Supreme Court of India
Suraj Ratan Thirani & Ors vs The Azamabad Tea Co. & Ors on 13 January, 1964
Equivalent citations: 1965 AIR 295, 1964 SCR (6) 192
Author: N R Ayyangar
Bench: Ayyangar, N. Rajagopala

PETITIONER:
SURAJ RATAN THIRANI & ORS.

Vs.

RESPONDENT:
THE AZAMABAD TEA CO. & ORS.

DATE OF JUDGMENT:
13/01/1964

BENCH:
AYYANGAR, N. RAJAGOPALA
BENCH:
AYYANGAR, N. RAJAGOPALA
SINHA, BHUVNESHWAR P.(CJ)
SHAH, J.C.

CITATION:
1965 AIR 295 1964 SCR (6) 192
CITATOR INFO :
R 1980 SC1655 (5)

ACT:
Code of Civil Procedure (Act Y of 1908), 0. Ix, r. 9-scope of--Crown Grants Act, s. 3-Lease by Government-Effect of-Applicability of s. 41 of Transfer of Property Act (IV of 1882).

HEADNOTE:
The property covered by the Tea Estate was granted by the Government by way of lease in 1898 for 30 years. In 1913 it was purchased' by Azam Ali. When he died in 1917, he left behind 8 sons, 9 daughters and 3 widows. The name of Ismail, his eldest son, was entered in the official records as next in succession. Ismail borrowed considerable sums from National Agency Co. Ltd., and for securing the same, deposited the title deeds of the Tea Estate on the footing that he was its full owner. As the amount under the mortgage was not paid, a suite was filed for realisation of the amount by sale of mortgage property.,.
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The suit was decreed and in execution the property was auctioned and sale was confirmed in 1931 in favour of the

decree-holder who sold the same to Azamabad Tea Estate, the principal respondent in this case.

The heirs of Azam Ali brought suit No. 58 of 1931 to set aside the decree and sale in favour of the National Agency Co. Ltd., on ,various grounds but that suit was dismissed for default.

The suit out of which the present appeal has arisen was filed subsequently. The plaintiffs-appellants who claimed title under purchasers 'for the heirs of Azam Ali challenged the validity of the transactions by which the National Agency Co. Ltd. claimed to have purchased the entire 16 annas interest in the property at the court sale in pursuance ,of a decree obtained by them against Ismail. The trial Court held that the purchase made by the National Agency Co. Ltd. was valid and extended to the entire interest in the property and hence the venders of -the plaintiffs had no title to convey to them any interests in the property. The High Court in appeal disagreed with this finding but dismissed the appeal on other grounds except to the extent of an 8 pies share in the property. The appellants came to this Court on a certificate of fitness granted by the High Court.

The points raised before this Court were whether the High Court was right in holding that the present suit was barred by O. IX, r. 9 on the ,ground that when suit No. 58 of 1931 was dismissed in default, no action was taken to get it restored, this was raised by the respondent and whether in any event their claims to the 2 as 13 odd gundas share of Ashfaq, son of Ismail, should not have been decreed.

HELD (i) that the suit was substantially barred by 0. TX, r. 9. The essential bundle of facts on which the plaintiffs based their title and their right to relief were identical in the two suits the property sought to be recovered in the two suits was the same. The title of the ,persons from whom the plaintiffs claimed title by purchase was based ,on the same facts. The additional allegation about possession in October 1934 did not really destroy the basic and substantial identity of the ,causes of action in the two suits.

The ban imposed by 0. IX, r. 9 does not create merely a personal bar or estoppel against the particular plaintiff suing on the same cause ,of action and does not leave the matter at large for those claiming under him. The word "plaintiff" in the rule includes his assigns and legal representatives.

(ii)that when the Government granted the lease in 1928, the lease was granted not only in favour of Ismail but also in favour of the ,other co-sharers although the name of Ismail alone was mentioned in the lease deed. The provisions of s. 3 of the Crown Grants Act did not affect the beneficial interest in the lease.

Section 41 of the Transfer of Property Act did not help the respondent as there was no evidence to show that Ismail was

put forward by
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the other co-sharers as the ostensible owner of the property. The conduct of the co-sharers in permitting Ismail to manage the common property did not by itself raise any estoppel precluding them from asserting their rights. Even a cursory enquiry by the mortgagee would have disclosed that Ismail was not the full owner.
As regards the contention of the appellants that they should have been granted a decree to the extent of 2 As. 13 odd gundas share of Ashfaq in addition to the 8 pies share decreed to them by the High Court, the case was ordered to be remitted to the trial Court for giving its finding regarding the reality of the sale by Ashfaq.
Gopi Ram v. Jagannath Singh, I.L.R. 9 Pat. 447, Mohammad Khalil Khan v. Muhbub Ali Mian, 75 I.A. 121 and Soorijomonee Dasee v.Suddanund, (1873) 12 Ben. L.R. 304, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 330 of 1960. Appeal from the judgment and decree dated March 18, 1954, of the Calcutta High Court in Appeal from Original, Decree No. 80 of 1947.

