment of the lower Court was superseded by the judgment of the Court of appeal." Just as in that case the cousins were allowed to sue again in spite of the dismissal of their previous suit on a technical ground, so also can the creditors of Kr. Vijai Verma be allowed to raise the question of his being owner of a moiety in spite of dismissal of his suit on the ground of his dying leaving no heirs other than his opponents in the suit. The facts in Fateh Singh v. Jagannath Bakhsh Singh, 47 ALL. 158, relied on by the appellants, were different. There F, a reversioner, brought a suit against a Hindu widow R, her transferee J and another reversioner C. The suit was for a declaration that an alienation by R in favour of J was invalid. It was contested by R and J that G was the nearer reversioner in whose presence F had no right to sue. F replied that he had a right even if G was the nearer reversioner because he had colluded with R and J. While the suit was pending, R died and the question of declaration became of no importance because p and G at once became entitled to possession over the property. F got the plaint amended by seeking the relief of possession. He applied for permission to amend the plaint further by taking the plea, that there existed a custom in his family according to which he and G were equal in degree from R. That application was rejected. It was conceded that he could not succeed as against G in the absence of the custom. As he was not allowed to plead the custom, his suit was dismissed. But, while dismissing the suit, the Court gave him permission to file a fresh suit for possession on account of fresh cause of action having accrued to him by R's death. He filed a fresh suit and the Judicial Committee decided that it was barred by res judicata. They held that the allegation of the family custom was one which might and ought to have been made in the earlier suit because it was the alternative case and that F having lost on one alternative case, could not fight on the other alternative case. The earlier suit was dismissed on merits on the ground that G was the nearer reversioner in whose presence no decree for possession could be passed in favour of F. F failed to take the plea that under the family custom he was equal in degree. It is not that he took the plea and the Court refused to adjudicate upon it as in the present case. In the present case Kr. Vijai Verma took the alternative plea that even apart from the Mitakshara Law he was entitled to a moiety under the will of his father, and the Judicial Committee expressly refrained from deciding his case on the basis of the will because in their opinion the decision of that question was rendered nugatory by his death leaving as his heirs none other than his opponents in the suit. If F could succeed in the second suit, he ought to have first succeeded in the earlier suit and when he failed in the earlier suit, he could not be permitted to file another suit.

39. Section 11 does not lay down that if one suit is dismissed, another suit on the same cause of action cannot be filed. It does prevent the filing of another suit but only in certain circumstances and not absolutely or in all circumstances. A suit may be dismissed on a technical ground and another suit on the same cause of action may be instituted (if within limitation). In some cases a subsequent suit is barred even though the earlier suit was dismissed on a technical ground or without its merits having been gone into; but in those oases it is barred not on the ground of res judicata but on account of statutory provisions such as Order XXII, XXIII, etc. It is stated by Bigelow in his Law of Estoppel, Ed. 6, p. 55, that "if the decision was rendered upon a mere motion or a summary application, or if the cause was dismissed upon some preliminary ground, as upon a plea in abatement, because the wrong forum or mode of suit, had been resorted to, for want of jurisdiction, defect in the pleadings, misjoinder, non-joinder, non-appearance of the plaintiff, or the like, the parties are at liberty to raise the main issue again in any other form they choose."

Therefore, it would not be correct to say that the question of genuineness of the will cannot be agitated now because the previous suit by Kr. Vijai Verma, who raised it in it, was dismissed. One must consider not the mere fact of dismissal but the grounds on which that suit was dismissed.

40. When their Lordships of the Judicial Committee dismissed Kr. Nijai Verma's suit, they dismissed it as Sm. Vijai Kunwari's suit. Kr. Vijai Verma having died and Sm. Vijai Kunwari having been substituted as his legal representative, the suit became her suit. The reasons given by their Lordships leave no room for doubt that they dismissed her suit and not Kr. Vijai Verma's suit. It was open to their Lordships to take into consideration the facts that were brought into existence during the pendency of the litigation. As observed in Deopati v. Mahabir Prasad Singh, 25 Pat. p. 529:

> "As a general rule, a Court of appeal in considering the correctness of the judgment of the Court below, will confine itself to the state of the case of the time such judgment was rendered and will not take notice of any fact which may have arisen subsequently. But the Court will in exceptional circumstances depart from this rule especially when by so doing it can shorten litigation and best attain the ends of justice by preserving the rights of the parties."

Mandli Prasad v. Ram Charan Lal, A.I.R. (35) 1948 Nag. 1, also may be referred to for a Court's giving relief on the changed circumstances. When a litigant dies during the pendency of litigation, the Court is bound to take into consideration the effect of the death on the progress or the ultimate result of the suit.

41. When a plaintiff dies and the cause of action survives, his legal representative must be brought on record to continue the suit. Whether a cause of action survives or not, depends upon the nature of it and not upon whether there is any person to whom it can survive. A cause of action may survive even if the deseased plaintiff left no heir to his estate. Order XXII, C. P. C. does not state in what circumstances a cause of action survives, it only states the procedure to be followed when it survives and when it does not survive. Substantive law contained in the Contract Act and the Succession Act must be referred to to find out which causes of action survive and which do not. Under that law the survival of a cause of action is not dependent upon there being an heir. The cause of action on which

Kr. Vijai Verma brought the suit survived and under the rules of procedure his legal representative was to be brought on record.

42. A legal representative is brought on record simply for the purpose of continuing the suit, Balabai v. Ganesh, 27 Bom. 162, Parsotam Rao v. Janki Bai, 28 ALL. 109 and Maung Po Mya v. Ma Gyan Bom, 72 I. C. 205. A dead person cannot be a party to a suit and there must be two parties, so when a sole plaintiff dies somebody's name must be brought on record so that the suit may continue. Under Order XXII, C. P. C. a legal representative's name is to be brought on record when the cause of action survives. A legal representative is defined in the Code to mean a person who in law represents the estate of a deceased person and includes any person who intermeddles with his estate. The person who, in law, represents the estate of a deceased is his heir (in the absence of an executor or administrator). But any person who intermeddles with his estate without being his heir also is his legal representative. Thus, even a wrongdoer who has no title to the estate of the deceased can be his legal representative and be brought on record as such. It would be for the Court to see whether the suit should be decreed in his favour or not. Merely because he is substituted as a legal representative, he would not be entitled to a decree to which the deceased plaintiff would have been entitled. The deceased plaintiff might have been entitled to one, but unless he establishes his title to the estate of the deceased, he would not be entitled to it. As observed by Batty, J. in Balabai's case, the Court has simply:

> "to decide who shall proceed with it, without, in any way affecting the ultimate liability or right of the persons in favour of whom or against whom the order is passed." (p. 169).
>
> In Parsotam Rao's case it was laid down that the appointment of a legal representative "is not a determination of any issue which is properly raised in the suit."

