THE INDIAN LAW REPORTS

PUNJAB SERIES

FULL BENCH

Appellate Civil

LETTERS PATENT APPEAL

Before Bhandari, C. J., Khosla and Dulat, JJ.

BABU GITA RAM KALSI,—*Appellant.*

versus

S. PRITHVI SINGH AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 51 of 1951

1955

May, 20th

Res judicata—Pro forma *defendants in an action—No relief claimed against them—Whether decision in the action operates as* res judicata *against or in their favour—Code of Civil Procedure (V of 1908)—Section 11—Expressions "Necessary parties", "Proper parties" and* "Pro forma *parties"—Meaning of.*

On 22nd August, 1945, G.R. brought a suit against A.S., Defendant No. 1, for a mandatory injunction restraining him from putting up any structure on a courtyard belonging jointly to G.R., A.S. and defendants 2 to 7 and asking for the demolition of the structure already built. Relief was only claimed against defendant No. 1 and not against defendants 2 to 7. Defendants 2 to 7 did not appear in court and *ex parte* proceedings were taken up against them. On 18th June, 1947, trial Court decreed G.R.'s suit. When G.R. proceeded to execute the decree, defendants 6 and 7 raised objections under section 47 and Order IX, Rule 13, Civil Procedure Code to the effect that the decree was not executable against them for various reasons among others:—

(a) that an *ex parte* decree had been passed against them;

(b) that the decree had been passed against defendant No. 1 alone and no one else;

(c) that defendants 2 to 7 had been described in the plaint as *pro forma*; and

(d) that no relief had been claimed, and no decree awarded against them.

The executing court came to the conclusion that the objections were barred by the rule of *res judicata* and dismissed them. On appeal the Senior Sub-Judge upheld the decision of the trial Court. In second appeal a learned single Judge held that as defendants 2 to 7 were merely *pro forma* defendants and as no relief was claimed against them their objections were not barred by the rule of *res judicata*. He accordingly allowed the appeal. G.R. appealed to the High Court under clause 10 of the Letters Patent.

Held, per Full Bench—

That a *pro forma* defendant is joined as a party in a suit because his presence is necessary in order to enable the Court effectually and completely to adjudicate upon the matters in controversy between the parties. He does not enjoy any special rights or privileges which are not available to others and is as bound by the decision of the Court as the other parties to the litigation. If, therefore, any such person had a right to be heard or to control the proceedings he is bound by the doctrine of *res judicata* even though he was joined merely as a formal party and even though no relief was sought or claimed against him.

Khosla, J. (Contra)—

Held, that the following four conditions must be fulfilled before the principle of *res judicata* can be invoked, namely:—

(a) that there was a conflict of interest between the co-plaintiffs or co-defendants;

(b) that it was necessary to decide that conflict in order to give the plaintiff the appropriate relief;

(c) that a decision between co-plaintiffs and co-defendants was given; and

(d) that the party (co-plaintiff or defendant) had or must be deemed to have had notice that the relevant question was in issue.

Whether a defendant who has been described as a *pro forma* defendant will or will not be bound by the decision in a particular suit will depend upon the facts of that case and it will be too broad a proposition to lay down that all *pro forma* defendants are outside the scope of *res judicata*. There may be cases where a *pro forma* defendant against whom no relief is claimed will nevertheless be bound by the decision in that suit, but in that case it must be shown that there was an issue between him and the plaintiff and that the plaintiff did attack his rights and he was aware of that fact. Where the plaintiff says "I have no quarrel with this defendant. I do not seek any relief against him, he is only a *pro forma* defendant and he need not even be informed of my suit", the Court will have to say that no issue between the plaintiff and that defendant arose, and therefore, there was no matter directly and substantially in issue between them, and in such a case the principle of *res judicata* cannot be applied.

Held also, that expressions "necessary parties", "proper parties" and "*pro forma* parties" are frequently used by lawyers, although these expressions are not contained in the phraseology of the Code of Civil Procedure. By "necessary parties" is meant parties between whom and the plaintiff there is a conflict and against whom the plaintiff claims some relief. By "proper parties" is meant persons against whom no relief may be claimed but who are interested in the decision of the suit and whose rights may be adversely affected by granting the plaintiff the relief he claims. These are persons who are indirectly interested in the suit. Persons having a smaller interest even than " proper parties" are frequently called "*pro forma* parties". These are persons against whom no relief is claimed, who can scarcely be said to be interested in the issue of the suit and whose presence or absence would really make no difference to the Court in arriving at a correct decision. There can be no doubt that the phrase "*pro forma*" is frequently used and has been given a certain definite meaning. The expression has been frequently used in judicial decisions.

Letters Patent Appeal under Clause 10 of the Letters Patent of the East Punjab High Court, against the judgment of Hon'ble Mr. Justice Kapur, dated 5th April, 1951, in Execution Second Appeal No. 264 of 1949.

Case referred by a Division Bench consisting of Hon'ble C. J., Mr. A. N. Bhandari, and Hon'ble Mr. Justice Khosla, to a larger Bench for its final decision, due to the importance mentioned in their judgment, dated the 20th July, 1954.

M. L. SETHI, for Appellant.

K. S. THAPAR, for Respondents.

JUDGMENT OF THE DIVISION BENCH

Bhandari, C. J. BHANDARI, C.J.—This appeal raises the question whether a person who is merely a formal party to an action and against whom no relief is claimed is bound by or entitled to the benefits of the rules of *res judicata*.

The facts of the case are simple and not in dispute. On the 22nd August, 1945, one Geeta Ram brought a suit against Arjan Singh, defendant No. 1, for a mandatory injunction restraining him from putting up any structure on a courtyard belonging jointly to the plaintiff and defendants 1 to 7 and requiring him to demolish any structure which had already been constructed. Defendants 1 to 7 were impleaded as defendants but relief was claimed only against defendant No. 1 and none against defendants 2 to 7. Defendants 2 to 7 failed to appear in Court and *ex parte* proceedings were taken against them. On the 18th June, 1947, the trial Court passed a decree in favour of the plaintiff, the relevant portion of which is in the following terms:—

> "It is hereby ordered that an *ex parte* decree for permanent injunction in accordance with the prayer in the plaint be passed in favour of the plaintiff against defendant No. 1. Defendants Nos. 2 to 7 are *pro forma*."

When the plaintiff proceeded to execute the decree for the demolition of the building which had been constructed on the courtyard belonging jointly to the plaintiff and the defendants, Prithvi Singh and

Nand Avtar Singh, defendants Nos. 6 and 7, raised certain objections under section 47 and Order IX, rule 13 of the Civil Procedure Code. They alleged that the decree was not executable against them for various reasons, among others being—

(a) that an *ex parte* decree had been passed against them;

(b) that the decree had been passed against defendant No. 1 alone and no one else;

(c) that defendants 2 to 7 had been described in the plaint as *pro forma*; and

(d) that no relief had been claimed, and no decree awarded against them.