S. T. Desai and B. P. Maheshwari, for the appellants. B. Sen, N. R. Ghosh, Salil K. Datt and P. K. Ghosh, for the respondents Nos. 1 and 2.

January 13, 1964. The Judgment of the Court was delivered by AYYANGAR J.-This is an appeal preferred, by virtue of a certificate of fitness granted by the Calcutta High Court, against its judgment, by which the decree passed by the Subordinate Judge of Darjeeling was substantially affirmed. The plaintiffs are the appellants before this Court. The suit out of which the appeal arises was brought by the appellants claiming title to and the recovery of possession of a property known as the Azambad Tea Estate which comprised about 378 acres of land in Touzi No. 911 of the Darjeeling Collectors. This property was set out in Schedule A to the plaint and besides a claim was also made to certain other items of the movable and certain other tenures, but this appeal is not concerned with these others which were set out. in Schs. B and C to the plaint.

One Kazi Azam Ali was admittedly a full owner of this entire property and the proceedings giving rise to the appeal are concerned with the rights of his heirs to it. The plain- tiffs claim their title on the basis of various purchases from the heirs of this Azam Ali. The contesting defendants were the Azamabad Tea Co. who also claim the entire property as transferees from the National Agency Co. Ltd., who too have been impleaded as defendants. The National Agency Co. Ltd. claim to have purchased the entire 16 as. interest in the property at a Court sale in pursuance of a decree obtained by them against Kazi Mohammed Ismail, the eldest son of Azam Ali. Various contentions were raised by the plaintiffs in challenge of the validity of the transactions by which the defendants

claimed their title. But the learned Subordinate Judge repelled the plaintiffs' claim and held that the purchase by the National Agency Co. Ltd. was valid and extended to the entire interest in the property and that in consequence the plaintiffs' vendors had no title to convey to them any interest in the property. The plaintiffs' claim of the property in respect of Sch. A was therefore dismissed. The plaintiffs preferred an appeal to the High Court and the learned Judges upheld the title of the plaintiffs to an 8 pies share in the property mentioned in Sch. A to the plaint but confirmed the decree of the Subordinate Judge as regards the rest. The learned Judges however granted a certificate of fitness to the plaintiffs on the strength of which the present appeal has been filed. The history of the transactions before the suit occupies a period of over 20 years and the facts in relation thereto are at once long, voluminous and complicated. But, for the disposal of the appeal and the points urged before us it is wholly unnecessary to set these out and we shall therefore confine ourselves to a narration of the bare outlines of the case along with those facts which are necessary to appreciate the contentions raised in support of the appeal. The property covered by the Tea Estate was granted by Government by way of lease to one Mudir and another for 30 years, the term to start on the 1st of April 1898. The grantees effected transfers of their lease-hold and after several successive transfers the property was purchased in 1913 by one Kazi Azam Ali who got his name registered as a proprietor. It was Azam Ali who started the tea garden. constructed the requisite factories as accessories thereto and named it the Azamabad Tea Estate. Azam Ali had several children and among them 8 daughters and in consideration of gifts made to them, these daughters by a registered deed executed in 1909 relinquished their rights of succession to Azam Ali. They thus faded away from the picture and no more notice need be taken of them. Besides these 8 daughters, Azam Ali had 8 sons who survived him and were among his heirs, when he died on June 8, 1917. Mohammed Ismail was the eldest of these sons. Azam Ali also left behind him a daughter who was born after' the relinquishment of 1909 and three widows. Admittedly the sons of Azam Ali, his widows and his last daughters were all his heirs entitled to his estate in the shares as prescribed by Muslim Law. On Azam Ali's death his eldest son--Ismail-had his name entered in the Government records as the next in succession and at the time the thirty years term of the lease expired, the lease continued to remain in the name of Ismail alone. We now proceed to the transactions as a result of which the contesting defendants claim to have obtained the full title to the Tea Estate. Ismail made large borrowings and among them were some from the National Agency Co. Ltd. and for securing the loan he deposited with them the title deeds of the Tea Estate. It may be mentioned that the deposit was on the footing that he was the full owner of the 16 as. share of the property mortgaged. The amount due under the mortgage was not paid in time and the mortgagee filed a suit for the enforcement of its mortgage and prayed for the sale of the property for the realisation of the mortgage money. The suit was decreed as prayed for and the property was sold in execution of the final decree and was purchased by the mortgage-decree holder on September 24, 1931. The sale was confirmed on November 13, 1931. This decree-holder purchaser sold the property to the Azamabad Tea Estate--the principal respondent before is. There was some little controversy as regards the reality and effectiveness of the transfer of the property from the National Agency Co. Ltd. to the Azamabad Tea Estate, but nothing turns on this, for even if that transfer was not effective that would not help the plaintiffs so long as they could not displace the title of the National Agency Co. Ltd. under the latter's court auction purchase. The case of the plaintiffs rested on the fact that Ismail who got himself registered as if he were a full proprietor of the lease-hold interest in Touzi 911 was merely one of several co-sharers of Azam Ali's estate to whom it passed on his death. The lease-hold

which was his property was according to them inherited by all his heirs including Ismail, the seven other sons, the three widows and the daughter born after 1909.