In the words of Batton, J. C. in Mt. Dhapu v. Ram Autar, A. I. R. (10) 1923 Nag. 209, "the interlocutory order has no final effect on the rights of the parties to the suit."

In the Annual Practice, 1946-47, p. 331, it is stated that:

> "Where there is a question whether the representatives of a deceased are liable for his wrongful acts which may be joined as defendants, leaving the question of the liability to be decided at the trial."

Therefore, the bringing on record of Sm. Vijai Kunwari was only a procedural matter and the Court had to decide whether she was entitled to a decree as legal representative of Kr. Vijai Verma or not. The suit could not possibly be decreed in her favour unless it was proved that she represented the estate of Kr. Vijai Verma. All that the Judicial Committee decided is that she failed to prove it.

43. It was suggested that if their Lordships of the Judicial Committee intended to dismiss the suit of Kr. Vijai Verma on the ground that not Sm. Vijai Kunwari but Raja Ajai Verma (with or without Kr.

Kesho Verma) was the legal representative, they would have held the suit to have abated. What were the reasons for their Lordships' dismissing the suit is clear from the judgment itself. Moreover, the suit certainly did not abate. There is no instantaneous abatement of a suit on the death of a plaintiff if the right to sue survives, see Order 22, Rule 1. If in a case in which the right to sue survives, a sole plaintiff dies and his legal representative is not made a party within a certain time, the suit abates, this is Rule 3. As in the present case the right to sue survived and Sm. Vijai Kunwari was made a party as Kr. Vijai Verma's legal representative within the time, there was no abatement. A discordant note was struck by Batty and Chandavarkar JJ. in Balbai's case, by stating that a suit cannot be dismissed on the ground that the person claiming as the legal representative of the deceased plaintiff in it fails to prove that claim. In that case M sued to recover possession of property of R, who was his first cousin, from E's maternal uncles who had taken possession of it, he died during the pendency of the suit, the name of B, his sister's daughter, was brought on record as his legal representative without any contest, later the defendants challenged her right to represent the estate of M, the Court framed an issue "whether the heir plaintiff Balabai is not the legal representative of deceased plaintiff Mahadeo Narain,"

> and the Court dismissed the suit holding that she was not the legal representative. Batty J. considered that the dismissal was wrong, while Aston J. considered that it was vital to the success of the suit prosecuted by B that she should be adjudicated the nearest heir of M and that nothing was to be gained by prosecuting the suit as legal representative of M if she was not his nearest heir and was for upholding the order of dismissal. On this difference between the two learned Judges, the matter was referred to a third Judge, Chandavarkar J., who agreed with Batty J. The facts which differentiate that case from the present case are that the issue that was decided was about B's being legal representative and not heir of M and that the estate of M did not pass on by inheritance to the defendants of the suit. The Court had already appointed B as the legal representative and the same issue could not be tried as an issue in the suit. If the defendants contested her being the legal representative, they should have done so before her name was brought on record. Having regard to the definition of "legal representative," anybody could be appointed as legal representative. When Chandavarkar stated, p. 188, that :
>
> "There is no provision in the Code which says that a suit should be dismissed if a person claiming as a legal representative of the deceased plaintiff in it fails to prove that claim,"

he was right. If B failed, it was not on account of any provision in the Code but on account of the application of Hindu law under which the estate of M passed on his death to other persons. In the absence of fraud or collusion, a decree passed in favour of or against a representative enures for the benefit of, or binds, the heir of the deceased. So it can be argued that a decree can be passed in favour of the legal representative who is brought on record in place of the deceased sole plaintiff, even though he is not proved to be his heir, and that the decree would enure for the benefit of the heir whoever he may be. But the same cannot be said when it is to be passed against the heir himself as in the present case. It would have been meaningless for their Lordships to pass a decree in favour

of Sm. Vijai Kunwari against Raja Ajai Verma if it was to enure for the benefit of Raja Ajai Verma. If a person is brought on record as the legal representative of a deceased defendant, the suit may be decreed against him even though he is not the heir of the deceased defendant. But the case of an inter meddler with the deceased plaintiff's estate stands on a different footing. In the former case, the decree is passed against the legal representative even though he is not the heir because he himself accepts the liability. Rahimunnissa Begam v. M.A. Srinivasa Ayyangar, 54 I. C. 565, was cited in support of the propositions that an order of abatement is a judgment to be followed by a decree and operated as a judgment in favour of the defendant and that the only course open to the deceased plaintiff's legal representative to escape the effect of the abatement order is to apply to have it set aside. As in the instant case there was no abatement, there is no question of the creditors of Kr. Vijai Verma being concluded by an abatement order.

44. The real basis of the judgment of their Lordships is the merger of the estates of the person suing and the person sued. There must bet two parties to a suit and no suit can be brought by a person against himself. When the right to sue and the liability to be sued merge in one person, the cause of action is extinguished by merger and the suit must fail on that ground. Kr. Vijai Verma had a cause of action to sue Raja Ajai Verma and Kr. Kesho Verma, but when he died the cause of action devolved upon Raja Ajai Verma and Kr. Kesho Verma themselves and was extinguished by merger. When the cause of action was extinguished the suit had to fail.