The Subordinate Judge came to the conclusion that defendants 2 to 7 were parties to the suit, that they had full opportunity to contest the claim of the plaintiff on all the grounds available to them and that as they did not avail of the opportunity which was open to them they were estopped by the doctrine of *res judicata* from re-agitating the case under section 47 of the Code of Civil Procedure. He accordingly dismissed the objections and the order of the trial Court was upheld by the Senior Subordinate Judge in appeal. A learned Single Judge of this Court, however, came to a contrary conclusion. He held that as defendants 2 to 7 were only a formal party and as no relief was claimed against them their right to object to the execution of the decree was not barred by the rule of *res judicata*. He accordingly allowed the appeal, set aside the order of the Courts below and declared that defendants 2 to 7 were at liberty to take the objections which had been raised by them. Geeta Ram plaintiff is dissatisfied with the order and has come to this Court in appeal under clause 10 of the Letters Patent.

The decision of the question as to who are parties to a particular suit is not always free from

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difficulty. Ordinarily a judgment rendered in a particular case affects only those who are parties to the suit or are in privity with the parties, for a judgment cannot be allowed to operate to the detriment of a stranger. *Prima facie* the parties to a judgment include persons who are named as such in the record but this general statement is subject to certain well-recognised exceptions. The first is that not only should a person's name appear in the record as a party but that it should appear on the record at the time of rendition of a valid judgment, *Gobind* v. *Taruck* (1), *Kalee Commar* v. *Pran Kishoree* (2). The second is that there must be not only an identity of parties but an identity in the quality, character or capacity in which they appear. A party acting in one capacity or in one right cannot be affected by a judgment when acting in some other capacity or right.

The question which has arisen in this case is whether there is a third exception to the rule enunciated above, namely that a person who has been joined merely as a nominal or a formal party and has no interest in the result of the litigation is bound by or entitled to the benefits of the rules of *res judicata*. Mr. M. L. Sethi, who appears for the plaintiff, contends that a person who has been impleaded in a suit merely for the sake of form is as much bound by the rules of *res judicata* as any contesting party and has cited a number of cases in support of his contention. The principal decision on which he relies is the well-known case of *Deokee Nundan* v. *Kalee Parshad* (3). In this case it was contended that a decision in a former suit cannot be *res judicata* as against the plaintiff in a subsequent suit because "though he

(1) I.L.R. (1872) 3 Cal. 145
(2) (1872) 18 W.R. 29
(3) 8 W.R. 366

was a defendant in that (former) suit he was not a principal defendant, but was only made a defendant *iehteatan (pro forma)* and that the whole tenor of the plaint shows that the claim was made against the principal defendants and not at all against the precautionary defendant." A Division Bench of the Calcutta High Court overruled this contention with the observation that a decree made in favour of a plaintiff in a suit is binding on the defendants collectively and severally notwithstanding that any of them was made a defendant only *iehteatan*, that is by way of precaution. Any issue which is material to the rights of parties in the matter of the suit between them whether actually contested or not shall not afterwards be raised in a subsequent suit between the same parties. This decision was followed in *Sethurama Iyer* v. *Ram Chandra Iyer* (1), and *Monjur Mondal* v. *Ahamad Hondel and others* (2). Our attention has also been invited to cases such as *Mst. Munni* v. *Tirloki Nath* (3), *Maung Sein Dane* v. *Ma Pan Nyun* (4), *Kedar Nath Goenka* v. *Munshi Ram Narain Lal* (5), *Hafiz Mohammad Fateh Nasib* v. *Sir Swarup Chand-Hukam Chand* (6), which relate to co-defendants.

Mr. K. S. Thapar, on the other hand, relies upon *Dogar Singh* v. *Mt. Dhanti* (7), *Mohammad Din* v. *Hirda Ram* (8), *Sikandar* v. *Mst. Karam Nishan and others* (9), and *Firm Daulat Ram Vidya Parkash* v. *Sodhi Gurbaksh Singh* (10), which lay down the proposition that a finding against a

(1) A.I.R. 1918 Mad. 967
(2) A.I.R. 1953 Cal. 155
(3) A.I.R. 1931 P.C. 114
(4) A.I.R. 1932 P.C. 161
(5) A.I.R. 1935 P.C. 139
(6) A.I.R. 1942 Cal. 1
(7) A.I.R. 1928 Lah. 493
(8) A.I.R. 1935 Lah. 942
(9) A.I.R. 1938 Lah. 842
(10) A.I.R. 1949 E.P. 213

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defendant who was joined only as a *pro forma* party and against whom no relief was claimed cannot operate as *res judicata.*

As the statement of the doctrine of *res judicata* appearing in section 11 of the Code of Civil Procedure is not exhaustive and as it is open to a Court, in view of the observations contained in *Munni Bibi* v. *Tirloki Nath* (1), to examine English decisions for ascertaining the general principles upon which the doctrine should be applied, I endeavoured to look for English precedents but was unable to find any. I accordingly consulted certain American works on 'Judgments' and was able to lay hands on certain passages which appear to have a bearing on the point at issue. In paragraph 430 of his important work on Judgments, Freeman observes as follows:—

> "*Nominal and Real, Proper and Necessary parties.* Parties to a judgment, in the strict sense, include only those persons who are named as such in the record and over whom the Court has acquired jurisdiction. As to such persons the judgment is of course conclusive, unless they have been previously nonsuited or dismissed, or are joined merely as formal parties and have no control over the proceedings, as in case of an action by a grantee in the name of grantor, and as to whom no relief is sought or granted. The fact that they are merely 'proper' and not 'necessary' parties does not relieve them from the conclusive effect of the adjudication."

This exposition of the law has been amplified and explained in the Restatement of the law of Judgments as adopted and promulgated by the American

(1) (1931) 58 Ind. Appls. 158

Law Institute. Section 81 of Chapter IV is in the following terms:—

"81. *Formal Parties.* A person who, although a party to an action, has no control over it and no proprietary or financial interest in its outcome, is a formal party and, if the other party has notice of the facts, is not, in subsequent actions between him and the other party, bound by or entitled to the benefits of the rules of *res judicata.*" Then follows the comment:—

"a. Under the rule stated in this section, a person known to the other party to the action to have no control of or interest in the outcome of an action, is not affected by any of the rules of *res judicata*, by way of merger, bar or collateral estoppel.

The rule applies to cases of assignment where the action is brought by the assignee in the name of the assignor and where the assignor has neither interest in nor control over the outcome of the action. It applies also to bonds running to a public official such as a judge where the action is brought by and for the benefit of the beneficiary of the bond."

It will be seen from the above that three separate sets of views have been entertained in the matter of *pro forma* parties. One view is that a judgment is conclusive against all parties

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to the litigation including nominal or formal parties, *Deokee Nundan Roy* v. *Kalee Pershad* (1). Another view is that a finding against a *pro forma* defendant against whom no relief is claimed is not binding or conclusive, *Dogar Singh* v. *Mst. Dhanti* (2). The third view is that a finding against a formal party is conclusive unless the following conditions are satisfied, viz., that:—

(a) The said party has no control over the litigation;

(b) it has no proprietary or financial interest in its outcome; and

(c) the other party has notice of the facts.