The term of the lease granted by the Government expired in 1928 and a renewed lease was granted in the name of Ismail alone. Rival contentions were urged as regards the effect of this circumstance on the right of Ismail. It was the case of the contesting respondents that the lease granted in 1928 in favour of Ismail was his sole and individual pro- perty and even if for any reason the other heirs of Azam Ali had an interest in the previous lease-hold, they did not have any such interest in the property covered by the fresh lease. On the other hand, the case of the plaintiffs was that by the renewal of the lease, Ismail obtained qua his co-heirs the same interest as he formerly had in the lease of 1898. The renewal, they stated, was for the benefit not merely of Ismail but for everyone of his co-heirs who still retained his or her interest in Azam Ali's estate. On this basis the plaintiffs raised the contentions that when by the sale in execution of the mortgage decree obtained by the National Agency Co. they purchased the property mortgaged, it was only the interest of Ismail that passed to them and not those of his co-sharers who were no parties to the mortgage, There is one further transaction to which we must advert before passing on to the next stage of the proceedings. After the mortgage by deposit of title deeds in favour of the National Agency Co., Ismail transferred his entire interest in the mortgaged property, that is, in the equity of redemption, to his wife Mst. Nazifannessa, by a deed dated May 6, 1930. Notwithstanding this deed and this transfer of the equity of redemption Mst. Nazifannessa was not made a party to the mortgage suit by the National Agency Co. The plaintiffs who claim to have acquired Mst. Nazifannessa's interest contended that by reason of the failure to implead Nazifannessa in the mortgage action, her right to redeem the mortgage was still in tact in spite of the mortgage decree and the sale in pursuance thereof, and on this footing made a claim in the alternative to redeem the mortgage in favour of the National Agency Co. and obtain possession after re- demption.

To complete the narrative of the relevant facts, very soon after the purchase in Court auction in execution of the mortgage decree, the heirs of Azam Ali brought a suit (58 of 1931) to set aside the decree and the sale in favour of the National Agency Co. Ltd. on various grounds--collusion, fraud, the circumstance that Ismail was merely a co-sharer entitled to about 2 1/2 as. share in the property and so could not mortgage more than that share, and that the decree could not bind a larger interest nor the sale convey anything more than that share, even if it conveyed any title to the property. This suit however did not proceed to trial, but was dismissed for default, in that the plaintiffs did not appear in Court on the date fixed for trial. The only other matter to be mentioned is that the plaintiffs have, by their purchases, acquired from the several co- heirs, directly or mediately, the entire 16 as. share in the property assuming that their vendors had any such right. Armed with these purchases the plaintiffs filed this suit for the reliefs already indicated.

The defences raised to the suit were three- fold:

(1) That Ismail was the sole proprietor of the Tea Estate at the date of the mortgage and consequently the entire interest was the subject of mortgage and so passed at the court sale. This was based on the provisions of the Crown Grants Act, now the Government Grants Act. It would be recollected that the thirty years lease of Touza 911 was renewed in 1928 and this renewal was made

in the name of Ismail alone. Based on this feature a contention was raised that the grant of the lease created a new title in the grantee since the original lease in which alone the heirs of Azam Ali might have had a share was extinguished by the termination of that lease by efflux of time. (2) The second line of defence was that Ismail, even if in fact or law was not the full owner, was an ostensible owner of the entire interest in the property and that the co-heirs were estopped from questioning the validity of the mortgage of the entire interest effected by him under s. 41 of the Transfer of Property Act and that in conse- quence the sale in execution passed the entire 16 as. share to the purchaser.

(3) Lastly, it was urged that the plaintiffs' suit was liable to be dismissed by reason of the provisions of 0. IX, r. 9 of the Civil Procedure Code as the earlier Original Suit 58 of 1931 brought by the co-heirs to set aside the sale under the mortgage decree had been allowed to be dismissed for default.

The learned Judges of the High Court rejected the first two of the defences but held that except to the extent of an eight pies share which represented the interest of a co-heir which was not affected by the proceeding in Suit 58 of 1931, the plaintiffs were precluded by 0. IX. r. 9, Civil Procedure Code from disputing the sale in execution of mortgage decree by reason of the dismissal for default of Suit 5 8 of 1931.

Before proceeding to set out the arguments addressed to us by Mr. Desai, learned counsel for the appellants, it might be convenient to dispose of the submissions made to us by Mr. Sen, learned counsel for the respondents, seeking to ,sustain the first two defences which were repelled by the High Court.

