(1880) 06 CAL CK 0025

Calcutta High Court

Case No: None

Fatten Lall	APPELLANT
Vs	
Gujju Lall	RESPONDENT

Date of Decision: June 1, 1880

Acts Referred:

- Evidence Act, 1872 - Section 13, 40, 41, 43

Citation: (1881) ILR (Cal) 171

Hon'ble Judges: Richard Garth, C.J; Pontifex, J; Morris, J; Mitter, J; Jackson, J

Bench: Full Bench

Judgement

Richard Garth, C.J.
This special appeal depends upon a question of law, which we think should be referred to a Full Bench.

2. It was admitted on both sides in the lower Courts, that if Sham Behari Lall survived Mussamut Sheo Bucham Koer, then the plaintiff was the nearest heir of Bhichuk Lall, and as such was entitled to succeed; but if, on the other hand, Mussamut Sheo Bucham Koer survived him, then he was not so entitled.

3. In the Court of first instance, the plaintiff relied upon a judgment in a former suit, dated the 26th of June 1876, in which the question was raised between Gujju Lall, the present defendant (who was the plaintiff in that suit), and Janki Singh and others (the defendants in that suit), whether Gujju Lall or Sham Behari Lall was the nearest heir of Bhichuk Lall. It was decided in that suit that Sham Behari Lall was the nearest heir of Bhichuk Lall. In this suit it was contended by the defendant in both the lower Courts, that the judgment in the former suit could not be used as evidence in this suit, because the present plaintiff was no party to the former proceedings; while the plaintiff on the other hand, contended that the former judgment was admissible in evidence u/s 13 of the Evidence Act, as being a transaction by which the right claimed in this suit by the plaintiff was asserted and denied. Both the Courts

considered the judgment admissible in evidence, and upon the strength of it decided in the plaintiff''s favour.

4. It has now been contended before us on special appeal, that the lower Courts were wrong in admitting the former judgment as evidence in this case, and upon this one point the special appeal depends.

5. It has been decided by this Court in several cases, three of which are reported in 23 W. R. 162 that decrees in suits between third parties are admissible in evidence u/s 13 of the Evidence Act, whilst in other cases in this Court such evidence has been constantly rejected.

6. The question, therefore, referred to the Full Bench is, whether, u/s 13, or any other section of the Evidence Act, the judgment in the former suit, which was admitted and acted upon as evidence in this suit, was legally admissible?

7. Mr. M. Ghose (with him Baboo Jogesh Chunder Dey) for the appellant.-The status of heirship was really determined in the former suit between the defendant in the present suit and a stranger. It was not intended that the words "existence of a right or custom," used in Section 13 of the Evidence Act, should include any and every right. The Evidence Act did not alter what was the previous law on the subject,-viz., the English law. It was intended by this section to include the class of cases such as right of ferries and roads, and all cases in which judgment inter alios are admissible.-All that Section 13 of the Act has done, is to adopt Sir Barnes Peacock''s judgment in Kanhya Lall v. Radha Churn (B. L. R. Sup.662; s.c. 7 W.R. 338. [Garth, O.J.-The rule in, England only applies to public rights.] It will probably be contended by the other side that, u/s 43, the judgment is admissible. Before the Evidence Act was passed, such judgments were not admissible in evidence, and it was not the intention of the framers of the Act to make any alteration. Clause 4 of Section 32 also shows that the right or custom must be a public right or custom. I contend that the word "right" means a right of a public character or of a quasi-public character. u/s 13 this judgment is not evidence. The cases on which the other side relies are Neamut Alt v. Gooroo Doss 22 W. R. 365 and Guttee Koiburto v. Bhukut Koiburto 22 W. E. 457, but the judgments there appear to be inter partes. The case of Hunsa Koer v. Sheo Gobind Raoot 24 W.E. 431 was the case of an ex parte decree, and that was held as admissible in evidence " quantum valeat." Naranji Bhikhabhai v. Dipaumed ILR 3 Bom. 3 points out that such judgments as the one in Question are at best not conclusive evidence; see also Jogendro Deb Roy Kut v. Funindro Deb Roy Kut 14 Moore''s I. A. 367; S.C. 11 B.L.R. 244, in which the decision of the Full Bench in the case of Kanhya Lall v. Radha Chum B.L.E. sup. 662: S.C. 7 W.E. 338 is adopted. There are also cases since the passing of the Evidence Act, in which judgments inter partes have been rejected. [GARTH, C.J.-Section 91 of Vol. I of Taylor on Evidence (7th ed.) lays down "that such judgments are not admissible, except by way of demurrer or estoppel."]