The circumstances in which the American Courts are prepared to exclude a person from the operation of the doctrine of *res judicata* are far more stringent than the circumstances in which some of the Courts in India are prepared to exclude him.

As a considerable diversity of opinion has manifested itself in various Courts and as the matter appears to be of some importance, I would direct that the case be referred to a larger Bench for decision.

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KHOSLA, J. I agree.

JUDGMENT OF THE FULL BENCH.

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BHANDARI, C.J. After a careful consideration of the arguments which have been addressed to us

(1) (1867) 8 W.R. 366
(2) A.I.R. 1928 Lah. 493

and of the judgments which are about to be delivered I am of the opinion that the respondents are bound by the rule of *res judicata.*

The facts of the case appear sufficiently from my order dated the 20th of July, 1954, by which the case was referred to the Full Bench.

It is a fundamental rule of law that to make a judgment pleaded in bar, a technical bar it must appear to have been between the same parties. The expression "parties" in this context "includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side". (1 Greenleaf, Evidence 16th Edition, section 523). As to such persons the judgment is conclusive.

Section 11 of the Code of Civil Procedure declares that judgments and decrees bind only parties and privies. This section makes no distinction between a formal and an informal party or between a party against whom a relief is claimed and a party against whom no relief is claimed. A *pro forma* defendant is joined as a party in a suit because his presence is necessary in order to enable the Court effectually and completely to adjudicate upon the matters in controversy between the parties. He does not enjoy any special rights or privileges which are not available to others and is as bound by the decision of the Court as the other parties to the litigation. If therefore any such person had a right to be heard or to control the proceedings he is bound by the doctrine of *res judicata* even though he was joined merely as a

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formal party [*Munni Bibi* v. *Tirloki Nath* (1), *Maung Sein Dane* v. *Ma Pan Nyun* (2)] and even though no relief was sought or claimed against him, *Kidar Nath Goenka* v. *Munshi Ram Narain Lal* (3), *Hafiz Mohammad Fateh Nasib* v. *Sir Swarup Chand Hukum Chand* (4).

But a question may well be asked what are the circumstances in which a person may claim that a judgment rendered in an action to which he was a party is not *res judicata* as to the facts therein decided. The answer is simple and clear. A party to an action can escape the binding force of a former adjudication between the same parties only if he can satisfy the Court that he had no right to be heard in the earlier case or that he had no control over the proceedings. Only one example need be cited by way of illustration. The statutory right of action of a wife in the United States for a wrong done to her is her separate property and her husband cannot contest or interfere with the conduct of the suit or appeal from the decision therein. If, therefore, a wife in an action to which her husband is merely a formal party, recovers judgment for personal injury to herself, and her husband brings another action to recover for the loss of the wife's services resulting from the same injury, the record of the first suit is not admissible in evidence as conclusive of the defendant's negligence [*Walker* v. *Philadelphia* (5)].

There can be no doubt in the present case that the judgment in the original suit is binding on both the parties to the execution proceedings. The parties before the trial Court were the same as the parties before the executing Court. They

(1) 58 I.A. 158
(2) A.I.R. 1932 P.C. 161
(3) A.I.R. 1935 P.C. 139
(4) A.I.R. 1942 Cal. 1
(5) 78 American State Reports 801

were directly interested in the subject-matter of the litigation not only because they were owners of the courtyard on which the building had been constructed but also because the two contesting respondents claim to be owners of the building which was sought to be removed, they had a direct financial interest in the result of the action. They had a right to be heard in the cause, they could control the proceedings, they could produce their own witnesses, they could cross-examine the witnesses produced by the plaintiff and they could protest against the order of demolition by preferring an appeal to the higher Court. Moreover it seems to me that although they are endeavouring to overthrow the former adjudication they would have held it binding on the plaintiff if it had been determined the other way. It is futile in the circumstances to argue that they were joined merely as formal parties and that they are not bound by the decision of the Court in the former suit.

KHOSLA, J. This matter has been referred to a Bench of three Judges for decision.

It is necessary to set out the facts of the case in some detail. On the 22nd of August, 1945, Gita Ram brought a suit against seven persons. In this suit he claimed a permanent injunction against Arjun Singh defendant No. 1 directing him to remove a structure which he had put up on land owned jointly by the plaintiff and defendants Nos. 1 to 7. He also asked for an order restraining defendant No. 1 from erecting any structure upon the land in future. In paragraph 5 of the plaint he said that defendants Nos. 2 to 9 (9 was obviously a mistake for 7) were also shareholders and had for that reason been made parties to the suit. The plaintiff presumably meant that defendants Nos. 2 to 7 were shareholders in the site only and not in

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the structure. The usual summonses were issued to the defendants and when the case came up before the Court on the 31st of October, 1945, defendant No. 1 was present with his counsel and the report of the office was that defendants Nos. 2 to 4 had been served while defendants Nos. 5 to 7 had not been served. The Court ordered the issue of fresh summonses to defendants Nos. 5 to 7 and directed that they should be served personally and also by affixation of summonses on their houses. On the next date of hearing, the 24th of November, 1945, again only the plaintiff and defendant No. 1 were present. Defendants Nos. 5 to 7 were reported to have been served by the affixation of summonses on their residences. The Court decided to proceed *ex parte* against them. There was no definite order with regard to defendants Nos. 2 to 4. Defendant No. 1 submitted that he had not received a copy of the plaint and asked for time to put in his written statement. The Court allowed this prayer on condition he paid Rs. 10 costs and directed him to put in his written statement on the 13th of December, 1945. On the 13th of December, 1945, the counsel for defendant No. 1 stated that he was not prepared to pay the costs but wanted to put in a written statement. This was not allowed and the Subordinate Judge passed an order which concluded as follows :—

> "As a result the written statement cannot be taken on the file and this amounts to failure on the part of the defendant. The defence is barred and I order the plaintiff to produce evidence in support of his case on 21st December, 1945."

Defendant No. 1 went up in appeal to the Senior Subordinate Judge. His appeal was dismissed on the 2nd of April, 1946, and the case was

sent back for trial. The case now went to another Subordinate Judge and on the 30th of April 1946, the Subordinate Judge ordered the parties and their counsel to be summoned for the 11th of July 1946. On the 22nd of June, 1946, the plaintiff put in an application in Court saying that it was not necessary to issue notices to defendants Nos. 2 to 7. Paragraph 4 of this petition ran as follows:—

> "That the defendants Nos. 2 to 7 are *pro forma* defendants and they live in far off places and against them *ex parte* proceedings have already been ordered. Therefore, it is not necessary to inform them."