The first of them was that by reason of the renewal of the lease in 1928 in the name of Ismail and the entry of his name as sole lessee in the revenue records, the leasehold became his sole property. Apart from the arguments about Ismail being the ostensible owner of the entire 16 as. share in the lease-hold under the lease of 1898-which we shall consider a little later-Mr. Sen did not dispute that Ismail's co-heirs were entitled to their fractional shares in the property under the original lease. The acceptability of this argument regarding the renewed lease has to be determined on -the basis of two factors-first the intention of the parties, and here primarily of the grantor, as to the nature and quantum of the title intended to be conferred on or obtained by Ismail and, second, the provisions of the Crown, Grants Act which governed the grant on which reliance was placed as leading to that result. First, as to the intention of the parties. The original lease of 1898 was due to expireon March 31, 1928. On July 20, 1928 Mohd. Ismail made a petition to the Deputy Commissioner, Darjeeling by which after drawing the latter's attention to the date on which the lease was to expire, he "respectfully solicited the favour of' kindly granting a further lease of the said Estate for a further period of 30 years." The Deputy Commissioner replied by letter dated August 10, 1928 sending Ismail the draft of the renewed lease for his approval and return adding "in the record of rights the following names have been recorded:

1. Kazi Mohammed Ismail 2 as.;

2. Kazi Isahaque 2 as.;

3. Kazi Yakub 2 as.;

4. Kazi Samoddoha 2 as.;

5. Kazi Nurul Huda 2 as.;

6. Kazi Badarudduza 2 as.;

7. Kazi Insaf Ali 2 as.;

8. Kazi Asfaque 2 as.;

Please mention the name in whose favour the lease will have to be issued." Ismail returned the draft lease with his approval but desired that the lease should be issued according to the name in the land register. We are unable to read this request as meaning that Ismail, contradicting what the Government said, wanted that the leasehold interest should be his sole property in which his co-heirs who had interest in the earlier lease were to be denied all beneficial interest. It was thereafter that the lease was executed on February 1, 1929 in the name of Ismail to be operative from April 1, 1928 and was in terms in renewal of the previous lease. In the circumstance, we are satisfied that the Gov- ernment intended to grant a lease in favour of his co- sharers as well, though the lease deed was in the name of Ismail alone. If Ismail intended to benefit himself at the expense of his co-sharers and as we have said, we do not read his reply to the Deputy Commissioner as disclosing such an intention, the same was not made known to the Government. We are therefore unable to accept Mr. Sen's submission based on the intention of the parties. He, however, submitted that whatever be the intention of the parties, by reason of s. 3 of the Crown Grants Act Ismail's title to the full 16 as. share in the leasehold could not be disputed. This section reads:

> "3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to (their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

If, as we have held. it was the intention of the Government in granting the renewal that the co-heirs too should have the benefit of the lease we do not see how these provisions affect their beneficial interest in the lease. Nor are thereany clauses in the lease which preclude the existence of abeneficial interest in persons other than the lessee named.This point is therefore without substance and is rejected.

The next point urged was based on s. 41 of the Transfer of Property Act. It was said that Ismail was by reason of the entry in the revenue registers, which the co-heirs did nothing to correct, ostensibly the full owner of the property and hence the mortgage by him as full owner and the sale in court auction in execution of the decree by the National Agency Co. Ltd. passed the full title to the Tea Estate and that the co-heirs were consequently estopped from disputing the defendant's right to the full 16 as. share in the property.

In order that s. 41 of the Transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co- sharers and besides that they took reason-able care to ascertain whether Ismail had the power to make a transfer of the full 16 as. interest. Now, the facts however were that except the property being entered in the revenue records in Ismail's name, and that the management of the property was left by the co-sharers with Ismail, there is not an iota of evidence to establish that Ismail was put forward by them as the ostensible owner of the property. It is manifest that the conduct of co-sharers in permitting one of them to manage the common property does not by itself raise any estoppel precluding them from asserting their rights. The learned Judges have also pointed out that even the least enquiry by the mortgagee would have disclosed that Ismail was not the full owner and this finding was not seriously challenged before us. In this view it is unnecessary for us to consider the submissions made to us by Mr. Desai that s. 41 was inapplicable to cases of sales in court auctions for the reason that what the court is capable of selling and what is sold in execution of a decree is only the right, title and interest of the judgment-debtor and nothing more. We, therefore, hold that the learned Judges of the High Court rightly held that s. 41 of the Transfer of Property Act afforded no defence to the respondents. The next and the only point remaining for consideration is whether the appellants' suit is barred under the provisions of 0. IX. r. 9, Civil Procedure Code. The part of this provision material for our purpose runs:-

> "Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action."