45. There is no substance in the contention advanced on behalf of Raja Ajai Verma that Kr. Vijai Verma having failed in his suit, the creditors cannot set up his title to the moiety. The contention would have been upheld if Kr. Vijai Verma had failed on the ground that the will was not genuine. He, however, failed, not on merits but because of his death. When he did not fail to substantiate his claim to the moiety, there is no scope for contending that the creditors cannot set up jus tertii in him. All that they are debarred from doing is to set up jus tertii in Sm. Vijai Kunwari, but they have not sought to do this. Ramamurti Dhora v. Secretary of State, 36 Mad. 141, which was referred to on behalf of the appellant, was overruled by the Secretary of State v. Badshah Sahib, 44 Mad. 778, in which a Full Bench held that a judgment in a suit by A against B, a rival claimant for an office, negativing A's title as against B is no bar to a suit by A against a third party for the emoluments of the said office but is only a piece of evidence on the question of A'S title. Another case relied upon is Guda Kueri v. Adnath Pande, 1988 A. L. J. 860. There p sued for a declaration and possession alleging jointness with his nephew B and claiming title to his property against his supposed widow K. K was a party as also her daughter G and her son M. The trial Court, holding that G and M were not the daughter and daughter's son of R and that the plaintiff was joint with R, decreed the suit in his favour. Only G and M appealed and did not make K a party to the appeal. The appellate Court held that P was not joint with R and yet dismissed the appeal because G and M could not set up the right of K against whom the plaintiff had obtained the decree which was not appealed against by K. It was again a decision on merits in favour of the plaintiff, it being found by the trial Court that the plaintiff was joint with R and consequently entitled to the property by survivorship even in the presence of his widow K. K submitted to the finding of the trial Court which became conclusive as against her in spite of the appeal by G and M to which she was not a party. Bajpai J. observed that before G and M could be allowed to set up a jus tertii, they must prove that K had a subsisting right. This is exactly what the creditors have been allowed to do.

46. The order of His Majesty in Council dated 20-12-1938, dismissing the suit of Sm. Vijai Kunwari, is undoubtedly final and conclusive. No Court in India can grant a declaration that the order is illegal and void, Fariduddin Ahmad v. Murtaza Ali Khan, A. I. R. (23) 1936 Oudh 67. Nobody has disputed these propositions, nor are they infringed by the creditors being allowed to prove that the will is genuine and that Kr. Vijai Verma inherited a moiety under it. It was suggested that if anybody felt aggrieved by the judgment of their Lordships of the Judicial Committee, his remedy was to have the judgment reviewed. It would be presumptuous on the part of anyone to say that there was anything wrong with the judgment of their Lordships, The judgment his to be "punctually observed, obeyed and carried into execution." But nobody has ever thought of not doing so. Nobody has refused to observe, obey and carry into execution the finding of their Lordships that Sm. Vijai Kunwari is not an heir of Kr. Vijai Verma.

47. I now proceed to examine whether the will is genuine or not. The original will is not before us, it having been lost. We have to decide the question only by looking at its copy. The original, however, was before the trial Court and this Court in the previous litigation and both have pronounced in favour of its genuineness.

48. [After discussing the circumstances and the evidence the judgment continues as follows :] I find that the will was duly executed by Raja Fateh Singh.

49. Respondent 7, Raja Uma Nath Baksh Singh, who was claimant set No. 81 before the learned Special Judge, died during the pendency of this appeal on 27-7-1946. As no application for substitution of names of his legal representatives was made within three months, the appeal abated as against his legal representatives on 27-10 1946. Long after this date, on 19-4-1947, the appellant applied for the abatement being set aside and for the substitution of the name of Raja Vishambhar Singh vice Raja Uma Nath Baksh Singh, as his son and legal representative. The application was accompanied by an affidavit signed by his Mukhtar-am in which it was asserted that he heard about the death of Raja Uma Nath Baksh Singh only on 6-11-1947 from a clerk of Raja Uma Nath Baksh Singh's counsel and that he verified the fact at Rae-Bareilly on 10-11-1917. The application has been opposed by Raja Vishambar Singh who has filed a counter affidavit sworn by his Mukhtar-am in which it is stated that the news of Raja Uma Nath Baksh Singh's death was published in the "Leader" and the "Pioneer" and that the appellant had paid a condolence visit to Raja Vishambar Singh at Lucknow. The appellant's is Mukhtar-am tiled a re joinder affidavit denying that the appellant read the news of the death in the papers and met Raja Vishambar Singh at Lucknow. The appellant is a Khattri and so was Raja Uma Nath Baksh Singh. Raja Uma Nath Baksh Singh was a Taluqdar and the appellant also is a prominent landlord. It is difficult to believe that the appellant did not know of the death of Raja Uma Nath Baksh Singh for such a long time. The application for the setting aside of the abatement must be rejected and the appeal must stand abated as against respondent 7.

50. Ram Bharosey Lal' respondent 1, was claimant set No. 32 before the learned Special Judge. On 7 9-1927 Kr. Vijai Verma executed a mortgage for Rs. 14,000 in his favour. He sued on the foot of the mortgage (Suit No. 9 of 1933). As Kr. Vijai Verma had died, the suit was instituted against Raja Ajai Verma, Kr. Kesho Verma, and Sm. Vijai Kumari, It was contended by Raja Ajai Verma on the ground that the mortgaged property was a part of Powayan estate in which Kr. Vijai Verma had no interest

and that consequently it was not bound by the mortgage. The mortgaged property consisted of villages which are in dispute and also one house. The suit was decided in 1933. This Court had already held on 22-12-1932 that one moiety in the estate was inherited by Kr. Vijai Verma under the will. On the basis of this judgment, the Court held that the mortgaged property belonged to Kr. Vijai Verma and passed a preliminary decree for Rs. 80,183 odd. In 1934 a final decree was passed. Ram Bharosey Lal lodged his claim on the basis of this decree before the learned Special Judge, he sought a decree for Rs. 41,280 odd. The learned Special Judge allowed his claim for Rs. 28,000. He applied the rule of "Damdupat" as required under Section 14, Encumbered Estates Act, and reduced the interest so as to be equal to the principal. He added the costs of the suit and made the decree executable against the assets of Kr. Vijai Verma.