The counsel for the plaintiff supported this petition with a statement which he made in Court. The Court ordered that if the defendants could not be served personally they should be served by affixing notices on their residences. The 11th of July, 1946, was the next date of hearing and the report of the office was that none of the defendants had been served personally. Defendant No. 1 was reported to have gone to Lahore. Defendant Nos. 2 to 4 were served by affixation. Defendant No. 5 had gone to Karachi and defendants Nos. 6 and 7 were served by affixation. The Court ordered that notices by registered post should issue to defendant No. 5 and if the remaining defendants could not be served personally they should be served by affixing notices on their residences. On the next date of hearing, the 26th of August, 1946, the order was that defendants Nos. 2 to 4 and 6 and 7 had been served by affixation but in respect of defendant No. 5 the postal cover for issuing a registered notice had not been put in. The plaintiff was ordered to put it in at once and the notice was ordered to be issued for the 26th of October 1946. On the 26th of October, the Court held that all

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the defendants had been served. Defendant No. 1 had been debarred from putting in his defence and the plaintiff was ordered to call his evidence for the 10th of December, 1946. The plaintiff appears to have given a list of three witnesses and when the case came up on the 10th of December 1946, only one of them was present. The other two, it appears, were not served. The hearing was adjourned to the 22nd of February, 1947, and the Court directed the issue of fresh summonses to the two unserved witnesses. On the 22nd of February 1947, the Presiding Officer was on leave and the case could not be taken up. The Reader directed the parties to appear on the 21st of May 1947. There is, however, nothing to show that the case was taken up on the 21st of May 1947, and the Court took up the file on the 7th of June, 1947. The parties were not present and the Court directed the issue of notices to the parties and to their counsel for the 18th of June 1947. It appears that notices were issued only to the counsel and counsel for the plaintiff and defendant No. 1 were served. No attempt was made to serve defendants Nos. 2 to 7. On the 18th of June, 1947, the plaintiff and his counsel alone were present. Neither defendant No. 1 nor his counsel was present and the Court ordered that plaintiff's evidence be recorded *ex parte*. The plaintiff contented himself by making a brief statement and then concluded his evidence. On this statement the Court passed an *ex parte* decree. By this decree the plaintiff was granted a permanent injunction in the terms prayed for against defendant No. 1. It was also mentioned in the decree that defendants Nos. 2 to 7 were *pro forma*. The effective phrase in the decree-sheet may be translated as follows:—

> "Thus it is ordered that an *ex parte* decree regarding a permanent injunction according to the plaintiff's prayer is

granted against defendant No. 1 with costs. Defendants Nos. 2 to 7 are *pro forma* (*tartibi*)."

The plaintiff took out execution of this decree and defendants Nos. 6 and 7 objected on the ground that the structure which defendant No. 1 had been ordered to demolish did not belong to him but to them (defendants Nos. 6 and 7). On this the decree-holder (the appellant) raised the plea of *res judicata* and contended that the matter had been finally decided between him and the defendants in the suit and, therefore, defendants Nos. 6 and 7 could not raise this plea in execution proceedings. The executing Court repelled this plea and rejected the objections of defendants Nos. 6 and 7. They appealed to this Court and Kapur J. held that the matter could not be treated as *res judicata* as between the plaintiff and defendants Nos. 6 and 7. He accordingly remanded the case for the disposal of the objections raised by defendants Nos. 6 and 7 on merits. The decree-holder filed an appeal under clause 10 of the Letters Patent and this appeal came up before my Lord the Chief Justice and myself. After hearing counsel for both parties we decided to refer the matter to a larger Bench and it has now been heard by a Bench of three Judges.

The question for our decision is whether in the circumstances narrated above the decision of the trial Court operates as *res-judicata* as between the plaintiff and defendants Nos. 6 and 7. In other words, are defendants Nos. 6 and 7 barred from raising the plea that the decree cannot be executed against them inasmuch as it was only defendant No. 1 who was ordered to demolish the structure and they, the real owners of the structure, have a right to object to its demolition?

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The contention of defendants Nos. 6 and 7 is that there was no issue raised as between them and the plaintiff. The plaintiff treated them as *pro forma* defendants. They were not bound to put forward any defence because no attack was made upon their rights and, therefore, there was no matter which was "directly and substantially in issue" between them and the plaintiff, nor was any decision given upon such matter. The requirements of section 11 of the Code of Civil Procedure had, therefore, not been fulfilled and the *ex parte* decree granted in favour of the plaintiff could not bar them from raising the plea which they had raised in the executing Court.

In order to determine this matter it is necessary to consider the full significance of the provisions of section 11 of the Code of Civil Procedure and the nature of the principle of *res judicata*. The relevant portion of section 11 runs—

> "11. No Court shall try any suit or issue in which the *matter directly and substantially in issue* has been directly and substantially in issue in a former suit *between the same parties*, or between parties under whom they or any of them claim, litigating under the same title.
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> *Explanation IV*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
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On page 40 of Mulla's Civil Procedure Code, Volume I, the author sets out the conditions of *res judicata* as follows :—

"I. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue* either actually or constructively in the former suit.

II. The former suit must have been a suit *between the same parties or between parties under whom they or any of them* claim.

III. The parties as aforesaid must have *litigated under the same title* in the former suit.

IV. The Court which decided the former suit must have been a Court *competent to try the subsequent* suit or the suit in which such issue is subsequently raised.

V. The matter directly and substantially in issue in the subsequent suit must have been *heard and finally* decided by the Court in the first suit."

Mr. Thapar who appeared on behalf of the respondents (defendants Nos. 6 and 7) accepted this statement with one small modification. He contended that in condition No. II above for 'suit' we should read 'issue'. He contended that it was not enough to say that the former suit should have been between the same parties. The issue should have been between the same parties or the subject-matter should have formed the basis of a conflict

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between the same parties. He contended that only thus could the doctrine of *res judicata* be applied as between co-plaintiffs and co-defendants. For instance, if A, B and C bring a suit against X, Y and Z and a certain matter is directly and substantially in issue in that suit, and if there is a conflict with regard to this matter between A and B and the conflict is adjudicated upon, A and B will be bound by this decision even though the suit was not between them and they were arrayed on the same side. Similarly, if there is a dispute between X and Y and it is necessary to decide that conflict in order to dispose of the case, the decision will bind X and Y. As between plaintiffs and defendants (e.g., A and X) the matter is very plain and any issue which has been decided between them will bind them both in a subsequent proceeding, therefore, in order to bind two parties it is necessary that that matter should have been directly and substantially in issue *between them* and not merely in the suit to which they were parties. On this point there is no conflict of legal opinion whatsoever, and it has been held that (1) as between co-plaintiffs and (2) as between co-defendants the decision in a previous suit will operate as *res judicata* only if—

(a) there was a conflict of interest between the co-plaintiffs or co-defendants;

(b) it was necessary to decide that conflict in order to give the plaintiff the appropriate relief;

(c) a decision between co-plaintiffs and co-defendants was given; and

(d) the party (co-plaintiff or co-defendant) had or must be deemed to have had notice that the relevant question was in issue.

This was the law laid down by the Privy Council in *Mt. Munni Bibi* v. *Tirloki Nath* (1), *Maung Sein Done* v. *Ma Pan Nyun* (2), *Kedar Nath Goenka* v. *Munshi Ram Narain Lal* (3), *Hafiz Mohammad Fateh Nasib* v. *Sir Swarup Chand Hukam Chand* (4), *Sahurama Iyer* v. *Ramchandra Iyer* (5), and *Chandu Lal* v. *Khalilur Rahaman* (6), in which emphasis was laid on the condition (d) stated above.