8. Baboo Mohesh Chunder Chowdhry for the Respondent.-Although the present plaintiff was no party to the judgment in question, yet the defendant was; and the Evidence Act did not intend to exclude as evidence all judgments which do not come u/s 40. The case of Lala Ranglal v. Deonarayan Tewary (6 B.L.R. 69) points out that such a judgment as the present is admissible.

9. The opinion of the Full Bench was as follows:

Mitter, J.

10. In this case I have the misfortune to differ from his Lordship the Chief Justice and my other colleagues. But the importance of the question referred to the Full Bench, and the fact that the majority of the decided eases on the point are in favour of the view I take, I apprehend, justify me in stating fully the grounds of the conclusion at which I have arrived.

11. Sections 40 to 43 of the Evidence Act deal with the subject of relevancy of judgments, orders, or decrees of Court. Section 40 provides that the existence of a judgment, decree, or order is a relevant fact, if it by law has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. Section 41 deals with what are usually called judgments in rem; and by Section 42 judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. Then Section 43 provides that "judgments, orders, or decree, other than those mentioned in Sections 40, 41, and 42, are irrelevant, unless the fact that such a judgment, order, or decree existed is relevant under some other provision of this Act.

12. It is clear that the judgment mentioned in the order of reference is not relevant under Sections 40 to 42. Therefore, the question that we have to determine is, whether or not it is relevant under some other provision of the Evidence Act, so as to bring it within the proviso of Section 43.

13. I am of opinion that it is relevant both under Sections 11 and 13. I shall deal with the question of its relevancy u/s 13, first. That section provides:-

14. When the question is as to the existence of any right or custom, the following facts are relevant:

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(b) Particular instance in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from.

15. The existence of a right to some Immovable property is in question in this case. That right was asserted and recognized in a previous proceeding of a Court of Justice, and it seems to me that it would not be unwarrantably straining the

language of the section in question to say, that that proceeding was a transaction "within the meaning of Section 13; because the word "transaction" in its largest sense means "that which is done."

16. If the words "transaction" and "right" be not construed in this way, judgments, decrees, and orders which were, before the passing of the Evidence Act, considered conclusive, and which now, according to the law of evidence as administered in England, are considered, when not pleaded as estoppel, cogent evidence, would be excluded. Take for example the following illustration:-A brings a suit against B for enhancement of rent. B sets up a mukurrari potta in defence. A Court of competent jurisdiction finds the potta to be genuine, and dismisses the suit. After the lapse of several years, B sells his right to C, and A then rejects the latter forcibly. Thereupon C brings a suit against A to recover possession of the land covered by the mukurrari potta. A denies the mukurrari right, and alleges that B was a tenant-at-will. Before the Evidence Act was passed, the former judgment would have been conclusive evidence of B''s mukurrari: see Soorjomonee Dayee v. Suddanund Mohapatter (12 B.L.R. 304) and Krishna Behari Ray v. Brojeswari Chowdhranee (L.R. 2 I. A. 283; S.C I. L. R. 1 Cal. 144. According to the law of evidence as at present administered in England, it would equally be considered conclusive, and, if not conclusive, at least as cogent evidence in the subsequent suit. See Taylor on Evidence, Section 1497.

17. Was it intended by the Evidence Act to declare such judgment as this irrelevant? But it would be irrelevant, unless it be relevant either u/s 11 or Section 13. It is not relevant u/s 40, because its existence, does not by law prevent the Court from "taking cognizance of the second suit." In the second suit it is the plaintiff who would seek to use it as relevant evidence, and it is apparent that he would not rely upon it to bar the cognizance of His own suit. It may be said that, u/s 13 of the present Procedure Code, the existence of the first judgment would prevent the Court from holding a trial of the issue as to the mukurrari right of B, and would therefore be relevant u/s 40. Supposing that the word "trial" in the section in question refers not only to a criminal trial, but also to a " trial " of an issue in a civil suit, the judgment in question would not have been relevant under this section before the present Procedure Code was passed, because, u/s 2 Section 2:-The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court Unless suits previously of competent jurisdiction in a former suit between the same heard and determined. parties or between parties under whom they claim.] of Act VIII of 1859, it would not have prevented any Court from holding a trial of the issue as to the mukurrari title in the second suit. Then again, suppose in the second suit the judgment in question was not produced at or before the trial, and evidence bearing upon this issue was allowed to be adduced. Then suppose at a later stage of the case, the plaintiff produced the judgment in question and satisfied the Court, that, in the exercise of its discretionary power, it ought to receive it. Under these circumstances, I apprehend it would not be admissible u/s 40 of the Evidence Act, because its

existence would and could not at that stage of the case prevent the Court from holding a trial of the issue regarding B''s mukurrari title.