The learned Judges of the High Court have held that this provision barred the plaintiffs' claim in the present suit except to the extent of an 8 pies share in the estate which belonged to Azifunnessa and Najifennessa, two of the daughters of Azam Ali, who on the death of their mother became entitled to that share. These two were not the parties to suit No. 58 of 1931 and hence the learned fudges held that their share (which was purchased 'by the plaintiffs) was unaffected by the dismissal of that suit.

The decision of the High Court in regard to this 8 pies share has become final and thus is outside controversy. The ,only question is whether the plaintiffs-appellants are entitled to anything beyond this share.

The suit, 58 of 1931, was instituted by 7 plaintiffs Ashfaq, Shamsuzzoha, Nurul Huda, Mohd. Yakub, these four being the sons of Azam Ali, two of his daughters Mahbuba Khatun and Habiba Khatun and one of his widows Bibi Marium. There were two defendants-the National Agency Co. Ltd. the purchaser in court sale of the property under the mortgage decree, whose title was challenged and against whom reliefs were claimed and Mohd. Ismail who was a pro forma defendant. Ashfaq, The first plaintiff, died after the institution of the suit and certain of the parties already on record were recorded as his legal representatives. The allegations in the plaint briefly were that the 2nd defendant Mohd. Ismail was not tile sole proprietor or owner of the Azamabad Tea Estate and that for that reason, the mortgage in favour of the 1st defendant, the mortgage-decree obtained by it and the sale thereunder passed to it no title except to the extent of 2- 1/2 as. share belonging to Mohd. Ismail. The plaintiffs therefore prayed for a decree declaring-

(1) that Mohd. Ismail had only 2-1/2 as. share in the property and the remaining 132-1/2 as. share belonged to the plaintiffs; (2) that only 2-1/2 as. share was sold under the mortgage decree and purchased by the National Agency Co. Ltd. at the court sale.

The suit was instituted on 28th November, 1931 and after the issues were settled, the suit was posted for trial on 22nd August, 1932, on which date the plaintiffs were absent, no witnesses on their behalf were present, and their pleader reported no instructions. The suit was therefore directed to be dismissed with costs in favour of the National Agency Co. Ltd. who was the only party present in Court. It may be mentioned that Mohd. Ismail never appeared during the hearing of the suit.

Before taking up for consideration certain points urged before us by Mr. Desai regarding the construction of 0. IX r. 9 C.P.C. we might dispose of a contention raised by him that Suit No. 58 of 1931 was filed fraudulently and collusively and the dismissal was the result of a settlement brought about collusively in order to defeat the plaintiffs' rights. We consider that there is no factual basis to sustain, this plea for he could point to no definite proof in support, and the most he could do was to refer us to certain suspicious circumstances. We cannot obviously base any decision or rest any finding, on mere suspicion and we have no hesitation in saying that the submission does not deserve serious consideration.

The next submission was that even the 212 as. share of Ismail did not pass under the sale in execution of the mortgage decree, because it was said Ismail had been, adjudicated an insolvent in Insolvency Case 38 of 1931 by the Dist. Judge Purnia, as a result of which the properties which were the subject of the court-sale had vested in the official receiver before the relevant date. Though, no doubt, an allegation regarding this matter was made in the plaint and this was denied by the plaintiffs there is nothing in the judgments of the courts below or in the, evidence to indicate that the necessary facts were proved or that this point was urged with any seriousness at any stage of the proceedings until in this Court. We have therefore nothing beyond the bare allegations and denials and as the full facts in relation to this matter were not placed before the Court we hold that this plea is devoid of merits and does not merit consideration.

It was next said that two of the plaintiffs in suit No. 58 of 1931, Nurul Huda and Habiba Khatun, a son and a daughter of Azam Ali were really adults but were shown in the cause title as minors represented by their respective natural guardians as their next friends and that as these adults could not in law be represented by persons purporting to act as their guardians they could not be held to be parties to the suit and hence their interests could not be affected by the dismissal of the suit. This also is one of the matters in respect of which the plaintiffs beyond a mere pleading which was denied, made no grievance in the courts below and the facts in relation to this issue, namely, the age ,,of the two plaintiffs at the date of the plaint not having been clearly proved, we do not find it possible to entertain the plea at this stage.

Mr. Desai, then submitted that Ashfaq who had figured as the first plaintiff in suit No. 58 of 1931 had already on April 18, 1931 transferred his 2 as. 13 gandas and odd share in Touzi No. 911 to one Pir Baksh from whom the plaintiff obtained a conveyance by a deed dated September 2, 1943 of what he had purchased from Ashfaq. For this reason he urged that on the findings on the merits of

the title in favour of the plaintiffs on the first two defenses we have dealt with earlier the plaintiffs should have been granted .a decree to this share of Ashfaq in addition to the 8 pies share decreed to them by the High Court. No doubt, if this transaction were made out and was real, it would stand on the same footing as the 8 pies share in regard to which a decree was granted in favour of the plaintiffs by the judgment now under appeal. We shall however consider this matter after dealing with the point urged as regards the construction of

0. IX. r. 9, Civil Procedure Code, which was his main submission and which, if upheld, would entirely eliminate the bar under this provision of law.