It is unnecessary to discuss all these rulings in detail. It will be noticed that in all these cases the conflict was between co-defendants and it was held that because it was necessary to decide that conflict in order to give the plaintiff the appropriate relief and because the party had or must be deemed to have had notice of that fact he was barred from raising the question again. It seems to me that all four conditions must be fulfilled before the principle of *res judicata* can be invoked. The statement of the law by the Privy Council on this matter rests on the premises that there must be a matter directly and substantially in issue *between the parties* as required by section 11 of the Code of Civil Procedure. If there was no conflict between the parties then the parties cannot be bound by the decision in a previous suit.

In *Munni Bibi's case* (1), facts were that a suit was brought by one Narayan Singh who was an assignee of an old decree against Amar Nath.

(1) A.I.R. 1931 P.C. 114
(2) A.I.R. 1932 P.C. 161
(3) A.I.R. 1935 P.C. 139
(4) A.I.R. 1942 Cal. 1
(5) A.I.R. 1918 Mad. 967
(6) A.I.R. 1950 P.C. 17

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He had attached Amar Nath's house but the attachment was released on objections being taken. In his suit Narayan Singh claimed a declaration that he was entitled to sell the property. He impleaded the objector Kanno who was a *Mutawalli* under an old deed, Kashi, a niece of Amar Nath, and Munni, daughter of Amar Nath. A decree was passed in favour of Narayan Singh. Gokal Nath, son of Kashi who had died in the meantime paid off the decree and had the house released. Subsequently a suit was filed by Munni. It was held that she was barred by the principle *of res judicata.* Their Lordships observed—

> "It is true that the appellant (Munni) did not enter an appearance in the suit, and it is also said that she was not a necessary party to it ; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position.
>
> Their Lordships must, therefore, hold that the title to the house as between the appellant and Kashi is *res judicata* in the present suit by reason of the 1909 decision."

Maung Sein Done v. *Ma Pan Nyun* (1), arose out of a suit by a woman against her sister and two brothers. Her claim was that the family was governed by Burmese Customary Law under which females were not excluded from inheritance.

(1) A.I.R. 1932 P.C. 161

The defence taken by her brothers was that the family was governed by Chinese Customary Law which excluded females. The plaintiff's claim was dismissed on the finding that Chinese Customary Law applied. The second sister then filed a suit against the two brothers and this suit was held barred by the decision in the previous suit on the ground that in the previous suit there had been a conflict between brothers and sisters and this conflict was necessary for the decision of the suit, and the conflict had been decided. Their Lordships observed—

> "The issues involved in the present suit of Ma Pan Nyun are identical with the issues in the earlier suit; and their Lordships are of opinion that in regard to those issues; (1) there was in the earlier suit a conflict of interest between Ma Pan Nyun and her brothers; (2) this conflict would necessarily have had to be decided in order to give Ma Sein the relief which she claimed; and (3) the question between Ma Pan Nyun and her brothers (viz., whether she was entitled to any share in her mother's estate) was finally decided."

In *Sethurama Iyer* v. *Ramchandra Iyer* (1), the previous suit had been filed by two reversioners to set aside certain alienations by a widow in favour of defendants Nos. 2 and 4. The plea taken by the plaintiff was that the properties belonged to the husband of the widow and not to defendant No. 2. One of the reversioners was impleaded as defendant No. 6. The suit was originally decreed in part and an appeal was filed and ultimately the matter was compromised. Some

(1) A.I.R. 1918 Mad. 967

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properties were given to defendant No. 2 and some to defendant No. 6. Defendant No. 2 then filed a suit for possession against defendant No. 4 who was in possession of some of the properties allotted to him (defendant No. 2). The plea of defendant No. 4 was that the property had never belonged to the widow's husband. It was held that this plea could not be raised in view of the decision in the previous suit brought by the reversioners. The learned Judges observed—

> "There can be no question that the right to the plaint property was not in issue between the plaintiffs in that suit and defendant 4. We take it that the claim of the present plaintiff who was defendant 2 in the former suit is under the then plaintiffs. As regards the defendant, we have to read with S. 11, Ex. 4, which makes it incumbent upon the defendant to put forward all his defences in respect of the properties in dispute."

They again observed—

> "It has been held that a person who is added as a *pro forma* defendant would be concluded by the decision come to in the suit. If a man is put on the record as a party defendant, it is his duty to see that the property in suit is not decreed to the plaintiff if he has any right thereto."

This decision in my view appears to go beyond the dicta laid down by the Privy Council in the three decisions cited above.

The Calcutta decision *Hafiz Mohammad Fateh Nasib* v. *Sir Swarup Chand Hukam Chand* (1), is based on the Privy Council decisions and reiterates the principle of *res judicata* in almost identical terms.

It seems to me, therefore, that before the principle of *res judicata* can be applied it must be clearly established that in the previous litigation an issue was raised between the relevant parties. In other words, there was a conflict emerging from an attack made by one party and the defence set up by the other and that conflict was adjudicated upon. Further, it must be shown that the party against whom the principle is sought to be applied had or must be deemed to have had notice that the relevant question was in issue.

The contention of Mr. Thapar is that in the present case there was in fact no conflict between the plaintiff and the defendants Nos. 6 and 7 nor can the defendants be credited with the knowledge that there was an issue between them and that the plaintiff was entitled to claim demolition of their property as against them. Mr. Thapar drew our attention to two circumstances.

(1) in the original plaint no relief was claimed against defendants Nos. 6 and 7; and

(2) in the application of the 22nd of June 1946, the plaintiff definitely said that defendants Nos. 2 to 7 were *pro forma* defendants and need not be served.

The word he used was 'tartibi' and this is clearly a translation of the expression *"pro forma"* or *"nominal"*. According to Mr. Thapar no issue can

(1) A.I.R. 1942 Cal. 1

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possibly arise between the plaintiff and *pro forma* defendants because the very expression means that they are formal or nominal parties and the plaintiff does not wish to join issue with them.

The Civil Procedure Code does not anywhere use the phrase "*pro forma*". Order I deals with the question of parties to suits. Rule 3 answers the question who may be joined as defendants. Rule 10 provides that the Court may strike out the name of any party who has been improperly joined or may add another party who has not been joined and whose presence before the Court is necessary. Lawyers frequently use the expressions "necessary parties", "proper parties" and "*pro forma* parties" although these expressions are not contained in the phraseology of the Code. By "necessary parties" is meant parties between whom and the plaintiff there is a conflict and against whom the plaintiff claims some relief. By "proper parties" is meant persons against whom no relief may be claimed but who are interested in the decision of the suit and whose rights may be adversely affected by granting the plaintiff the relief he claims. These are persons who are indirectly interested in the suit. Persons having a smaller interest even than "proper parties" are frequently called "*pro forma* parties". These are persons against whom no relief is claimed, who can scarcely be said to be interested in the issue of the suit and whose presence or absence would really make no difference to the Court in arriving at a correct decision. There can be no doubt that the phrase "*pro forma*" is frequently used and has been given a certain definite meaning. The expression has been frequently used in judicial decisions.