18. The judgment in question then, at least in some cases, not being admissible u/s 40, and it being evident that it is not admissible under Sections 41 and 42, it would be excluded altogether, unless its existence be relevant under some other provision of the Act. But if we construe the words "transaction" and "right" in Section 13 in their largest sense, it would be relevant under that section.

19. But it has been said that law of evidence as administered in England, was the law of evidence in force in this country before the Evidence Act was passed; that the judgment of the description mentioned in order of reference is and was not admissible under English law; and that if the Legislature intended to alter the law in this respect, it would have done so by a more clear and express provision than what is contained either in Section 13.

20. But I apprehend that the law of evidence as administered in England was not, in its integrity, the law in force in this country before the passing of the Evidence Act. The statutory provision on this subject was contained in the second paragraph of Section 24 of Act VI of 1871, which is to the following effect: "In cases not provided for by the former part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience." This is only a re-enactment of the provision of Section 15 of Regulation III of 1793. Therefore, so far as the legislative enactments go, there is no foundation for this proposition.

21. Upon an examination of the decided cases on the subject, it would be found to be equally untenable.

22. The question was fully discussed by Mr. Justice MARKBY in Doorga Doss Roy Chowdhry v. Norendro Goomar Dutt Chowdhry 6 W. R. 232, and he came to the conclusion that the rule of English law was not applicable "in all its strictness" to mofussil Courts in this country. I may as well cite here the observation of the Judicial Committee upon this point in the case of Unide Rajaha Roje Bommarauze Bahadur v. Pemmasamy Venhatadry Naidoo 7 Moore''s I. A. 128:

With regard to the admissibility of evidence in the native Courts in India, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the native Courts in the East India, where it is perfectly manifest, the practitioners and the Judges have not that intimate, acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice; we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it; and more especially

where we find that it has been the practice of the Court to receive documentary evidence without the strict proof which might here be considered necessary; indeed, the consequence of so doing would inevitably be, if the strict rule were adhered to, to reject the most important evidence not only in this case, but almost in every other.

23. In another case (Naragunty Lutchmeedavamah v. Vengama Naidoo9 Moore''s I. A. 66 Judicial Committee observed that "the native Courts of India in receiving evidence do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document authenticated by the signature of the proper officer, as prima facie evidence, subject to further enquiry if it were disputed."

24. There is, therefore, no foundation for the proposition that, before the passing of the Evidence Act, the law of evidence as administered in England was applied with all its technical strictness to mofussil Courts in the country. On the other hand, they were guided by their own practice, which was to a great extent moulded on principles of substantial justice.

25. Acting upon this principle, the Courts in this country, before the passing of the Evidence Act, always held that judgments of the description mentioned in the order of reference were admissible in ''evidence. See Doorga Doss Roy Chowdhry v. Narendro Coomar Dutt Chowdhry (6 W. R. 232) and Lala Ranglal v. Deonarayan Tewary (6 B. L. R. 69). In this latter case, speaking of a judgment of the description mentioned in the order of reference, Mr. Jus tree D.N. MITTER says:

That decisions like the one under our consideration have been frequently admitted in our Courts as evidence, is, I believe, a proposition beyond all dispute, and I do not see any reason why we should depart from this practice merely because it is opposed to the English law of evidence." The observation of Mr. Taylor in Section 1495 shows that, in his opinion also, the propriety of this rule of English law is questionable.

26. The law of evidence as administered in England was not, therefore, in its integrity, the law in force in the mofussil Courts Of this country, and according to the practice of these Courts before the passing of the Evidence Act, decisions like the one under consideration were admitted in evidence. It seems to me that we ought not to come to the conclusion that this rule of taw, founded as it was on a long practice of the mofussil Courts, was altered by the Evidence Act, unless that was clearly made out by the provisions of the Act itself.

27. Then, again, if we do not construe Section 13 in the way I have suggested above, the result would be, that a class of judicial proceedings, which were always considered as furnishing cogent evidence on the question of possession, would, be excluded. I refer to awards under Act IV of 1840, and the corresponding sections of the Criminal Procedure Code. They have been invariably acted upon as affording

valuable evidence of possession, even after the passing of the Evidence Act. They would not be relevant u/s 40, because, apart from other grounds, a proceeding under Act IV of 1840 before a Magistrate cannot be called "a suit" within the meaning of Section 13 of the Civil Procedure Code. Then if these awards'' are not admissible either u/s 11 or Section 13, they would not be relevant at all. I would hesitate to come to the conclusion that the Evidence Act was intended to exclude this class of evidence, unless it was made out as clearly as possible from its provisions.