51. Respondents 2 to 6, who are the sons of Seth Radha Krishan, were claimants set No. 35 before the learned Special Judge. Kr. Vijai Verma executed a mortgage in 1928 for Rs. 23,000 in favour of Seth Radha Krishan, who sued in 1934 Raja Ajai Verma on the foot of the mortgage and obtained a final decree for Rs. 39,901-2-0. His sons, the respondents, lodged a claim before the learned Special Judge on the basis of that decree for a sum of Rs. 41,893-2-0. The learned Special Judge decreed that claim for Rs. 30,913-4-0 against Kr. Vijai Verma's assets.

52. It is pleaded in the grounds of appeal that the plea of res judicata was not available to the respondents 1 to 6 (Ram Bharosey Lal and Sita Ram and his brothers). As I have found that Kr. Vijai Verma had become the owner of a moiety in the mortgaged properties through the will, the appellant, who has inherited the moiety, is liable to satisfy the mortgage decrees oat of it. But even if my interpretation of the judgment of the Judicial Committee were wrong and it were not open to the respondents to prove that the will was genuine and that Kr.Vijai Verma inherited a moiety in the properties, the appellant is still brand by the decrees passed in the mortgage suits. The decrees were passed on the basis of this Court's judgment dated 22-12-1932, but they would not be automatically vacated by the judgment of the Judicial Committee dismissing Kr. Vijai Verma's suit. The Judicial Committee reversed the decision of this Court in that particular suit but not decisions in other suits based on that decision. The remedy of the parties aggrieved by those decisions was to have them reversed through appeal, review or revision after the decision of the Judicial Committee, but they took no such action. Therefore the decrees passed in favour of the respondents remained in force. No question of those decrees operating as res judicata arises at all. In the proceedings before the learned Special Judge they only formed the basis of the claims of the respondents, their rights under the mortgages executed by Kr. Vijai Verma had merged in the decrees. The learned Special Judge, while decreeing claims under Section 15, Encumbered Estates Act was bound by the findings behind those decrees, except to the extent they were against the provisions of Section 14 of the Act. In this instance none of the findings, except the one relating to interest, could be said to be against the provisions of Section 14 and could be ignored by the learned Special Judge. In particular, he was bound by the finding that the mortgaged properties were liable to be sold in satisfaction of the decretal debts due to the respondents. Even if those findings were inconsistent with the decision of the Judicial Committee, the learned Special Judge was not competent to ignore them. He was bound to hold that the mortgaged properties, which are now in the hands of the appellant, were liable to be sold in satisfaction of the decretal debts of the respondents. The question before him was whether the appellant's property is liable to satisfy the respondent's debts or not. The decrees laid down that

it is; this bound the learned Special Judge even though the reasons on account of which the decrees so laid down were wrong or against the judgment Of the Judicial Committee. He was not at all concerned with the question whether the appellant and Kr. Vijai Verma could set up their paramount title to the mortgaged properties in the mortgage suits and whether their claim in this respect was allowed or rejected. All that he was concerned with is that the appellant is now in possession of the properties which were declared under the decrees to be liable to be sold in satisfaction of the respondents' decrees. That is why he has, while passing simple money decrees in favour of the respondents, declared that those decrees will be satisfied only out of the assets of Kr. Vijai Verma in the appellant's hands.

53. I now come to the appeal as directed against the creditors of Raja Ajai Verma and Raja Indra Bikram Singh themselves. Those creditors are respondents 19 to 27. There is no controversy about the appellant's liability to satisfy the debts due to them. But he has raised the question of interest as against Shyam Behari Lal Saigal respondent 19 (creditor set No. 10 before the learned Special Judge) and Ram Autar-Ram Kumar Singh Krishna Kumar Singh, respondents 25-27 (creditors set No. 4 before the learned Special Judge). Shyam Behari Lal Saigal was a creditor of Raja Indra Bikram Singh through several promissory notes bearing interest at 12 per cent. p. a. He obtained a decree in 1929 for Rs. 20,498 9-9 on the basis of the promissory notes. Some thing was paid towards the satisfaction of his decree and he lodged a claim before the learned Special Judge for Rs. 25,499 odd. It was agreed between the parties that the principal of the pronotes should be taken to be Rs. 13,158. The appellant has already paid more than Rs. 15,000 so he contended before the learned Special Judge that the rate of interest fixed in the decree was too high and that as he had paid an amount larger than the principal, he was not liable to pay anything more towards interest, and that his liability under the decree could not exceed Rs. 13,158. He relied upon the rule of "Damdupat" embodied in Section 14 (4) (a) of the Act. The claim that because he had already paid more than Rs. 13,158 he was not liable to pay anything towards interest, has no foundation at all. All that the provision relied upon lays down is that the amount of interest held to be due by the learned Special Judge should not exceed the outstanding portion of the principal on the date of the application, i. e., that he could not pass a decree for more than Rs. 13 158 as interest. It does not lay down that he must take into account the interest paid in the past and that the total amount of interest paid and to be paid should note exceed the outstanding portion of the principal. The learned Special Judge has given Shyam Behari Lal Saigal a decree for the aggregate amount of Rs. 25,000 odd which is less than double the amount of the principal. He has fully complied with the provision relied upon. After the passing of the decree in 1929 in favour of Shyam Behari Lal Saigal on the basis of the promissory notes, the Usurious Loans Act of 1918 was amended in 1921 by the Provincial Government. Under Section 15 the learned Special Judge was bound to accept the findings of the Court passing the decree "except in so far as they are inconsistent with the provisions of Section 14." The relevant provisions of Section 14 are that the outstanding interest should not exceed the outstanding portion of the principal and that "the provisions of the Usurious Loans Act, 1918, will be applicable to proceeding under this Act." The question is whether the Act as it stood prior to its amendment in 1931 should be considered or the Act as it stood after the amendment. Nothing turns upon the use Of the words "Usurious Loans Act, 1918," they do not mean that the learned Special Judge should consider the unamended Act. The citation of the Act remains the same inspite of its amendment in 1934. It does not cease to be an Act of 1918 and does not become an Act of 1934 merely on account of

the amendment. The amendment was not retrospective. When the Court passed the decree in 1929, it could have passed it only on the basis of the Act as it stood then. The decree was consistent with the provisions of that Act. The Court was not bound to treat 12 per cent. p a., interest as usurious and reduce it. Its finding that the interest was not usurious did not become inconsistent with the Act merely because it was later amended but without retrospective effect. It might have been possible to argue that it was inconsistent if the amendment had been given retrospective effect, but it is not possible to argue so when the amendment was not given retrospective effect. Under Section 15 the learned Special Judge had "to see whether the civil Court that passed the decree could have passed the decree which it did pass if that Court had to comply with the provisions of Section 14,"

