Sajjadanashin Sayed Md.B.E.Edr.(D)By ... vs Musa Dadabhai Ummer & Others on 23 February, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1238, 2000 (3) SCC 350, 2000 AIR SCW 901, (2000) 2 JT 352 (SC), 2000 (2) ALL CJ 1425, (2000) 2 ALLMR 444 (SC), (2000) 2 KER LT 89, 2000 (2) ALL MR 444, 2000 (4) LRI 119, 2000 (2) SCALE 52, 2000 (2) JT 352, 2000 (2) UJ (SC) 960, 2000 (3) SRJ 265, (2000) 1 CIVILCOURTC 712, (2000) 3 GUJ LR 1913, (2000) 2 LANDLR 281, (2000) 2 MAD LJ 172, (2000) 2 SCJ 113, (2000) 2 SUPREME 121, (2000) 2 SCALE 52, (2000) WLC(SC)CVL 170, (2001) 1 CIVLJ 344, (2000) 1 CURCC 286, 2000 (3) BOM LR 516, 2000 BOM LR 3 516

Author: M.Jagannadha Rao

Bench: R.C.Lahoti, M.J.Rao

CASE NO.:
Appeal (civil) 5390 of 1985

PETITIONER:
SAJJADANASHIN SAYED MD.B.E.EDR.(D)BY LRS

Vs.

RESPONDENT:
MUSA DADABHAI UMMER & OTHERS .

DATE OF JUDGMENT: 23/02/2000

BENCH:
R.C.Lahoti, M.J.Rao

JUDGMENT:

M.JAGANNADHA RAO,J.

L.....I.....T.....T.....T.....T.....T.....T..J This appeal arises out of orders passed rejecting the preliminary objection raised by the appellant. The preliminary objection was that the present proceedings initiated by the deceased first respondent on 21.8.1967 before the Assistant Charity Commissioner, Surat Region under section 19 of the Bombay Public Trusts Act, 1950 to declare

three Rozas (situated at three places Ahmedabad, Broach and Surat) were public trusts, were barred by res judicata in view of three decisions arrived at earlier - one in 1931, another dated 19.1.1967 and a third one initiated in 1965. In the present proceedings, which relate to the Rozas at all the three places, the Assistant Commissioner in his orders in Inquiry No.142/67 dated 26.7.68 accepted the preliminary objection of res judicata but the Joint Charity Commissioner, Gujarat in his order in Appeal No.85/68 dated 17.12.73 did not accept the plea (before him, the plea was confined to the Rozas at Broach and Surat). He set aside the order and remanded the matter for inquiry. The said order of the Joint Commissioner was affirmed on 30.9.76 by the learned Assistant Judge in Misc. Civil Application No.32 of 1974 and by the Division Bench of the Gujarat High Court in First Appeal No.985 of 1976 on 27.7.85. As the preliminary objection was negatived, a direction was given to the Assistant Commissioner to dispose of the Inquiry No.142 of 1967 on merits. Aggrieved by the above-said orders, the appellant(who was respondent in the main Inquiry No.142/67) has filed this appeal and has raised the same plea of res judicata before us once again. In the present appeal, the plea of res judicata is confined to the Rozas at Broach and Surat. As the contention of res judicata raised by the appellant concerns three earlier proceedings, we shall have to refer to them. But we may also point out that in certain other proceedings relied upon by the respondents a view has already been taken that principle of res judicata does not apply. These other proceedings were those started in 1954 under section 19 of the Bombay Act (Appl. 289/54) by one Ali Miya Mahmadiya & others, in connection with the Ahmedabad Roza. There a similar plea of res judicata was raised by the appellant Sayed Mohumed Baquir El-Edroos and the said plea was rejected by the Deputy Commissioner on 23.4.56 and that decision was confirmed by the Charity Commissioner in Appeal 125/56 on 29.5.57,-reversed by the District Judge in 149/57 on 29.12.1959 - but the plea of res judicata was once again rejected by a learned Single Judge of the Gujarat High Court on 24.4.67 in the case reported in Ali Miya vs. Sayed Mohammed [1968 (9) Guj.L.R. 1002] and that decision of the learned Single Judge was affirmed on 14.9.70 by a Division Bench in Sayed Mohammed vs. Ali Miya [1972 (13) Guj.L.R.285]. In fact, in the present proceedings, the Joint Commissioner, the Assistant Judge and the High Court have all applied the ratio of those two decisions relating to Ahmedabad Roza

- on the question of res judicata - in relation to the Broach and Surat Rozas as well. It was held that on the same ratio, that the earlier orders relied upon by the appellant declaring the Broach and Surat Rozas to be private trusts and not public trusts, were not res judicata.