In *Nibaranchandra Shaha* v. *Matilal Shaha* (1), some of the defendants were described as *pro*

(1) I.L.R. 62 Cal. 642

forma defendants and the learned Judges observed—

> "On the facts of this case, I cannot, however, give effect to the plea of *res judicata*. No relief was claimed in the money suit against the plaintiffs. They were not necessary parties at all to that suit and, although it may have been thought desirable to have them as parties defendants, their position was that of *pro forma* defendants only."

Again, in *Firm Daulat Ram Vidya Parkash* v. *Sodhi Gurbaksh Singh* (1), my Lord the Chief Justice observed—

> "They (judgment-debtors) were at best *pro forma* defendants. It has been held repeatedly that there can be no issue between *pro forma* defendants and the other parties to the suit."

In *Dogar Singh* v. *Mt. Dhanti* (2), it was held that a finding against a *pro forma* defendant against whom no relief is claimed does not operate as *res judicata*.

In *Muhammad Din* v. *Hirda Ram* (3), it was held—

> "Where a person is merely a *pro forma* defendant in a previous suit and no relief is sought against him there, he is not precluded from raising the same question in a subsequent suit and principle of *res judicata* in any shape or form does not apply."

(1) A.I.R. 1949 E.P. 213
(2) A.I.R. 1928 Lah. 493
(3) A.I.R. 1935 Lah. 942

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I have referred to these rulings merely in order to show that the expression "*pro forma*" is not unknown to law and although it is not contained in the Code it is frequently used with a certain meaning. Whether a defendant who has been described as a *pro forma* defendant will or will not be bound by the decision in a particular suit will depend upon the facts of that case and it will be too broad a proposition to lay down that all *pro forma* defendants are outside the scope of *res judicata*. I can conceive of cases and some of them were cited before us where a *pro forma* defendant against whom no relief is claimed will nevertheless be bound by the decision in that suit, but in that case it must be shown that there was an issue between him and the plaintiff and that the plaintiff did attack his rights and he was aware of that fact. Where the plaintiff says "I have no quarrel with this defendant. I do not seek any relief against him. He is only a *pro forma* defendant and he need not even be informed of my suit," the Court will have to say that no issue between the plaintiff and that defendant arose and, therefore, there was no matter directly and substantially in issue between them, and in such a case the principle of *res judicata* cannot be applied. There is no magic or charm about the phrase "*pro forma*" and a defendant is not entitled to say "I was only a *pro forma* defendant in the previous suit and that decision does not bind me." He can only claim immunity if he shows that a number of other conditions were satisfied. These conditions I have already set out above, namely, that there was no conflict between him and the plaintiff, it was not necessary to decide that conflict and the conflict was not adjudicated upon, and he had no notice of it nor could he be deemed to have had notice of it. If he can show this, then whether he was described as a real defendant, a *pro forma*

defendant or a "nominal" defendant he will not be bound by the previous decision.

In the present case if the matter were confined to the contents of the plaint alone, defendants Nos. 6 and 7 could not have claimed exemption from the principle of *res judicata*, but we find that the plaintiff went further and in his application of the 22nd of June 1946, stated that the defendants Nos. 2 to 7 were *pro forma* parties and it was not necessary to effect service upon them. This in my view clearly indicated that the plaintiff did not wish to join issue with defendants Nos. 2 to 7. He had no quarrel with them. He did not question their rights nor did he claim that the decision of the suit would in any way affect their rights in the site or in the structure upon it. It must be remembered that this was a suit not for possession of property but for a mandatory and a prohibitive injunction against a particular person. Such a relief is personal to the party alone although it may indirectly affect property. If in such a case the plaintiff says that he has no quarrel with some of the defendants he cannot afterwards turn round and say that the decision binds them also. This in my view is the significance of the use of the expression "*pro forma*" by the plaintiff in his application of the 22nd of June, 1946. He used the expression "*pro forma*" in the sense that the defendants were really not necessary parties and that they need not control the proceedings or enter a defence. Otherwise there was no point in his saying that no notice need issue to them.

The fact that notices did issue to them would make no difference to the case. Service was effected on the defendants by affixation. Supposing service had been effected personally and supposing the defendants had come to Court to

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examine the file in order to see what sort of defence they should enter, they would have seen the plaintiff's application and at once come to the conclusion that it was not necessary for them to take any part in the proceedings because the plaintiff had no quarrel with them and did not even want them to be served. Can the plaintiff now turn round and say that the defendants were bound by that decision when he by his own conduct gave them to understand that they need not enter upon a defence ? When there is no attack, no defence need be put forward. It is not a case where the plaintiff is merely refrained from asking a relief against certain defendants. He has gone further and described them as *pro forma* defendants and stated that they need not be served. In such a case it must be held that there was no matter directly and substantially in issue between the plaintiff and defendants Nos. 6 and 7 and the case does not come within the mischief of Explanation IV.

The very nature of the suit is such that it was not necessary for the plaintiff to implead defendants Nos. 2 to 7. It must be remembered that this was a suit by a co-owner against other co-owners in order to challenge an encroachment made by one of them. It was, therefore, not necessary to join all the co-sharers as defendants. *Parmeshri Kunwar* v. *Dhuman Kunwar* (1), was a case almost on all fours with the present case. In that case a co-sharer complained against the action of another co-sharer and brought a suit to have a construction made upon a vacant space in the *abadi* of the village demolished. He did not join all the co-sharers, and it was held that he could maintain the suit.

(1) A.I.R. 1929 All. 393

Mr. Sethi has cited a number of cases in which it was held that where the right in a joint property is challenged all the co-sharers must be joined as parties, but they were all cases where the conflict was between a stranger and one or more co-sharers. *Maulu* v. *Ghanaya* (1), was a suit to assert rights in *shamilat* land by an outsider, and *Rakheldas Mukherji* v. *Kalipada Bhattacharji* (2), was a case in which the plaintiff claimed an easement in property owned by several persons. It was held in both these cases that all the proprietors must be impleaded. These cases are, however, different from the case where one co-owner wishes to challenge an encroachment made by another co-owner. In such a case he need not implead all the co-owners. There is no analogy between such a case and a suit for partition in which too all the co-owners must be impleaded.

I am thus clearly of the view that the plaintiff by his own conduct showed unequivocally and unmistakably that he did not wish to join issue with defendants Nos. 2 to 7. He was not making any attack on their rights and did not seek any relief against them. He described them as *pro forma* and even went as far as to say that no notices need issue to them. Defendants Nos. 2 to 7, therefore, must be treated as strangers to the suit and as merely nominal parties. They were not bound to offer any defence or raise any pleas. They had no control over the proceedings and although their names continued to appear on the record they must be treated as purely nominal parties. Even the decree-sheet did not hold them liable to any extent. The injunction was granted against defendant No. 1 only and it was stated that defendants Nos. 2 to 7 were *pro forma* defendants. Defendants Nos. 6 and 7, therefore, are now clearly entitled to challenge the plaintiff's right to demolish

(1) A.I.R. 1934 Lah. 366
(2) A.I.R. 1936 Cal. 534

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the structure on the site which they claim as theirs. If the site belongs to them the plaintiff will not be entitled to ask defendant No. 1 to demolish the structure because defendants Nos. 6 and 7 are not bound by the decree against defendant No. 1. I would, therefore, dismiss this appeal holding that the matter is not *res judicata* as between the plaintiff and defendants Nos. 6 and 7.