> to quote the words of Hamilton and Yorke JJ. In Ram Sagar Prasad v. Mt. Shyama, A. I. R. (26) 1939 Oudh 75 quoted with approval by Thomas, Ziaul Hasan and Yorke JJ., in Baijnath Singh v. Tulsi Ram, A. I. R. (26) 1939 Oudh 184. The learned Judges observed in Baijnath Singh's case that for a Special Judge to ignore the finding of the civil Court on the ground that it was inconsistent with the amended Act, though it was consistent with the unamended Act which was in force when it was passed, would be to give retrospective effect to the amendment inconsistently with the provision of Section 1(2) of the amendment Act. Ram Sagar Prasad's case was relied upon by a Full Bench of this Court in Rukunuddin v. Lachhmi Narain, 1945 A. L. J. 444. Sahi Mal Manohar Das v. Iltifatunnissa Begum, 1941 A.L.J. 366 was cited at the Bar, but I do not see its relevancy. There was no question there whether a Special Judge should ignore a finding reached before the amendment on the ground that it was inconsistent with the amended Act. Only two questions were decided in that case. One is whether a Special Judge can interfere with a decree though the Usurious Loans Act itself prohibits interference with a decree, and the other is whether he can apply the provisions of the Usurious Loans Act even though the loan was before 1918 and the civil Court passing the decree rightly refused to apply its provisions to the case. The first question has not been raised before us, and the second question could not be raised because the promissory notes were of 1924. It is true that the Special Judge in that case reduced the interest from 81/2 per cent. compoundable to 7 per cent. simple and this was confirmed by a Bench of this Court. Though the Special Judge had apparently given effect to the amended Act, it was not argued in that case that he should have at the most given effect to the unamended Act and such an argument could not have been raised even because what the Special Judge had done could have been done under the unamended Act.

54. The only effect of the amendment of the Usurious Loans Act is that the discretion given to the Court is taken away to some extent. Under the amended provision the Court must bold a rate of interest exceeding a certain rate as usurious and a rate not exceeding another certain rate as not usurious. In the case of an unsecured loan, the Court has full discretion in respect of a rate of interest ranging between 9 per cent. p. a. and 24 per cent. p. a. simple, it must hold a rate of interest below 9 per cent. to be not usurious and a rate of interest above 24 per cent. to be usurious. So even under the amended provision a Court is not bound to declare interest at 12 per cent. p. a. to be usurious and the decree passed by the Civil Court in 1929 calculating interest at 12 per cent. p. a.

cannot be said to be inconsistent with the provisions of even the amended Act. The learned Special Judge could not, therefore, interfere with the decree in order to reduce interest. The decree passed by him for Rs. 25,499 odd is correct.

55. Ram Autar, Ram Kumar Singh and Krishna Kumar Singh were mortgagees under a mortgage of 1926 for Rs. 10,000 bearing interest at Rs. 13-8-0 p. a. compoundable yearly. They filed a suit against the appellant in 1929. The Civil Court applied the provisions of the Usurious Loans Act and reduced the rate of interest. It is not known to what extent it reduced it. Before the learned Special Judge the appellant claimed further reduction and the learned Special Judge refused it. Under the amended provision a rate of interest exceeding 12 per cent. p. a. would be usurious in the case of first mortgage and a rate of interest exceeding 24 per cent. would be usurious in the case of a subsequent mortgage. It is not known whether the mortgage in favour of Ram Autar, etc. was a first mortgage for a subsequent mortgage. But even if it was a first mortgage and even if the Civil Court had reduced the interest to 12 per cent. p. a. the decree could not be said to be inconsistent with the provisions of the amended Act. The civil Court was not bound to reduce the rate of interest to a particular figure so long as it was not higher than 12 in the case of a first mortgage and 24 per cent. in the case of a subsequent mortgage. What I have said when dealing with the Case of Shyam Behari Lal Saigal holds good here also, and the decree passed by the learned Special Judge in favour of Ram Autar, etc., is correct.

56. Manohar Lal, respondent 18, (creditor set No. 29 before the learned Special Judge) obtained one simple money decree in 1926 against Rani Kamla Devi and another simple money decree in 1926 against Kr. Vijai Verma. He filed a claim on the basis of these decrees against the appellant and the learned Special Judge has decreed his claim on the basis of both the decrees. The appellant contends that he is not an heir of Rani Kamla Devi and has not received her assets. But his name was brought on record in place of Rani Kamla Devi's in the decree on the ground of his being her representative and in possession of her assets, the decree was twice pat in execution and part of the decretal money has also been recovered from him. The amount decreed against him by the learned Special Judge is a small amount of Rs. 748-15-0. It is too late for him to contend that he has not received Rani Kamla Devi's assets. He does not appear to have pressed before the learned Special Judge that it should be mentioned in the decree that it was against Rani Kamla Devi's assets in his hands. I am not prepared how to add this qualification in the decree passed by the learned Special Judge.