We may also point out that special Leave petitions Nos.2574, 2575/71 against the Division Bench Judgment of the High Court dated 14.9.70 were got dismissed by the appellant as withdrawn on 16.11.1971. No doubt, this Court observed that the plea of res judicata would be available to the appellant in the regular inquiry in that case. Later on, the District Judge renumbered the Petition 149/57 as CMA 352/67 and on merits held that the Ahmedabad Roza was a public trust, RFA 488/72 filed by the appellant was dismissed by the High Court on 4.5.73 and SLP (CA No.1974/75) was dismissed for non- prosecution by this Court. Thus the rejection of the plea of res judicata and the finding on merits so far as the Ahmedabad Roza was concerned, became final. That was why in the present proceedings at the stage of Joint Charity Commissioner, the plea of res judicata was confined to the Rozas at Broach and Surat. The earlier history of these wakfs is set out in the reported judgments of the Gujarat High Court referred to above. These judgments refer to two other

judgments of the Bombay High Court. Edroos family in Gujarat claimed to be descendants of Hazarat Imam Ali, the son-in-law and cousin of Prophet Muhamed. One of the descendants of the said Hazrat came down to India in 1542 A.D. and founded his Gadi at Ahmedabad, Broach and Surat. The members of the Edroos family were Sajjadanashins or Mutavallis of the wakf throughout. The three Rozas at the three places as well as the villages which were granted - not only for the maintenance of these Rozas but also for the benefit of the Waquif's family, - constituted the wakf. The holder was buried in the house and his Dargah is situated in this place. There is also a place for reciting prayers. In Sayed Abdul Edroos vs. Sayad Zain Sayad Hasan Edroos [ILR 13 Bom. 555], a Division Bench of the Bombay High Court, traced the history of the wakf and held that the custom of primogeniture did not apply to the office of Sajjadanishin or Mutavalli of this wakf. In the next litigation, in Saiyad Jaffar El Edroos vs. Jayad Mahomed El Edroos [ILR 39 Bom. 277], which is more important, another Division Bench held, after construing the royal grants relating to the villages Umrao and Orma that the grants were primarily for the Rozas and Dargas and they clearly constituted "wakf" but that the Sajjadanashin or Mutavalli had, however, a right to the surplus income left over after discharge of the legal obligations regarding the wakf. In exercise of that power over the surplus income, the Sajjadanishin, it was held, could provide for the needs of the indigent members of the family and this was a pious obligation which was only a moral obligation and not a legal obligation and hence the indigent members of the Edroos family could not, as of right, claim maintenance out of the surplus income. We shall now come to the 1928 suit filed under Section 92 of the Code of Civil Procedure which is the first of the cases giving rise to the plea of res judicata. This was a Regular Suit No.201 of 1928 filed under section 92 CPC by three plaintiffs impleading the father of Sayed Mohamed Baquir-El-Edroos, the appellant in this appeal, as defendant. (The appellant before us was also the appellant before the Division Bench which decided Sayed Mohamed vs. Ali Miya 1972 (13) Guj. L.R.285 in relation to the Ahmedabad Roza). The plaintiffs contended that the appellant's father was not legally appointed to the shrines at the three places and that he was mismanaging the properties and prayed that an injunction should be granted. They also asked for the framing of a scheme and for appointing a board of trustees. The Collector granted permission on 22.2.28 for filing the suit under section 92 CPC. The first Sub Judge, Surat dismissed the suit on 6.10.1931.

Appeal No.80/31 filed by the plaintiffs was also dismissed and cross-objections were allowed on 21.11.1938. The Second appeal to the High Court was withdrawn. In the judgment of the District Court, we find that there were 8 points. Points 1 to 7 related to the validity of appointment of the defendant and the nature of the office and the right to the surplus etc. On those points, it was held that the appointment of the defendant as Sajjadanishin was valid and that the grant of the property was both for the Rozas and for the maintenance, presumably of Sajjadanishin and his family members. It was held that the Sajjadanishin had complete power of disposal over the surplus as he was not in the position of an ordinary trustee. While the upkeep of the Dargas, the holding of fairs and proper attention to the visitors to the Rozas was a primary legal obligation and a charge on the income of then villages, the Sajjadanishin, it was held, had full power over the surplus. On this basis, the plaintiff's plea that the Sajjadanishin was misutilising the income was rejected by the District Judge and the judgment of the trial Judge dated 6.10.31 dismissing the suit filed under Section 92 of the Code of Civil Procedure was affirmed. This judgment of the learned District Judge is dated 21.11.38.