Dulat, J.

DULAT, J. In August 1945, Gita Ram filed a suit against Arjan Singh and six other defendants and he claimed that Arjan Singh the first defendant had begun to construct a building on a common courtyard jointly belonging to the plaintiff and the seven defendants which was an interference with the rights of the other joint owners and he should, therefore, be directed to demolish the building he had already constructed and permanently restrained from constructing any other building on that land. The plaintiff stated that defendants Nos. 2 to 7 were co-sharers in the common courtyard and had been joined for that reason but that no relief was claimed against them. Only the first defendant, i.e. Arjan Singh, appeared to defend this suit but when he asked for permission to file a written statement the trial Court burdened him with costs and as he declined to pay the costs the Court ordered his defence to be struck off. Against this order Arjan Singh filed an appeal but that appeal was dismissed. When the case went back to the trial Court for further proceedings notices were again ordered to be issued to the other defendants. At that stage of the proceedings an application was put in on behalf of the plaintiff on 22nd June 1946 pointing out that proceedings were already *ex parte* against defendants Nos. 2 to 7 and they were really *pro forma* defendants and it was in the circumstances not necessary to serve them over again. I am mentioning

this fact because at one stage some argument was sought to be built on it. The trial Court did not accede to this prayer of the plaintiff and ordered issue of notices to all the defendants and this was done, and as the trial Court was satisfied that the defendants had all been served, it decided to proceed *ex parte* against them. It appears that at the final stages even the first defendant did not appear, and after hearing the plaintiff's evidence the trial Court decreed the claim directing the first defendant to demolish the building he had constructed and restraining him permanently from constructing any other building. The decree mentioned that the other defendants No. 2 to 7 were *pro forma.*

Gita Ram plaintiff took out execution of this decree and apparently sought to have the offending construction demolished. Two of the defendants Nos. 6 and 7 in the suit namely Prithvi Singh and Nand Autar Singh raised certain objections and one of these was that in the building sought to be demolished the two objectors had two-third share and as the decree directing the demolition of the building was only against the first defendant in the suit i.e., Arjan Singh, the building which did not at all belong to Arjan Singh could not be demolished in execution of that decree. In reply to this particular objection it was contended by the decree-holder that the two objectors were parties to the suit and should have filed their objection in the suit and having failed to do so they were debarred from raising that objection. The executing Court agreed with this view and over-ruled the objection. The two objectors appealed but the appeal was dismissed. There was then a second appeal to this Court and Kapur, J., who heard it came to the conclusion that as a matter of law a party joined merely as a *pro forma* defendant in a suit against whom no relief is

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sought is not bound by any finding or decision given in that suit and on this view allowed the appeal and directed the executing Court to proceed to hear the objection. Gita Ram thereupon filed an appeal under Clause 10 of the Letters Patent which came in the first instance before my Lord the Chief Justice and Khosla, J., who decided to refer it to the present Bench of three Judges.

We are called upon to decide whether on the facts of this case the rule of constructive *res judicata* debars the present respondents from pleading in the execution proceedings that the building sought to be demolished under the decree does not all belong to Arjan Singh but belongs in part to themselves. For this we have first to consider whether a *pro forma* defendant against whom no relief is claimed in a suit is not a matter of law bound by the decision as has been the view of the learned Single Judge. It is, I might mention here, conceded that the rule of *res judicata* mentioned in section 11, Civil Procedure Code, is applicable not only to suits but also to other proceedings including execution and that if the rule is otherwise applicable it would apply to this case.

Section 11, Civil Procedure Code, runs thus—

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation IV to this section then says—

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It will be observed that the section seeks to bind all the parties to a suit and makes no distinction either between necessary and unnecessary parties, or between parties against whom any relief is claimed and those against whom no relief is claimed. Nor does it of course speak of *pro forma* defendant or any other kind of defendant. There is thus nothing to be found in the language of the section to support the distinction drawn by the learned Single Judge as between a *pro forma* defendant against whom no relief is sought and any other defendant or party to a suit and there is, so far as we have been advised, nothing in the Code of Civil Procedure elsewhere, on which such a distinction could be founded. The learned Single Judge came to his conclusion mainly on the basis of previous authority and it is, therefore, necessary to consider the weight of that authority. Reliance has been placed largely on three decisions of the Lahore High Court, *Dogar Singh and others* v. *Mst. Dhanti* (1), *Mohammad Din* v. *Hirda Ram*, (2), and *Sikandar* v. *Mst. Karam Nishan and others* (3), and two decisions of the Calcutta High Court, *Broio Behari Mitter* v. *Kedar Nath Mozumdar* (4), and *Mahim Chandra Gope* v. *Sailendra Chandra De and others* (5). Two decisions, one of the Calcutta High Court, *Deokee Nundun Roy* v. *Kalee Pershad* (6), *and Sethurama*

(1) A.I.R. 1928 Lah. 493
(2) A.I.R. 1935 Lah. 942
(3) A.I.R. 1938 Lah. 842
(4) I.L.R. 12 Cal. 580
(5) A.I.R. 1934 Cal. 384
(6) (1867) 8 W.R. 366

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Iyer v. *Ramchandra Iyer* (1), were cited in support of the opposite view, but the learned Single Judge did not follow them.

The basic decision and the earliest in point of time in support of the learned Judge's view is *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2). In that case one Uma Churn Bagdi filed a suit for possession of a certain tank against Kedar Nath Mozumdar on the ground that he had taken it on lease from Brojo Behari Mitter who was joined in the suit as a *pro forma* defendant. The contesting defendant Kedar Nath Mozumdar pleaded that he was the owner of the disputed property, and it was found that he was in fact the owner and the suit was dismissed. Subsequently Brojo Behari Mitter brought a suit to recover possession of the same property against Kedar Nath Mozumdar and it was pleaded that the decision in the former suit was a bar to the second suit. A Full Bench of the Calcutta High Court came to the conclusion that the second suit was not barred under section 13 of the Code of Civil Procedure as it then was and the reason for this view was stated thus—

> "It is sufficient to point out that the conduct of the suit was not in his hands, and if it had been abandoned by the plaintiff so as to cause it to be dismissed, it could not reasonably be held that this suit was barred. If this were possible, a person in the position of the plaintiff would be helpless, for he would not be able to re-open the case or to contest the order passed by appeal to a higher Court."