On this the first submission was that the rule which spoke of the "plaintiff" being precluded from bringing a fresh suit created merely a personal bar against the plaintiff in the first suit and that in the absence of words referring to the representatives of the plaintiff or those claiming under the plaintiff as in s. 11 or s. 47 of the Civil Procedure Code, the bar was not attracted to cases where the subsequent suit was by the heirs and assigns of that plaintiff. In support of this submission Mr. Desai invited our attention to the observations of Das J. in Gopi Ram v. Jagannath Singh(1) where this argument was characterised as a weighty one and examined elaborately. Though the learned Judge decided this matter on quite a different line of reasoning, he referred to various earlier decisions which appeared to him to favour the view submitted to us by Mr. Desai and expressed his hesitation in (1) L.L.R. 9 Pat. 447 at P. 454.

rejecting that construction. We are not however impressed by the argument that the ban imposed by 0. IX. r. 9 creates merely a personal bar or estoppel against the particular plaintiff suing on the same cause of action and leaves the matter at large for those claiming under him. Beyond the absence in 0. IX. r. 9 of the words referring "to those claiming under the plaintiff" there is nothing to warrant this argument. It has neither principle, nor logic to commend it. It is not easy to comprehend how A who had no right to bring a suit or rather who was debarred from bringing a suit for the recovery of property could effect a transfer of his rights to that property and confer on the transferee a right which he was precluded by law from asserting. There are, no doubt, situations where a person could confer more rights on a transferee than what he possessed but those are clearly defined exceptions which would not include the case now on hand. This argument was addressed to the High Court and the learned Judges characterised it as startling, a view which we share. The rule would obviously have no value and the bar imposed by it would be rendered meaningless if the plaintiff whose suit was dismissed for default had only to transfer the property to another and the latter was able to agitate rights which his vendor was precluded by law from putting forward. Aga- in to say that an heir of the plaintiff is in a better position than himself and that the bar lapses on a plaintiff's death, does not appeal to us as capable of being justified by any principle or line of reasoning. In our opinion, the word "plaintiff' in the rule should obviously, in order that the bar may be effective, include his assigns and legal representatives.

It was next urged that 0. IX. r. 9 precluded a second suit in respect of "the same cause of action" and that the cause of action on which Suit 58 of 1931 was laid and the present suit-Title suit 18 of 1943 was not the same and so, the bar was not attracted.

In view of this argument it is necessary to examine them cause of action on which the present suit has been filed and compare and contrast with that in Suit 58 of 1931. Closely analysed the material allegations to found the cause of action on which reliefs were claimed in the present suit were (i) That the Tea Estate was originally the property of Azam Ali. When he died his estate was inherited by his 8 sons, his widows and a daughter. That the registration of the estate in the name of Md. Ismail was as a co-sharer, the property belonging beneficially to all the heirs. This position was not altered by the termination of the first lease and its renewal in 1928 for a further period of 30 years. All the co-heirs lived as a joint family with a common mess and hence there was no question of any adverse possession by Md. Ismail whose possession was not as sole proprietor or exclusive. The suit on the mortgage was fraudulent and collusive, by Ismail colluding with the mortgagee to defraud his co-heirs. Details were mentioned as evidence of the fraud and collusion. The sale in pur- suance of the decree which was passed ex-parte was also fraudulent. On the date of the auction Ismail had no title even to the 2-1/2- as. share because of his adjudication as an insolvent earlier. The manner in which the 8 pies share of the daughters was obtained by the plaintiff was set out, and similarly the purchase by them through Pir Baksh of the share of Ashfaq. The other purchases by the plaintiffs whereby they claimed to have obtained the 16 as. share in the Tea Estate were set out. The plaint then went on to refer to suit 58 of 1931 and set out their case as regards the nature of that litigation and its effect. Lastly, they pleaded that they had obtained possession of the Tea gardens on October 10, 1934 and that on the next day the defendants moved the Magistrate for an order under s. 144, Criminal Procedure Code and that the Magistrate had made an order against the plaintiffs restraining them from interfering with the possession of the defendants which necessitated their bringing the suit for the reliefs we have set out earlier.

We have already summarised the material allegations which were made in Suit 58 of 1931. The material difference between the cause of action alleged in the present suit consists only in the addition of the allegations about the possession and dispossession in October, 1934. This suit is based on the title of the plaintiffs by reason of their purchases and admittedly their vendors would have nothing to convey if the court sale conveyed, as it purported to convey, the full 16 as. interest in the Tea garden to the National Agency Co. Ltd. It was because of this that allegations were made to sustain their title and this could be done only if they established want of title to the extent of 16 as share in Ismail, the consequent ineffectiveness of the mortgage effected by Ismail and of the decree obtained in pursuance thereof and of the court sale in execution of that decree, being confined at the most to 2-1/2 as. share belonging to Ismail. These allegations which were fund- amental to the plaintiffs' case were identical with those which had been made in suit No. 58 of 1931. Bearing these features in mind, the proposition that Mr. Desai submitted for our acceptance was briefly this.