28. Then it has been said that, in Section 13 of the Evidence Act, the Legislature intended to refer to incorporeal rights only, because, in other parts of the Act, for example in Sections 32 and 48, where the same word occurs in conjunction with the word custom," it has been used in that sense. In the first place, it is by no means clear that Sections 32 and 48 deal only with incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature. It is true that, in the generality of cases, such rights are incorporeal, but it is by no means confined to that class only. Then in the next place, the word "right" is qualified by the word "public" in cl. 4, Section 32, and by the word "general" in Section 48. There is no such qualification in Section 13.

29. Moreover, no reasonable ground can be suggested for the necessity of restricting the meaning of the word "right" in Section 13 to the class "incorporeal." The contention of the appellant does not go to the extent of limiting the section to incorporeal rights of a public nature only. In that case, no doubt, it could be explained upon the ground that such a construction would have the effect of assimilating the provisions of the Evidence Act to the rule of English law on this subject. But the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, does not seem to me to be warranted by any general principle. It is difficult to suggest a reason which would justify the existence of distinction between the rules applicable to the proof of corporeal and incorporeal rights, respectively, whether of a public or of private nature. Why should the transaction of the nature described in Section 13 be relevant when A claims a right of way over a piece of land held and owned by B, and not so when he claims the land itself, appears to me inexplicable. It seems to me that the distinction would be arbitrary. I may as well here state a special consideration which leads me to think that the Legislature, by the use of the word "transaction," intended to include proceedings of Courts also. Is it at all reasonable to suppose that a mere assertion of a right by a person setting it up (whether that right is corporeal or incorporeal, it is quite immaterial for the purposes of this argument) would be admissible as evidence, and not the recognition of it by a Court of Justice? Certainly it seems to me to be highly improbable that that was the intention of the Legislature.

30. For these reasons I am of opinion that the judgment mentioned in the order of reference is relevant u/s 13 of the Evidence Act.

31. Then, as regards its admissibility u/s 11, it has been said that a judgment is not a fact as defined in the Act itself. It is true that the reasons of a decision cannot be called "facts" within the meaning of the Evidence Act; but the result of a particular judgment, i.e., whether it is favourable or unfavourable to a particular party, is, it seems to me, a fact as defined in that Act.

32. Illustration (d) of Section 43 is as follows:-"A has obtained a decree for the possession of land against B; C, B''s son, murders A in consequence.

The existence of the judgment is relevant as showing motive for a crime.

33. Now, the decree referred to in the illustration can only be relevant under Sections 7 8 or 11. In all these sections I find the word used is "fact," consequently it follows that the word "fact," as defined in the Act itself, includes decrees and judgments. "Besides, the definition itself is comprehensive enough to include them.

34. If, therefore, the word "fact," as defined in the Evidence Act, is comprehensive enough to include decrees and judgments, then it seems to me that the judgment mentioned in the order of reference would be relevant, because it having recognized the right of the plaintiff to the present suit, by itself and in connection with the circumstance that it was so recognized, notwithstanding the evidence adduced by the defendant, makes the existence of the fact in issue in this suit highly probable.

35. Again, it may be said, that if we are to admit the judgment under consideration as evidence, we must also hold that a judgment to which the person against whom it is sought to be used was not a party, would also be admissible, because the sections in question make no distinction between these two classes of judgments. It is true that that would be the consequence, but ordinarily no weight should be attached to a judgment between other parties. A similar objection may be urged against the rule of English law, by which, in matters of public interest, such as a claim of highway evidence of reputation from any one is receivable (see Section 545 of Taylor on Evidence). For example, in a claim of a highway alleged to be existing in an obscure village in the district of Nuddea, evidence of reputation of an inhabitant of Benares, evidently not possessing any information on the subject, would be receivable. But what weight would be attached to his testimony? Similarly, when a judgment would be sought to be used against a person who was not a party to it, ordinarily no weight ought to be attached to it. I say ordinarily, because there might be special circumstances which might give to it a weight which it otherwise Would not have. For instance, if it be proved that a particular person, although not formally a party to a previous proceeding, was yet substantially represented in it, because the whole control of that proceeding was in his hands, it would be just and reasonable to allow to the previous judgment some weight in that case. It seems to me that the Legislature, in enacting these sections, have followed out the principle which was laid down by the Judicial Committee in the case already cited, viz., to

leave to a Court of Justice in each particular instance to assign the proper weight and value to a previous judgment that might be produced as evidence in a cause.