The District Court in its judgment of 1931 had also framed Issue 9. The issue was as to whether the wakf was a private wakf or a public wakf and the learned Judge found that the wakf was a private wakf. He observed in para 15 of his judgment that from 1746 A.D. onwards, the "Sajjadanishins were using the revenue of these villages for their own maintenance and that of the members of their families and other dependants" and this was permissible according to the earlier judgment of the Bombay High Court in Saiyad Jaffar El Edroos Case (39 Bom.L.R.277). Always the Sajjadanishin was from the family and never a stranger or outsider. These facts, the learned District Judge held were sufficient to lead to the conclusion that the wakf was a `private' one. He observed that the documents in the case were also inconsistent with the wakf being a public one. It is this finding that is pleaded by the appellant as res judicata in the present proceedings. We have already stated that in relation to the Roza at Ahmedabad, an identical plea raised by the appellant was rejected by the learned Single Judge of the Bombay High Court in Ali Miya vs. Sayed Mohamed [(1968) 9. Guj.L.R.1002] and on appeal by the Division Bench in Sayed Mohamed vs. Ali Miya [(1972) 13 Guj.L.R. 285]. It is true that the above-said reported judgments of the High Court related to the Ahmedabad Roza and were rendered at the preliminary stage on a plea of res judicata but we find that the learned Judges in the said judgments have gone into the matter in detail as to why the decision rendered by the District Judge on 21.11.1938 would not be res judicata in the 1954 proceedings initiated under section 19 of the Maharashtra Public Trusts Act, 1950. Our task in this behalf has therefore been lightened and we will be adverting to the reasons given by the Division Bench of the High Court in Sayed Mahomed vs. ali Miya [(1972) Guj.L.R. 285] on the question of res judicata under Point 2. Under point 3, we shall refer to two other proceedings of 1967 and 1965 as these two decisions of the authorities also relied upon the 1931 judgment. The points that arise for consideration are:

> (i) What is meant in Section 11, CPC by an issue being collaterally or incidentally in issue as distinct from being directly and substantially in issue?
>
> (ii) Whether the decision of the District Judge, Surat in Appeal No.80/31 operates as res judicata in the present proceedings?
>
> (iii) Whether the decision of the Assistant Charity Commissioner dated 19.1.1967 in Inquiry No.14/64 filed by Peer Mohammed Fruitwala and Inquiry No.3/65 filed by Sayed Hasan Sayed Mohammed El-Edroos holding the properties in respect of Dargahs at Ahmedabad, Broach and Surat not to be public trust are res judicata in the present proceedings?

Point No.1:

> The words `collaterally or incidentally in issue' have come up for interpretation in several common law jurisdictions in the context of the principle of res judicata. While the principle has been accepted that matters collaterally or incidentally in issue are not ordinarily res judicata, it has however been accepted that there are exceptions to this rule. The English, American, Australian and Indian Courts and Jurists have therefore proceeded to lay down certain tests to find out if even an earlier finding on

such an issue can be res judicata in a later proceeding. There appears to be a common thread in the tests laid down in all these countries.* We shall therefore refer to these developments.

_____ *See Holdsworth History of English Law 147-54 (1944); Millar - The Historical Relation of Estoppel by Record 35 Ill.L.Rev.41 (1940); Millar - res Judicata in Continental and Anglo American Law - 39 Mich. L.R.1(1940); Comparative Study (1940) Wisc L.R. 234; Development in Res Judicata 1952. 65 Harv. LR 818;

Matters collaterally or incidentally in issue:

It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

As pointed out in Halsbury's Laws of England (Vol. 16, para 1538) (4th Ed), the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question (R Vs. Knaptoft Inhabitants (1824) B & C 883; Heptulla Bros Vs. Thakore (1956(1) WLR. 289 (297)(PC); or if any matter was incidentally cognizable (Sanders (otherwise Saunders) Vs. Sanders (otherwise Saunders) 1952 (2) All ERR p. 767 at 771). A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression 'collaterally or incidentally' in issue implies that there is another matter which is 'directly and substantially' in issue (Mulla, CPC 15th Ed., p.104).