57. In the result all decrees passed by the learned Special Judge in favour of the respondents must be confirmed.

58. The debts, due from the appellant fall in four classes : (i) debts due from him personally, (2) debts due from Raja Fateh Singh and Raja Indra Bikram Singh, (3) debts due from Rani Kamla Devi, and (4) debts due from Kr. Vijai Verma. His personal creditors, Murari Lal, Savitri Devi, Sri Ram, Saraswati Prasad, Partap Singh, Nanhu Mal, etc., lodged claims before the learned Special Judge. The debts due from Raja Fateh Singh and Raja Indra Bikram Singh are recoverable only from their assets in the appellant's possession, but the learned Special Judge has not said so in the decrees passed by him. Similarly, he, has not said that the debt due from Rani Kamla Devi is to be recovered from her assets in the appellant's possession. He has said only in respect of the debts due

from Kr. Vijai Verma that they are recoverable from his assets, in the appellant's hands. It is not stated why this distinction has been made between the debts duo from, various ancestors. Even if the debts due from Raja Fateh Singh and Raja Indra Bikram Singh were recoverable from all his property on account of the pious obligation, the same could not be said in respect of the debt due from Rani Kamla Devi. In any case so long as some debts are recoverable from him personally and some are recoverable from only particular property such as that inherited by him from Kr. Vijai Verma, the learned Special Judge ought to have complied with the provisions of Section 49(2), Encumbered Estates Act. When some debts are recoverable from the debtor's entire property and other debts are recoverable only from certain property in his possession, it is impossible to carry out liquidation proceedings. The liquidation proceedings contemplate that the entire property is liable for all the debts. That is why the Legislature has made provision in Section 49 (2) to deal with a case in which some debts are recovered from the entire property and others from certain specified property. The learned Special Judge has directed that the debts due from Raja Fateh Singh will be realised, then the debts due from Kr. Vijai Verma and Raja Indra Bikram Singh and then the debts due from the appellant and Rani Kamla Devi. This direction is likely to cause serious trouble in liquidation proceedings and it may even be impossible to give full effect to it. It can not be allowed to stand. The appellant must elect (1) to withdraw his application under Section 4, Encumbered Estates Act, or (2) to pay off his personal debts and also those due from Raja Fateh Singh, Raja Indra Bikram Singh and Rani Kamla Devi which have been treated by the learned Special Judge as his personal debts and let the debts due from Kr. Vijai Verma be recovered in liquidation proceedings from the property inherited by him from Kr. Vijai Verma, or (3) to have the whole of his property dealt with under the Act. He must mike his election within two months, If he refuses or neglects to exercise any of the options, his application would be liable to be dismissed.

59. The case should be listed again for final orders when the appellant informs the Court of his election or as early as may be after 30-4-1950.

60. As we differ in our judgments, we direct that this case be placed before the Hon'ble the Chief Justice for obtaining the opinion of a third Judge on the following point on which we differ.

61. Were the creditors of Kr. Vijai Verma debarred by the order of His Majesty in Council dated 20-12-1938 from proving that a moiety of the Pawayan State (except certain villages) is in the hands of the appellant, Raja Ajai Verma, as assets of Kr. Vijai Verma ?"

Wanchoo J.

62. This appeal has come up before me on account of a difference of opinion between the learned Chief Justice and Desai J. The question referred to me for opinion is as follows :

> "Were the creditors of Kr. Vijai Verma debarred by the order of His Majesty in Council, dated 20 12-1938 from proving that a moiety of the Pawayan Estate (except certain villages) which is in the hands of the appellant, Raja Ajai Verma, as assets of Kr. Vijai Verma?"

63. The facts which are necessary for reply to this question may be set out first. (After stating the facts, his Lordship proceeded as under:)

64. The point for decision, therefore, is whether in view of the fact that their Lordships had not gone into the question of will, it is open to the creditors, in the Encumbered Estates Act proceedings, to set up that will and prove that on the basis of it Kunwar Vijai Verma was entitled to half the property and that that half was now in possession of Raja Ajai Verma as assets of Kunwar Vijai Verma. This will depend upon whether the principle of res judicata applies to this case.

65. The decision of their Lordship of the Judicial Committee is reported in Ajai Verma v. Mt. Vijai Kumari, 1989 A. L. J. 264. At p. 266, their Lordships stated as follows :

> "With the consent of the parties their Lordships took up first the question of custom, and having come, somewhat reluctantly, to the conclusion that the custom is proved, they have not found it necessary to go into the question of the will."

At the end of the judgment, their Lordships observed at p. 273 as under :

> "The question of costs in this heavy litigation presents some difficulties. If Vijai Verma had survived and the finding of the High Court as to the validity of his father's will had stood, he would have succeeded in his suit, and have been entitled to his costs throughout. But the question of the will is still open, and his daughter's claim to stand in his shoes has failed. In the circumstances their Lordships think that justice will be met by leaving each party to pay their own costs in the Indian Courts, and awarding the costs of this appeal to the successful appellant, these costs to be paid by the respondent Mt. Vijai Kumari."

66. There is no doubt that their Lordships did not decide the question of the will. But even so, they dismissed the suit of Kunwar Vijai Verma. It was open to their Lordships, on the finding that Shrimati Vijai Kunwari was not entitled to inherit, to have held that both the appeals in the High Court abated because in one case, the appellant's heir was not brought on the record and in the other case, the respondent's heir was not brought on record within the period of limitation. If their Lordships had come to that conclusion, both the appeals before the High Court would have failed and the decision of the trial Court decreeing half the property in favour of Kunwar Vijai Verma, barring eight villages, would have stood. It was, therefore, open to their Lordships to have advised His Majesty accordingly, But they did not do so. It is not possible to say that their Lordships could not have visualised this way of disposing of the appeals before them, It is, therefore, idle to speculate on the reasons which impelled their Lordships to dismiss the suit of Kunwar Vijai Verma. It cannot be said that when their Lordships used the words "add that the suit originally filed by Vijai Verma should be dismissed," they meant anything other than the suit which started in 1922 on the plaint filed by Kunwar Vijai Verma. I do not see how it can be said that when their Lordships used the words quoted above, they meant to dismiss some suit of Shrimati Vijai Kunwari. Though, therefore, their Lordships had not decided the question of will, they certainly dismissed the suit which had been originally filed by Kunwar Vijai Verma in 1922.

67. It remains then to consider the effect off this decision of their Lordships of the Judicial Committee. Section 11, Civil P. C. provides that:

> "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 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. . . . ."

68. The question whether the creditors can now put forward the will, in my opinion, depends upon the answer to the question whether the heirs of Kunwar Vijai Verma can now put forward the will and succeed as against Raja Ajai Verma. If the heirs cannot do so, the creditors, who, are third parties, cannot say that the property belonging to Kunwar Vijai Verma was in the hands of Raja Ajai Verma as asset of Kunwar Vijai Verma.