36. I would, therefore, answer the question in the affirmative.

Pontifex, J.

37. In considering the rules of evidence it is necessary to look to the reason of the matter. With respect to judgments inter partes, it would be unreasonable that a person who has proved his case once against his opponent, who had a full opportunity of rebutting it, should be compelled a second time to adduce his proofs against the same opponent. Otherwise there would obviously be no end to litigation.

38. But it is by no means unreasonable that a person who has never before been put to the trouble and expense of adducing his proofs, should be treated in the same way as if his opponent had suffered no adverse judgment in any other proceeding.

39. The same opportunities of proof are open as were open to the successful litigant in the first proceeding. Why should a stranger to that proceeding be excused from furnishing evidence in the ordinary course?

40. In matters of public right the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding, and therefore he is properly excused.

41. The observations of the Privy Council, quoted by Mr. Justice MITTER, seem to me to refer more to matters of form than to matters of substance, and to apply to the manner in which a case should be treated by the final tribunal after having passed through all its stages.

42. But the matters we have to deal with is essentially one of substance and not of form, and in giving our judgment we shall be laying down the principle on which a case ought to be tried in its earliest stage.

43. The reason of the matter being, as it appears to me, against the admission in evidence of a judgment not inter partes, I think we ought not to give a final construction to Sections 11 and 13 of the Evidence Act, which construction would also, as pointed out in the judgment of the Chief Justice which I have had the opportunity of seeing, make Sections 40-43 surplusage.

44. I remain of opinion that the judgment in question in this reference s neither a "fact" within the meaning of Section 11, nor a "transaction" within the meaning of Section 13.

Jackson, J.

45. In my opinion the previous judgment was not admissible as evidence in this case.

46. In order to arrive at a conclusion on this point, it seems to me a relevant fact that the Indian Evidence Act, 1872, was passed by the Legislature of this country under the direction of a skilled lawyer, for the express purpose of consolidating, defining, and amending the law of evidence in India; that the construction of the Act is marked by careful and methodical arrangement; and that many of the more important expressions used in it are plainly interpreted.

47. It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should at the same time be contained in or deducible from one or more other rules relating apparently to topics quite distinct, which rules should be at the same time so expressed as to include not merely the specific rule in question, but also matters which that rule taken by itself would specifically exclude.

48. If we are to accept the argument for the respondent in this case, a judgment becomes relevant not only as a judgment, but also as a transaction, and again as a fact. If this be so, it is not very easy to see why the framers of the Act should have taken the trouble to frame the elaborate provisions which follow.

49. On the other hand, when in a law prepared for such a purpose, and under such circumstances, we find a group of several sections prefaced by the title "Judgments of Courts of Justice when relevant," that seems to me a good reason for thinking that, as far as the Act goes, the relevancy of any particular judgment is to be allowed or disallowed with reference to those sections.

50. But admitting, for the sake of argument, that the Act could have been drawn in so loose and unskinful a fashion, I proceed to consider whether the judgment in question can be admitted as a transaction or as a fact.

51. The kind of transaction relied on is that mentioned in Section 13, "where the question is as to the existence of any right or custom." It seems to me as clear as anything can be, that the "right" here spoken of is something quite distinct from ownership. How can it possibly be said, when the question between plaintiff and defendant is which of them is entitled to a thing, that the question relates to the existence of a right. That some one has a right to the property is undoubted. The question is, to whom it belongs. What is referred to in the section cited is evidently a right which attaches either to some property or to status: in short, incorporeal rights, which though transmissible, are not tangible or objects of the bodily senses. To this interpretation, the object, the particular facts selected, and the illustrations to the section, all seem to me to conduce.

52. But, in addition, I cannot look upon the description of a judgment of a Court of Justice as a transaction otherwise than as a misuse of language; nor can any of the verbs which must come in to complete the relevancy of -such transaction be properly used in respect of judgments.

53. A transaction, as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were, whereas, the judgment of a Court is something imposed by the authority of the tribunal. But the Court neither creates, claims, modifies, recognizes, asserts, nor denies a right or custom. It determines for or against. Consequently, in every point of view from which this section can be looked at, it seems to me wholly inapplicable to the case.

54. But then it is said that the judgment is a fact, and a relevant fact u/s 11.

55. No doubt, everything which has been called into being by some agency or other, is, in the widest sense, a fact; and in a certain sense, it may be said that a judgment is a fact within the meaning of Section 3 of the Evidence Act, and facts are relevant when connected with another fact in any of the ways referred to in connection with relevancy.