Difficulty in distinguishing whether a matter was directly in issue or collaterally or incidentally in issue and tests laid down in various Courts:

Difficulty in this area of law has been felt in various jurisdictions and therefore some tests have been evolved. Halsbury says (Vol.16, para 1538) (4th Ed.) that while the general principle is clear, "difficulty arises in the application of the rule in determining in each case what was the point decided and what was the matter incidentally cognizable, and the opinion of Judges seems to have undergone some fluctuations". Spencer Bower and Turner on 'The Doctrine of Res Judicata' (2nd Ed, 1969) (p.181) refer to the English and Australian experience and quote Dixon, J. of the Australian High Court in Blair Vs. Curran (1939)62. CLR. 464 (553) to say: "The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision on judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining

considerations, yet are not in point of law the essential foundation of a groundwork of the judgment". The authors say that in order to understand this essential distinction, one has always to inquire with unrelenting severity_ - is the determination upon which it is sought to find an estoppel so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do. It is suggested by Dixon J that even where this inquiry is answered satisfactorily, there is still another test to pass: viz. whether the determination is the 'immediate foundation' of the decision as opposed to merely "a proposition collateral or subsidiary only, i.e. not more than part of the reasoning supporting the conclusion". It is well settled, say the above authors, "that a mere step in reasoning is insufficient. What is required is no less than the determination of law, or fact or both, fundamental to the substantive decision". American jurists and Courts have also found difficulty but they have tried to lay down some tests. It is conceded in Corpus Juris Secundum (Vol.50, para

725) that "it is sometimes difficult to determine when particular issue determined is of sufficient dignity to be covered by the rule of estoppel. It is said that estoppel by judgment does not extend to any matter which was only incidentally cognizable or which came collaterally in question, although it may have arisen in the case and have been judicially passed on (Per Taft,J.

in North Carolina R Co.Vs. Story) (45 S.Ct.531 = 268 US

288). But this rule does not however prevent a judgment from constituting an estoppel with reference to incidental matters necessarily adjudicated in determining the ultimate vital point. American Jurisprudence (Vol. 46 Judgments para 422) too says:

"Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties". (Per Harlan, J. in Hoag vs. New Jersey) (356, US 464 = 78. S.Ct.829), quoting Restatement, Judgments (para 68(1)) and `Developments in the Law - Res Judicata' (1952) 65 Harv.

L.Review 818(820).(See also collateral estoppel by judgment - by Prof. Scott. (1942) Harvha R 1.) In India, Mulla has referred to similar tests (Mulla, 15th Ed.p.104). The learned author says: A matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter 'directly and substantially' in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was 'directly and substantially' in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was 'necessary' to be decided for adjudicating on the principal issue and was

> decided, it would have to be treated as 'directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. (Mulla, p.104) One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwar Singh Vs. Sarwan Singh: AIR 1965 SC Mohd.S.Labbai Vs. Mohd. Hanifa: AIR 1965 SC 1569). We are of the view that the above summary in Mulla is a correct statement of the law.
>
> We have here to advert to another principle of caution referred to by Mulla (p.105). "It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision".

The Privy Council and the Supreme Court had occasion to deal with these points. Three decisions,- two of the Privy Council and one decided by the Supreme Court -can be referred to in this context as illustrations of cases where in spite of an issue and a decision in an earlier case, the finding was treated as being only collaterally or incidentally in issue and not res judicata. In Run Bahadur Vs. Lucho Koer (1885) ILR 11 Cal 301 (PC) (see Mulla p.107), A, a Hindu, died leaving a widow and a brother C.The widow sued B, the tenant for rent of certain property forming part of the estate of her husband. C, the husband's brother, claimed the rent on the ground that the property was joint family property and that he was entitled to the rent by survivorship. C was then joined as a defendant. Two issues were framed (1) whether the deceased alone received the whole rent of the property in his life time, or whether the rent was received by him jointly with his brother C? (2) whether any rent was due and if so, how much was due from B? The finding on the first issue was that the deceased alone received the whole rent in his life time. Subsequently, C sued the widow for declaration that he and his brother were joint, and he claimed the property by right of survivorship. The question arose whether the deceased and C were joint or separate and the earlier finding was held not res judicata inasmuch as the matter was not 'directly and substantially' in issue in the earlier suit. It was in issue in the earlier suit only 'collaterally or incidentally', as it did not cover the entire question of C's title but related merely to the joint or separate receipt of rent.