69. Section 11, Civil P. C. can be divided into two parts. In the first place, when one suit has been decided inter partes, a second suit between, the same parties or their successors-in-interest in which the matter directly and substantially in issue is the, same as has already been decided in the former suit, is barred. In the second place, when an, issue has been decided inter partes, the same issue cannot be raised in a subsequent suit between the same parties even though the subsequent, suit may be based on a somewhat different cause of action.

70. The present case is, in ray opinion, of the first and not of the second kind. Therefore, these authorities, which lay down that where a particular issue has been left open in a previous suit, it can be raised in a subsequent suit based on a somewhat different cause of action, do not apply to the present case. As an instance of the second kind, I may mention the case of Abdullah Asghar Ali Khan v. Ganesh Dass, 1917 A. L. J. 889. In that case, Abdullah Asghar Ali Khan first sued for cancellation of a bond executed by him in favour of Ganesh Dass on the ground of false representation. That suit was dismissed on the ground that it was not properly framed and the Court expressly refrained from going into the merits. That dismissal was held not to bar a trial of the issue whether there was a false, representation on the part of Ganesh Dass or not, when raised in a subsequent suit brought by Ganesh Dass to recover his money on the foot of the bond. It will be seen that the subsequent suit was based on a somewhat different cause of action and that was why the decision in the previous suit was not res judicata in the subsequent suit because the question of false representation was not considered on the merits at all in the first suit.

71. Another case of the second kind is Shiam Lal v. Radha Ballabh, 48 ALL. 34. In that case certain property was sold and there was a suit for possession of it alleging that it was joint family property which the vendor could not sell. The vendee denied that it was joint family property and claimed that he had spent Rs. 5,000 over its improvement. The suit was decreed for joint possession with the vendee, but the question whether there had been an improvement was not decided. Later the same plaintiff brought a suit for partition of his share and the vendee again raised the question of improvement. It was then held that as the issue of improvement had not been decided in the

previous suit, it may be gone into in the subsequent suit. It will again be noticed that the subsequent suit was based on a somewhat different cause of action though the issue, which had arisen in the previous suit and had not been decided, also arose in the subsequent suit The reason for these decisions is that the issue in the previous suit had not been finally decided and, therefore, could be raised in the subsequent suit.

72. I have already said that the present case is of the first kind, namely, where the second suit is itself barred because the matter in issue in the second suit was directly and substantially in issue in the first suit and has been decided finally. In this class of, cases, it is not open to the party, who lost the first suit, to file a second suit for the same relief based on the same cause of action except in certain well-defined circumstances. A second suit can be entertained in such oases either when the first suit has been withdrawn under Order XXIII, Rule 1, in which case, of course, there will be no decision and Section 11 will not apply, or when, the first suit has been dismissed on a, technical preliminary ground. As an instance of this, I may refer to the case of Sheo Sagar Singh v. Sita Ram Singh, 24 Cal. 616 (P. C.). In that case, a suit had been brought by A, a woman, to recover, possession over her father's property which had been usurped by her first cousins. There was an appeal by the cousins during the pendency of which A died. The cousins did not proceed with the appeal on the ground that A had no son. Then cousins filed a suit for declaration that A left no son. That suit was dismissed by the trial Court on the ground that they had failed to prove that A left no son. But the High Court, on appeal, dismissed the suit on the sole ground that they had not impleaded two other persons who claimed to be interested in the estate of A's father. Later, the cousins purchased the interest of these two persons and again sued for a declaration that S was not A's son. It was then contended that the decision in the previous suit by the cousins that A had left no son, operated as res judicata. This contention was repelled by their Lordships of the Judicial Committee on the ground that the High Court had not decided the question whether A had left a son and merely dismissed the appeal on the ground that B and H had not been made parting to it. It will be seen from these facts that where a suit is dismissed on a technical or preliminary ground like non-joinder of parties a second suit for the same relief against the same parties may be brought after removing the technical defect if, otherwise, the suit is within time. But the circumstances, in the present case, are not of this technical and preliminary nature and the suit has not been dismissed for any technical defect like non-joinder of necessary parties. All the necessary parties were before the trial Court in this case and what had happened was that the plaintiff had died after the decree of the trial. Court and his rightful heirs were not brought on the record. As I have already pointed out, it was open to their Lordships to have merely held that the two appeals in the High Court had abated. But they did not do so and specifically said that the suit originally filed by Kunwar Vijai Verma was dismissed, even though they had not decided the question of will. In these circumstances, I am of opinion that their Lordships must be held to have negatived, by implication, both the grounds on which Kunwar Vijai Verma was claiming a half share in the estate left by Raja Fateh Singh. It is true that they had said that they had not gone into the question of the will and, while dealing with the question of costs, said that the question of the will was Still open. But when they dismissed the suit originally filed by Kunwar Vijai Verma, the result was that anybody, claiming to be the heir of Kunwar Vijai Verma, could not claim to set up the will and succeed on the basis thereof.

73. I may here refer to two cases which have been relied upon by the parties and which are both decided by their Lordships of the Judicial Committee. The first is Parsotam Gir v. Narbada Gir, 21 ALL. 503 which was relied upon by the creditors, while the second is Fateh Singh v. Jagannath Bakhsh Singh, 47 ALL. 158, which has been relied upon by the appellant. In Parsotom Gir's case, there had been a previous suit between the same parties in which the same claim upon title was made and a decree dismissed the suit. But the judgment in the former suit stated that it was left open to the plaintiff to sue again and that no matters affecting the rights of the parties were decided between them. It was then held that the prior decree was not a final decision within the meaning of Section 13. Civil P. C. (This refers to the Civil Procedure Code of 1882) and the defence of res judicata was not maintained. This decision certainly supports the creditors and, if I may say so with all respect, is difficult to reconcile with the law of res judicata, as laid down by their Lordships of the Judicial Committee themselves in the later case, Fateh Singh v. Jagannath Bakhsh Singh, reported in 47 ALL. 159. There are certain passages, however, in the judgment which may, perhaps, show why their Lordships held that the decision of the previous suit was not res judicata though the same plaintiff had brought it for practically the same relief against the same defendant and on, more or less, the same cause of action. At page 512 in the earlier Allahabad case 21 ALL. 505, their Lordships say :