56. Now, if we strip a judgment of the peculiar character of authority given to it by Section 40 et seq, all that it amounts to is this, that A and B were before Z, who is a Judge on a particular day, and that Z formed a particular opinion on a subject as to which A and B were at issue. This, according to the argument, makes it highly probable that X, a different Judge, should come to the same conclusion upon a similar dispute between A and C.

57. That the Legislature should have intended to give that sort of efficacy to the judgments of the Courts, I should have much difficulty in believing, even if the words otherwise suggested the construction which, in my opinion, they do not.

58. I have had the opportunity of reading the judgment which the Chief Justice proposes to deliver, as well as the observations of my brother PONTIPEX, in both of which I generally concur, and for the reasons there stated, and those which I have shortly given, I consider the evidence inadmissible.

Richard Garth, C.J.

59. I am of opinion that the former judgment was not admissible as evidence in this suit.

60. It was contended, in the first place, that it was admissible u/s 13 of the Evidence Act, as being a "transaction," in which the right in question in the present suit was claimed and recognized.

61. I consider that the former judgment was not a "transaction," and that the right claimed in this suit is not " a right " within the meaning of Section 13.

62. A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences inter se, the adjustment would be a transaction; and by a somewhat strained use of the word, the proceedings in a suit might also be called "transaction;" but to say that the decision of a Court of Justice is a transaction,

appears to me a misapplication of the term.

63. Then again as to the meaning of the word "right" in this section.

64. It is argued by the respondent''s counsel, that it means any right which can possibly be made the subject of a suit; but if this were its true meaning, the provisions of the section would necessarily apply to all suits, because the plaintiff in every suit claims a right of some kind, the existence of which forms the ground of his claim. Surely, this view is inconsistent with the first sentence of the section, because that sentence seems very plainly intended to confine its operation to a particular class of suits, viz., those in which "a question as to the existence of some right or custom" is raised.

65. It may be difficult, perhaps, to define precisely the scope of the word "right," but I think it was here intended to include those properties only of an i incorporeal nature, which in legal phraseology are generally called "rights," more especially, as it is used in conjunction with the word "custom." It is certainly used in that sense in subsequent parts of the Act (see Section 48 and Sub-section 4 of Section 32), which deal with matters of public or general "right or custom;" and in Section 13 the word is probably intended to include both public or private rights of that nature. The "right of fishery" mentioned in the illustration is a right which may be either public or private, according to circumstances.

66. That the expression is used in this limited sense is shown also, as it seems to me, by the words with which it is associated. The right mentioned in the section is one which can be created or exercised," which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word "right" when used in its more extended sense. It would be quite correct to speak of the creation or the exercise of a right of way or of a franchise, but no lawyer would think of saying that a right to a chattel or to damages had been "created or exercised."

67. I consider therefore, in the first place, that the judgment in the former suit is not a "transaction" within the meaning of Section 13; and in the next place, that if it were, it does not relate to the sort of right which is intended by the section.

68. But then it is argued that if the former judgment was not admissible u/s 13, it was so u/s 11, as being a " fact," which, either by itself or taken in connection with other facts, makes the case set up by the defendant improbable.

69. No doubt, the former judgment decided that the present defendant was not entitled to the right which he claims in this suit, but the question is, whether that decision can be properly considered as a fact. If it can, then all judgments or decisions of a Court of Justice, whatever may be their nature, and whoever may be the parties to them, would be equally admissible u/s 11, so long as they contained an adjudication, which is adverse to the claim of either party in a subsequent civil

suit. Thus a decision by a third class Magistrate in a criminal proceeding, with reference to the possession of land or other property, would be admissible as evidence in a civil suit between third parties, who were not represented in that proceeding, provided only that the decision of the Magistrate was adverse to the claim of either party to the suit. As for instance, if the Magistrate decided that X was in possession of certain property, his decision would be admissible in a subsequent civil suit between A and B, where both claimed the same property, in order to show the improbability that, at the time of the Magistrate''s decision, the property belonged either to A or B.

70. It is said that, in this particular case, the defendant, against whom the former judgment is sought to be used, was the plaintiff in the former suit, and had therefore ample opportunity in that suit of contradicting the evidence that was brought against him. But Section 11 makes no exception in favour of that or any other class of cases. If a previous adverse judgment is admissible in a civil suit under that section, it matters not what may have been the nature of the previous proceeding, nor who may have been the parties to it.