The next decision, again of the Privy Council is the one in Asrar Ahmed Vs. Durgah Committee, Ajmer (AIR 1947 PC 1) relating to the famous Dargah of Moinuddin Chisti, Ajmer. In a former suit of 1880 under Section of the Religious Endowments Act, 1863 filed by the President and one Member of the Durgah Committee for removal of one Ameer Ali, the Mutavalli on ground of maladministration, the question as to the hereditary nature of the office was the subject matter of a specific issue and it was held that the office was hereditary, accepting the plea of the defendant. While decreeing the suit for removal of the Mutavalli, the Court however held that if the Mutavalli behaved properly, he could be reinstated as the office was hereditary. In 1918, the Dargah Committee filed a suit against Nisar Ahmed, brother of the deceased Mutawalli, whom the Commissioner proposed to recognise as legal heir and Mutawalli, thus treating the office as

hereditary. But in that case the Committee claimed that the office was not hereditary. Nisar Ahmed, the defendant claimed the office as hereditary and relied upon the earlier finding. This suit however abated. Nisar Ahmed died in 1940. Then Ameer Ali's son filed a suit claiming the office to be hereditary. The suit was decreed by the District Judge but dismissed on appeal. In the plaintiff's appeal to the Privy Council, their Lordships rejected the plea of res judicata and held that the issue as to the hereditary nature of the office was irrelevant in the earlier suit and the decision was incidental to and not the substance of the earlier suit.

The Supreme Court decided a similar case in Pragdasji Vs. Ishwarlal Bhai (AIR 1952 SC 143).There the question of res judicata arose at two stages of the same proceeding. The plaintiffs filed a suit under Section 92 CPC in 1928 for (i) a declaration that the properties under the management of the defendant were religious and charitable trust properties (ii) the defendant be removed from the Gadi from possession of the properties and a suitable successor be appointed,

(iii) the defendant be called upon to account for his period of management and (iv) to frame a scheme for proper management of the institution. The defendant traversed the material allegations and pleaded that the suit was not maintainable inasmuch as no public trust existed and the properties were private properties of the defendant. On these pleadings, a number of issues were framed of which two were treated as preliminary issues (i) whether the temple and the properties in suit were public charitable properties? and (ii) if not, whether this Court has jurisdiction to try the suit? On the preliminary issues, the District Court gave a judgment on 18.7.1935 against the plaintiff and dismissed the suit. The High Court however held on 24.1.1938 that the charity was a public one covered by Section 92 of the Code of Civil Procedure. In the application for special leave, the Privy Council refused the application inasmuch as the case was at a preliminary stage but said that the order was without prejudice to the presentation of a fresh petition (for special leave) after all the issues were determined. Later, the District Court took up the suit for decision on merits. The court held that allegations of breach of trust and misconduct were not proved and the suit was dismissed but "subject to the declaration already given by the High Court that the temple and the properties in possession of the defendant were public, religious and charitable properties". The High Court affirmed the same on appeal by the plaintiff. The defendant came up in appeal to the Supreme Court objecting to the 'declaration' as to the public nature of the properties, virtually attacking the earlier finding dated 24.1.38. The Supreme Court vacated the 'declaration' made as to the public character of the charity and its properties on the ground that the said question was beyond the scope of Section 92 CPC in the earlier suit. This Court also held that in a suit under Section 92 CPC the only reliefs that could be claimed were those specified in Section 92 CPC and "a relief praying for a declaration that the properties in the suit are trust properties, does not come under any of these clauses". This Court observed:

> "When the defendant denies the existence of the trust, a declaration that the trust does exist might be made as auxiliary to the main reliefs under the section if the plaintiff is held entitled to it".

It was then stated by this Court that when the suit failed for want of cause of action, there was no warrant for giving the plaintiff a declaratory relief as to the public nature of the trust under Section

92 CPC. The finding as to the existence of a public trust in such circumstances was not more than an obiter dictum according to this Court. The appeal of the defendants was allowed and the declaration as to the trust being a public trust was set aside.