> "On the 14th November 1896 the learned Judges of the High Court pronounced a judgment which is almost, if not quite, as difficult to understand as the judgment of their prodecessors in 1886. They observe that the difficulty which they had felt in the case had been 'in trying to ascertain from the judgment of the Court in the previous suit what were the findings upon which this Court in that suit made its decree dismissing the suit". They then address themselves to the solution of that problem. They begin by rejecting the only part of the former judgment which is absolutely clear, and they express their opinion that 'the only possible construction of that judgment which would make it consistent throughout and would not suggest absolutely inconsistent findings' is a construction which (if their Lordships have rightly apprehended its effect) leaves it undetermined whether the ikrarnama of 1868 was or was not proved or was or was not binding: on the parties and attributes to learned Judges of one of the highest Courts of Appeal in India the view that a person who executes a solemn instrument in the terms of such an ikrarnama and accepts the management of property on the conditions therein contained is at liberty to repudiate the trust and to set up an adverse title in some other religious foundation if not in himself without being liable to removal either by the parties interested or by the Court."

It may be that their Lordships' decision was affected by considerations which are set forth in the above quotation.

73a. In the case of Fateh Singh v. Jagannath Bakhsh Singh, 47 ALL. 158, the appellants brought a suit to set aside a gift made by a Hindu widow out of her husband's estate. After the death of the widow, the appellants applied to amend their plaint by setting up a family custom of inheritance and by claiming possession of a share in the whole property. Upon that application failing and the

appellants admitting that apart from the alleged custom they could not succeed, the Subordinate Judge dismissed the suit, but gave them liberty to file a fresh suit for possession. Subsequently the appellants brought the present suit to recover from the parties to the former suit a share in the property basing their claim upon family custom. It was then held that the suit was barred by res judicata under the Code of Civil Procedure of 1908, Section 11, Explanation 4. It was also held that the Subordinate Judge, having dismissed the suit, had no power to give liberty to bring a fresh suit.

74. To my mind, this later case applies with full force to the circumstances of the present case. Whatever may have been the reasons which led their Lordships of the Judicial Committee to dismiss the suit as originally filed by Kunwar Vijai Verma, in spite of the fact that their Lordships said that the question of the will had not been decided by them, the dismissal clearly, in the circumstances of the present case, amounted to a negation of the claim under the will. The heirs of Kunwar Vijai Verma could not possibly bring a second suit to recover half the property on the basis of that will when the suit of Vijai Verma, himself for half the property, based as it was on inheritance and, in the alternative, on the will, was dismissed. Further as their Lordships disregarded in Fateh Singh v. Jagannath Bakhsh Singh, 47 ALL. 158, the rider put in by the Subordinate Judge giving an opportunity to file a fresh suit for possession, so when the suit of Kunwar Vijai Verma, as originally filed, was dismissed by their Lordships, the fact that their Lordships had not gone into the question of the will and had said that it was still open, when dealing with the question of costs, would not, under the circumstances, make the decision any the less res judicata and the heirs of Kunwar Vijai Verma would be barred from bringing a suit for recovery of half the property on the basis of the will.

75. If, therefore, the heirs of Kunwar, Vijai Verma could not bring a suit to recover half the property on the basis of this will after the decision of their Lordships of 20-12-1938, it is not open to the creditors to set up the will and say that half the property in the hands of the appellant is the assets of Kunwar Vijai Verma. Section 11, in terms, would not bar the creditors because they were not parties to the previous litigation and cannot be said to be claiming under Kunwar Vijai Verma. But they cannot claim any rights higher than those of the heirs, of Kunwar Vijai Verma to set up the will. I may, in this connection, refer to the case at Rahim-un-nissa Begam v. M. A. Srinivasa Ayyanagar, 54 I. C. 565. In that case, Rahim-un-nissa Begam had brought a suit for recovery of certain properties against her father and his transferees. She died during the pendency of the suit and an order was made declaring that the suit had abated. There, after the creditors of hers applied for setting aside the abatement, but that application was rejected. The creditors then obtained Letters of administration of Rahim-un-nissa Begam's estate and again applied for setting aside the abatement, but that was also rejected. Thereafter the creditors attached the property which was in dispute in the former suit claiming it to be the assets of Rahim-un-nissa Begam in the hands of her father and the transferees and the question arose whether they could do so. The Madras High Court held that a person, who had obtained a decree against the deceased plaintiff, stood in no better position and was equally concluded by the abatement order and though the principle of res judicata may not apply to him, he has to displace a chain in the title of the defendant and has to establish against a party in possession and in whose favour an order of Court has been passed that, that party is not entitled to retain possession as owner of the property. The principle of this case applies to the creditors in the present case also and they cannot say, after the dismissal of the suit originally brought by Kunwar Vijai Verma, that Raja Ajai Verma was not entitled to the property as owner in

his own right.

76. My answer, therefore, to the question is that the creditors of Kunwar Vijai Verma are debarred by the order of His Majesty in Council, dated 20-12-1938, from proving that a moiety of the Pawayan Estate (except certain villages) is in the hands of the appellant Raja Ajai Verma, as assets of Kunwar Vijai Verma.

Malik, C.J.

77. On a difference of opinion between us as to the effect of the order of His Majesty in Council, dated 20-12-1938, the point was referred to a third Judge. The opinion of the learned third Judge is that the creditors of Kunwar Vijai Verma are debarred by the order of His Majesty in Council, dated 20-12-1938, from proving that a moiety of the Pawayan Estate (except certain villages) is in the hands of the appellant, Raja Ajai Verma, as assets of Kunwar Vijai Verma.

78. As a result, of that finding the appeal is dismissed against respondents 1 to 6, that is Ram Bharosey Lal, Sita Ram, Ram Kishan, Sri Kishan, Gopal Kishan and Gopi Kishan. (Rest of the judgment is not material for the report.)