71. I consider that an adjudication or opinion expressed in a judgment, is not, properly speaking, "a fact," and certainly not a fact within the meaning of Section 11. The delivery or existence of the judgment itself may be a fact, but the decision which the judgment contains is no more a fact than an opinion expressed by any other person, who is not exercising judicial functions. Thus, if an opinion were given by the Legal Member of Council in answer to a question by the Government, or by a person skilled in any art or science with regard to some matter especially within his own province, that opinion, as it seems to me, would be quite as much a fact, and as admissible in evidence u/s 11, as the decision of a Judge upon a question which it was his duty to determine.

72. But, apart from these considerations, which arise out of the particular language of Sections 11 and 13, I think that, upon far higher and more substantial grounds, it is plain that the Legislature could never have intended to allow that wholesale departure from the English law upon this subject, which the respondent''s contention would involve, and that they certainly never intended to effect that departure by means of Sections 11 and 13, which professedly do not relate to judgments at all.

73. I suppose it must be generally acknowledged, that, with some few exceptions, the Indian Evidence Act was intended to, and did in fact, consolidate the English law of evidence.

74. The different chapters of the Act deal seriatim with the relevancy and consequent admissibility of the different kinds of evidence, and upon this principle, Sections 5 to 16 deal with the admissibility of facts, whilst Sections 40 to 45 deal expressly with judgments;-and I cannot help thinking, with all deference to the

opinions of those learned Judges who have expressed a contrary opinion, that if it had been really the intention of the Legislature to depart entirely from the English rule, and to make a very large class of judgments admissible here, which had never been admissible before the Act, either in England or in this country, they would have expressed their intention more plainly, by means of suitable provisions introduced into that portion of the Act which deals exclusively with judgments.

75. If there is one rule of law which is better known and approved than another, as being founded upon the most manifest justice and good sense, it is this; that (except in the case of judgments in rem and judgments relating to matters of a public nature, which are governed by a different principle) no man ought to be bound by the decision of a Court of Justice, unless he or those under whom he claims were parties to the proceedings in which it was given.

76. But if the construction which the respondent would put upon Section 13 is the correct one, any judgment of a competent Court, founded upon any conceivable right, would be evidence in any subsequent suit relating to the existence of the same right, although the parties to the two suits might be altogether different. And it is argued, moreover, that this radical change in the law of evidence has been brought about not by any direct enactment upon the subject of judgments, but by treating judgments as "transactions" u/s 13, and giving to the words "transactions" and "right" in that section what appears to me to be an incorrect interpretation. And with all due respect to the learned Judges who have adopted this view, I would add, that the mistake (as I consider it) into which they have fallen, has arisen, in great measure, from an erroneous supposition that under Sections 40 to 43, the English law upon the subject of judgments has been imperfectly enacted, and that, in order to give it its full scope, it is necessary to have recourse to Sections 11 and 13. Thus it has been considered, that Section 40 only makes former decrees admissible when they have the effect of preventing a Court of Justice from taking cognizance of a suit, that is, from dealing with a suit in its entirety, and that the words "holding a trial" must necessarily refer to criminal proceedings only.

77. This construction of Section 40 would, of course, confine its operation very materially. For example, in the case of a suit for three years'' rent, if a former decree had decided against the claim as regards the first year''s rent only, that decree would by law be a bar to the suit as regards that one year''s rent. But in the view which has been taken of the section, the decree, though a bar to the second suit pro tanto, would not be admissible in evidence under that section; because it would not prevent the Court from taking cognizance of the whole suit, but only of a part of it.

78. So again, if, in answer to a suit, some ground of defence were set up, which had been decided against the defendant in a former judgment between the same parties, that judgment, although, undoubtedly, a legal bar to the defence set up, would not be admissible u/s 40 ; because it would not prevent the Court from taking cognizance of the suit, but only of a defence set up to it. But surely it could never

have been the intention of the Legislature to confine the effect of Section 40 in this way, to let in as relevant evidence under that section one portion of a class of judgments which operate by law as estoppels, and to leave another portion of the same class of judgments which operate equally as estoppels to be admissible as "transactions" under some other section of the Act.

79. It is true that Section 40 might have been more clearly worded. It has, in fact, much the same defect as Section 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of Soorjomonee Dayee v. Suddanund Mohapatter (12 B. L. R. 304). But I cannot doubt that it was intended to include all judgments which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit, or trying any particular issue. The words "holding a trial" are amply large enough to admit of this construction; and it is not because in some other Act the words "holding a trial" may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in Section 40 of the Evidence Act.