These three cases are therefore instances where in spite of a specific issue and an adverse finding in an earlier suit, the finding was treated as not res judicata as it was purely incidental or auxiliary or collateral to the main issue in each of these cases, and not necessary for the earlier case nor its foundation. Before parting with this point, we would like to refer to two more rulings. In Sulochana Amma Vs. Narayanan Nair (1994 (2) SCC 14), this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in Uthiva Somasundareswarar Vs. Rajanga (AIR 1965 Mad

355) held (see para 8 therein) that the previous suit was only for injunction relating to the crops. May be, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right.

These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above referred to were satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in the earlier suit and was also the substantive basis for grant of injunction. In this context, we may refer to Corpus Juris Secundum(Vol.50, para 735, page 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

> "Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title".

We have gone into the above aspects in some detail so that when a question arises before the Courts as to whether an issue was earlier decided only incidentally or collaterally, the Courts could deal with the question as a matter of legal principle rather than on vague grounds. Point 1 is decided accordingly. Point 2:

> This point concerns the difference in the meaning of wakf in 1928 when the suit under Section 92 of the Code of Civil Procedure was filed and the wider meaning given in 1950 in the definition of wakf under the Bombay Act of 1950. While the law of public Wakfs as it stood in 1928 did not take within its meaning a wakf where the

Sajjadanashin could spend the income for the maintenance of himself and his family members after expending for the purposes of wakf, the 1950 Act widened the definition of public Wakf even to situations where under the grant the Sajjadanashin could expend the income for the maintenance of himself and his family members. This aspect was considered in great detail by the Division Bench of the Gujarat High Court in Sayed Mohammed Vs. Ali Miya (1972(13) Guj.LR 285). It was pointed out in that case that the definition of Wakf in Section 2(19) of the Bombay Public Trusts Act, 1950 covered a permanent dedication by a person professing Islam not only for the purposes which Islamic Law considered as 'religious' and 'charitable' but also which it considered as 'pious' such as where provision was made for the benefit of the members of the settlor's family or of the Sajjadanashin and his family members, who were poor. Section 2(19) covered even a wakf such as the one described in Section 3 of the Mussalman Wakf Validating Act, 1913 under which any benefit was claimable by the founder, his family, children and descendants, - provided that the ultimate benefit in such cases expressly or impliedly was reserved for the poor or for any other purpose recognised by the Muslim Law as religious, pious or charitable purpose of a permanent character. Section 9 of the Bombay Act included charitable purposes also. The Gujarat High Court pointed out as follows: (p.296) "It could never be argued after these provisions that the wakf is not a public trust on the ground that the entire surplus goes to the Sajjadanashin or Mutawalli or because the obligation was a pious obligation and not a legal obligation so that he could dispose of surplus in any manner he liked. This aspect cannot in any manner alter the public character of the public trust".

We agree with the above observations of the Gujarat High Court. The 1931 judgment arising out of the 1928 suit treated the Wakf as 'private' on the ground that apart from other obligations and charitable purposes, the Sajjadanashin could spend the income for the pious purposes also, namely for maintenance of members of his family. But now the definition in Section 2(19) brings in such a wakf also into its fold.

Thus, for this reason also, the 1931 judgment does not operate as res judicata. Point 2 is decided against the appellant.

Point 3:

The decision of the Assistant Charity Commissioner on 19.1.1967 in Inquiry 14/64 filed by Peer Mohammed Fruitwala was no doubt in a case arising under the Bombay Act 1950. It is true that this very wakf was held to be private but the point is that that decision dated 19.1.67 gets superseded by the latter judgment of the Gujarat High Court in Sayed Mohammed Vs. Ali Miya (1972(13) Guj.LR 285) dated 14.9.1970. The latter judgment governs. It is well settled that an earlier decision which is binding between the parties loses its binding force if between the parties a second decision decides to the contrary. Then, in the third litigation, the decision in the second one will prevail and not the decision in the first. We may also state that the 19.1.67

decision merely relied upon the 1931 decision without noticing the change in the definition. Hence, the 19.1.67 decision cannot become res judicata.

So far as the proceeding initiated in 1965, no plea of res judicata based on it was raised in the lower courts in the present proceedings. Therefore, we hold on point 3 against the appellant. The rejection of the preliminary objection is confirmed. It will now be for the Assistant Charity Commissioner to go into the merits in Inquiry No. as directed by the Joint Commissioner in his orders dated 17.12.73 insofar as the Rozas at Broach and Surat are concerned, in the light of this judgment and the judgment of the Gujrat High Court in Sayed Mohammed vs. Ali Miya [1972 (13) Guj.L.R.285]. The appeal is dismissed. There will be no order as to costs.