A cause of action is a bundle of facts on the basis of which relief is claimed. If in addition to the facts alleged in the first suit, further facts are alleged and relief sought ,on their basis also, and he explained the additional facts to be the allegations about possession and dispossession in October, 1934, then the position in law was that the entire complexion of the suit is changed with the result that the words of 0. IX. r. 9 "in respect of the same cause of action" are not satisfied and the plaintiff is entitled to reagitate the entire cause of action in the second suit. In support of this submission, learned counsel invited our attention to certain observation in a few decisions to which we do not consider it necessary to refer as we do not see any substance in the argument.

We consider that the test adopted by the Judicial Committee for determining the identity of the cause of action in the two suits in Mohammed Khalil Khan and Ors. v.Mahbub Ali Mian and Ors. (1) is sound and expressescorrectly the proper interpretation of the provision.In that case Sir Madhavan Nair, after an exhaustive discussion of the meaning of the expression "same cause of action" which occurs in a similar context in para (1) of O. 11 r. 2 of the Civil Procedure Code, observed:

> "In considering whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test (1)75 1. A. 121.
>
> to be applied is: are the causes of action in the two suits in substance-not technically-identical?"

The learned Judge thereafter referred to an earlier decision of the Privy Council in Soorijamonee Dasee v. Suddanund(1) and extracted the following passage as laying down the approach to the question :

> "Their Lordships are of opinion that the term 'cause of action' is to be construed with re- ference rather to the substance than to the form of action.....".

Applying this test we consider that the essential bundle of facts on which the plaintiffs based their title and their right to relief were identical in the two suits. The property sought to be recovered in the two suits was the same. The title of the persons from whom the plaintiffs claimed title by purchase, was based on the same facts viz., the position of Md. Ismail quoad his co-heirs and the beneficial interests of the latter not being affected or involved in the mortgages, the mortgage-decree and the sale in execution thereof. No doubt, the plaintiff set up his purchases as the source of his title to sue, but if as we have held the bar under 0. IX. r. 9 applies equally to the plaintiff in the first suit and those claiming under him, the allegations regarding the transmission of title to the plaintiffs in the present suit ceases to be material. The only new allegation was about the plaintiffs getting into possession by virtue of purchase and their dispossession. Their addition, however, does not wipe out the identity otherwise of the cause of action. It would, of course, have made a difference if, without reference to the antecedent want of fun title in Ismail which was common to the case set up in the two plaints in Suit 58 of 1931 and Suit 18 of 1943, the plaintiffs could, on the strength of the possession and dispossession or the possessory title that they alleged, have obtained any relief. It is, however, admitted that without alleging and proving want of full title in Md. Ismail the plaintiffs could be granted no relief in their present suit.

(1) (1873) 12 Beng. L.R 304,315.

134- 59S.C--14 The question is whether the further allegations about possession in October, 1934 have really destroyed the basic and substantial identity of the causes of action in the two suits. This can be answered only in the negative. The learned Judges of the High Court therefore correctly held that the suit was substantially barred by O. IX. r. 9. It now remains to consider the claim of the plaintiffs to the 2 annas 13 odd gundas share of Ashfaq. In paragraph 52 of their plaint the plaintiffs stated that by a registered sale-deed executed on April 18, 1931 Ashfaq, the son of Azam Ali sold the

entire interest which he possessed in the Azamabad Tea Estate to Pir Baksh in pursuance of a Bainama dated April 7, 1930 and put him in possession, and in the succeeding paragraph they set out their purchases of this share by a Kabala dated September 2, 1943. In the joint written statement filed on behalf of the defendants 1 and 2 these allegations were controverted. The execution of the sale-deed in favour of Pir Baksh was denied and it was further stated that even if the sale-deed were proved to have been executed it was a sham and nominal transaction and therefore inoperative to pass title. Though no specific issue in relation to this sale to Pir Baksh was raised, there was a general issue (Issue No. 8) which related to the plaintiff's acquiring title to the Tea Estate. Ile sale deed by Ashfaq was filed and marked as Ex. 12(i) and the sale in favour of the plaintiffs by Pir Baksh as Ex. 12(c). The effect however of this sale to Pir Baksh on the rights of the plaintiffs to relief does not appear to have been raised before the learned trial Judge. It may be pointed out that the learned trial Judge held that Ismail was the full owner of the property under the lease granted in 1928, by reason of the provisions of the Crown Grants Act and even if this were not so, he held that his co-heirs had consented to put him forward as the ostensible owner of the property with the result that they were' estopped from impeaching the mortgage and the sale of the property in execution of the mortgage decree. It is therefore possible that because of the view which the learned trial Judge was inclined to take of the title of Md. Ismail, the plaintiffs did not seriously put forward their rights under their purchase from Pir Baksh, because if the learned trial Judge was right, the sale by Ashfaq to Pir Baksh even if real would not have helped the plaintiffs to obtain any relief. In this connection it may be pointed that the plaintiffs claim to the 8 pies share which was allowed in their favour by the High Court, was not pressed in the trial court. Even in the High Court, however, the point arising from the sale by Ashfaq to Pir Baksh does not seem to have been pressed.