80. If this view is right, it disposes, as it seems to me, of the only real difficulty suggested by the respondent; and it will be found that many of the judgments which, in the cases cited to us in argument, have been held by learned Judges to be admissible u/s 13 only, were really admissible u/s 40. Thus, in the case put by my learned brother Mr. Justice MITTER in his judgment of the mukurrari potta, the former judgment would, undoubtedly, be admissable u/s 40, and would have the effect of prohibiting the Court from trying the same issue a second time. So in the case of Naranji Bhihhabhai v. Dipaumed (I. L. R. 3 Bom. 3), decided by Sir Michael Westropp and Mr. Justice MELVILL, I entirely agree in the conclusion arrived at by those learned Judges, because I consider that the former decrees were clearly admissible u/s 40, and were conclusive between the parties as to the existence of the plaintiff''s right at the time when those decrees were passed.

81. Section 40, in my opinion, admits as evidence all judgments inter partes which would operate as res judicata in a second suit. Section 41 admits judgments in rem as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not. And Section 43 admits all judgments not as res judicata, but as evidence, although they may not be between the same parties, provided they relate to matters of public nature relevant to the enquiry.

82. Putting this construction upon these three sections, it will be found that they do really embody the English law as to the admissibility of judgments as it existed at the time when the Indian Act was passed; and it would be strange, indeed, if having taken the pains to confine by these sections the admissibility Of judgments to those cases where they would be admissible by English law, the framers of the Act had, by another and a previous section, disregarded the English law entirely, and had admitted as evidence all judgments, whether between the same parties or not, which related to the same subject-matter.

83. It is obvious that, if the construction which the respondent''s counsel would put upon Section 13 is right, there would be no necessity for Sections 40, 41, and 42 at all. Those sections would then only tend to mislead, because the judgments which are made admissible under them would all be equally admissible as "transactions" u/s 13, and not only those, but an infinite variety of other judgments which had never before been admissible either in this country or in England. And it is difficult to conceive why, u/s 42, judgments though not between the same parties should be declared admissible so long as they related to matters of a public nature, if those very same judgments had already been made admissible u/s 13, whether they related to matters of a public nature or not.

84. But then it is said, that Section 43 expressly contemplates cases in which judgments would be admissible under other sections of the Act, which are not admissible under Sections 40, 41 or 42. This is quite true. But then I take it, that the cases so contemplated by Section 43 are those where a judgment is used not as a res judicata or as evidence more or less binding upon an opponent by reason of the adjudication which it contains, (because judgments of that kind had already been dealt with under one or other of the immediately preceding sections). But the cases referred to in Section 43 are such, I conceive, as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not This, I conceive, would be one of the many cases alluded to in Section 43.

85. Then, again, it was argued, that, in this country, the rules of evidence in the mofussil, especially as to the admissibility of former decrees, were never so strict as in England; and in support of that contention several cases were cited to us decided by Mr. Justice Dwarkanath Mitter and other eminent Judges of this Court; and we were referred to certain observations made by their Lordships of the Privy Council to the same effect see 7 Moore''s I. A. 137: and 9 Moore''s I. A. 90. But those cases, it must be borne in mind, occurred many years ago, at the time when the practice in the mofussil in this respect was very lax and before the Evidence Act was passed; and the observations of the Privy Council were made, as I humbly conceive, not as approving of this laxity of practice, but rather as excusing it, upon the ground that the mofussil Courts were not at that time so sufficiently acquainted with our English rules of evidence as to be able to observe them with anything like accuracy.

86. I conceive that one great object of the Evidence Act was to prevent this laxity, and to introduce a more correct and uniform rule of practice than had previously prevailed; and if that Act can now be made the means, as I trust it will, of preventing the mischief which too frequently occurs, of decrees between third parties being

improperly admitted as evidence in mofussil Courts, it will prove a very valuable aid to the administration of justice. I consider that the reception of loose evidence of that kind is especially dangerous in a country like this, where unhappily decrees are so often collusively obtained for no other purpose than to make them evidence in future suits between third parties.

87. It was argued that, instead of binding the Courts of this country by the strict rules of evidence, it would be more desirable, and was in fact the intention of the Evidence Act, to render all decrees admissible in evidence "as facts" or "transactions," leaving it to the discretion of the Courts to attribute to each judgment its due weight. But to my thinking this liberty of action would be extremely unsafe; and I certainly am not surprised to find that the Legislature here were unwilling to leave to the subordinate Courts in this country a discretion, which it has not been thought safe or right to entrust to English Judges.

88. I am, therefore, of opinion that the former judgment was not admissible in the present suit: and as the majority of this Court are of that opinion, the case must go back to the Court below to be decided upon the other evidence.

89. The appellant will be entitled to his costs in this Court; and those of the Court below will follow the result of the suit.

Morris, J.

90. I agree with the Chief Justice in holding that the former judgment was not admissible as evidence in the present suit.