We shall presently advert to and examine the submissions made to us by Mr. Sen as regards the merits of this claim to the share of Ashfaq, but before doing so we must refer to a point raised by Mr. Sen which necessitated a prolonged adjournment of the appeal after the main arguments were heard. After pointing out that the plaintiffs did not agitate or press before the courts below any special right based on the purchase of Ashfaq's share through Pir Baksh, he submitted that this might possibly have been because the property covered by the sale deed Ex. 12 (i) did not comprise Touza No. 911--the Azamabad Tea Estate. There was scope for this submission because in the record as printed for the use of this Court, the Schedule annexed to the sale deed Ex. 12(i) was not printed but only the portion containing the description of the parties and the words of conveyance, with the result that Mr. Desai was unable to make out whether as a fact Ashfaq's interest in the suit property was sold under Ex. 12(i). To make matters worse the Schedule to the sale deed of 1943 executed by Pir Baksh was also not translated and printed in the record prepared for the appeal. In view, however, of the categorical statement in the plaint as regards the indentity of the property conveyed under Ex. 12(i) with Ashfaq's share in the Azamabad Tea Estate, we considered that the appellant's submission could not be rejected as frivolous. We therefore acceded to the request of Mr. Desai and called foe the original of Ex. 12(i) from the High Court so that counsel might make submissions to us as regards the identity of the property conveyed. The document was accordingly obtained 'and translated for the use of the Court and when the appeal was again placed before us Mr. Sen admitted that the property conveyed by Ex. 12(i) was Ashfaq's 2 as. 13 gundas odd interest in Touza No. 911.

Coming now to the merits of the plaintiff's claim, it is common ground that if the sale by Ashfaq were real and intended to pass title to Pir Baksh, the plaintiffs would be entitled to a decree for a declaration that in addition to the 8 pies share granted to them by the High Court, they would be entitled to a further 2 as. 13 gundas share of Ashfaq in the plaint A Schedule property. Mr. Sen's submission, however, was that we should not entertain or give effect to this claim, because several circumstances throw grave suspicion on the reality of the transaction, and that in any event the claim could not be accepted without careful scrutiny of the facts.

Having regard to the definite case raised in the pleadings, we are not disposed to reject the claim merely because the same was not pressed in the courts below. Besides we cannot ignore the circumstance that the sale deeds Ex. 12(i) and 12(c) on which the claim was based were filed in the trial court, and Pir Baksh was examined to formally prove these deeds as the 31st witness for the plaintiff. Moreover, even though as regards certain other transfers, the trial Judge recorded findings that they were nominal, there was no such finding as regards the sale by Ashfaq. In view of these features, we have decided not to reject the claim of the plaintiffs based on this ground.

There are, however, certain features which throw some suspicion on the reality of the transaction which Mr. Sen pressed before us which have led us to desist from ourselves passing a decree for this additional share in their favour. The circumstances to which Mr. Sen drew our attention were these; (i) though Ashfaq executed the sale deed Ex. 12(i) on April 18, 1931, he figured as the first plaintiff in Suit 58 of 1931 which was filed on 28th November, 1931, without adverting to the sale, a piece of conduct certainly not consistent with the sale being real and intended to pass title; (2) though in the plaint the necessary averments were made regarding their obtaining the share of Ashfaq through Pir Baksh, the claim under this head was not pressed before the trial court; (3) when the plaintiffs preferred an appeal to the High Court from the total dismissal of the suit, they did not raise any specific ground touching their right to this share, nor were any argument addressed to the High Court on this point; and (4) there had been no mutation in the revenue records when this sale was effected and Pir Baksh who was examined as a witness admitted this fact. These circumstances are certainly capable of explanation, but they show that the claim of the plaintiffs cannot be accepted by us straightaway and a decree passed in their favour.

In these circumstances, we consider that the proper order to pass would be to remit the matter to the trial Court for recording a finding as regards the reality of the sale on the evidence already on the record and to pass an appropriate decree in the suit, that is, if the sale under Ex. 12(i) were held to be real, the plaintiffs would be entitled in addition to the 8 pies share decreed to them by the High Court, to a further 2 as 13 gondas odd share belonging to Ashfaq which they obtained under Ex. 12(c) through Pir Baksh, and in the event of the sale not being held to be real to no more than what the High Court has decreed.

With this modification, the appeal is dismissed with costs. Appeal dismissed.