(1) A.I.R. 1918 Mad. 967
(2) I.L.R. 12 Cal. 580

The ground adopted by the Full Bench thus was that a *pro forma* defendant has no control over the proceedings as in case of a decision adverse to him he cannot challenge it on appeal. It is not clear how the learned Judges formed the impression that a *pro forma* defendant cannot appeal and I can find nothing in principle or in our procedural law to support this view. In *Dogar Singh and others* v. *Mst. Dhanti* (1), Bhide J. of the Lahore High Court took the view that a finding in a suit cannot operate as *res judicata* against a defendant who was only a *pro forma* party and against whom no relief was claimed, and based this on *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2), without giving any other reason. The same view was repeated by Agha Haidar J. in *Mohammad Din* v. *Hirda Ram* (3), again without mentioning any particular reason. In the third Lahore case *Sikandar* v. *Mt. Karam Nishan and others* (4), decided by a Division Bench the matter of *res judicata* did not really require a decision as the case was settled on another ground. In passing, however, Din Mohammad J. did observe on the authority of *Dogar Singh and others* v. *Mst. Dhanti* (1), that a *pro forma* defendant who was not a necessary party to a suit is not governed by the rule of *res judicata*. This question of a *pro forma* defendant or a party not necessary to the suit was for consideration before their Lordships of the Privy Council in *Mt. Munni Bibi and another* v. *Tirloki Nath and others* (5), and it was argued in that case that the party sought to be bound by a previous decision was not a necessary party to that suit and had not put in appearance.

(1) A.I.R. 1928 Lah. 493
(2) I.L.R. 12 Cal. 580
(3) A.I.R. 1935 Lah. 942
(4) A.I.R. 1938 Lah. 842
(5) A.I.R. 1931 P.C. 114

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and their Lordships in repelling this basis for the argument observed—

> "It is true that the appellant did not enter an appearance in the suit, and it is said that she was not a necessary party to it; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position."

Subsequent to this decision and two other decisions of the Privy Council to which I need not refer, the matter came up for consideration before the Calcutta High Court in *Hafiz Mohammad Fateh Nasib* v. *Sir Swarup Chand Hukam Chand* (1), and the argument was advanced on the authority of *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2) and two later decisions of that Court that a *pro forma* defendant is not governed by the rule of *res judicata*, but on considering the question in the light of the Privy Council decisions, the Division Bench (Edgley and Biswas, JJ.) held:—

> "The law contemplates that even a *pro forma* defendant should ordinarily be bound by a decree which has been obtained in his presence. If a *pro forma* defendant is a proper party to a suit, he has every right to be heard, and it would follow that, if he refrains from putting his case before the Court, he

(1) A.I.R. 1942 Cal. 1
(2) I.L.R. 12 Cal. 580

> does so at his own risk and he cannot afterwards complain if his rights in connection with the subject-matter of the suit are placed in jeopardy by reason of his neglect." And further "The law allows any party to a suit who is adversely affected by a decree to appeal from it, and if a *pro forma* defendant considers that his interests with reference to the subject-matter of the suit have been prejudiced, an appeal filed by him would be competent."

The learned Judges here considered not only the authority of *Brojo Behari Mitter* v. *Kidar Nath Mozumdar* (1), but also the validity of the argument employed in it and did not accept either. The authority of *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (1), which seems to have been the basis of the decisions of the Lahore High Court already referred to was thus completely shaken. The latest decision of the Calcutta High Court on this point is in *Monjur Mondal* v. *Ahammad Mondal and others* (2), where Mookerjee J., after an exhaustive discussion of nearly all the previous cases came to the conclusion that all controversy in respect of this matter must be deemed to have been settled by the decision of the Privy Council and that the view that a *pro forma* defendant was not bound by the rule of *res judicata* was not good law.

> "I would, accordingly, hold" says the learned Judge "that a decision in a former suit cannot be avoided by a party merely on the plea that he was a *pro forma* defendant therein and that no relief was there claimed against him."

(1) I.L.R. 12 Cal. 580
(2) A.I.R. 1953 Cal. 155

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The rule was in fact very clearly stated as long ago as 1867 by two Judges of the Calcutta High Court in *Deokee Nundun Roy* v. *Kalee Pershad and others* (1), which the learned Single Judge declined to follow. It was urged in that case that the defendant was not bound by the decision in the previous suit because he was not a principal defendant but was only made 'defendant' as the plaintiff termed it *'ihtiatan'* (by way of precaution) and that the whole tenor of the plaint showed that the claim was made against the principal defendants and not at all against the precautionary defendants.

> "We are of opinion" observed the Court "that this contention cannot be upheld. The decree in any suit must be treated as an adjudication of rights as between the plaintiff on the one side, and the defendants collectively and severally on the other, except only so far as the decree itself contains any modification or reservation in regard to any of the individual defendants. If the claim which the present plaintiff now makes against Kalee Pershad be well-founded, it would have constituted a good *defence to the action* which Kalee Pershad formerly brought against him and others. It is his *own fault that he did not set up that defence at that time.* The necessity of putting some term to litigation is the foundation of the rule that any issue which is material to the rights of the parties in the matter of suit between them whether actually contested or not, shall not afterwards be raised in a subsequent suit between the same parties.

(1) (1867) 8 W.R. 366

> *And in this respect, a defendant brought in* pro forma *is in exactly the same situation as any other defendant whatever may be the case with regard to his costs.*"

Reference has been made to two other cases *Mahim Chandra Gope* v. *Sailendra Chandra De and others* (1), and *Firm Daulat Ram-Vidya Parkash* v. *Sodhi Gurbakhsh Singh and another* (2), but neither of these is really in point. The Calcutta case was decided on the ground that the plea sought to be raised by the party concerned in the subsequent proceedings was a plea falling outside the scope of the previous litigation, and there was no question about any *pro forma* party in that case. In the second case which is a decision of this Court it was found as a fact that the party sought to be debarred from raising a plea was not a party to the previous proceedings and also that the matter was not directly and substantially in issue in those previous proceedings, and although an observation does appear in the judgment that—

> "it has been held repeatedly that there can be no issue between *pro forma* defendant and the other parties to the suit."

that was merely an observation without any particular bearing on the decision.

It was said before us that the Privy Council decision which I have mentioned and the other Privy Council decisions on which the subsequent decisions of the Calcutta High Court were based were concerned with the application of the rule of *res judicata* between co-defendants and were, therefore, distinguishable from the present case. This distinction is wholly beside the point. What

(1) A.I.R. 1934 Cal. 384
(2) A.I.R. 1949 E.P. 213

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we are considering at the present moment is whether a party can avoid the application of the rule contained in section 11, Civil Procedure Code, on the ground that he was merely a *pro forma* party in the previous proceedings, and the Privy Council decisions leave no doubt that such a distinction is untenable. On authority too, therefore, it appears to me that the distinction drawn by the learned Single Judge is not sustainable and it must be held that a *pro forma* defendant can no more avoid the effect of a decision and the rule of *res judicata* than any other kind of defendant provided of course the other conditions are fulfilled.

But it is contended on behalf of the respondents that in the present case the other conditions are not fulfilled. To understand this part of the argument it is necessary to go back to section 11, Civil Procedure Code, for a moment. What that section expressly prohibits is the trial of a suit, and this of course applies to execution proceedings also, in which the matter directly and substantially in issue has been directly and substantially in issue between the same parties on a former occasion and has been finally decided. The matter, however, does not rest there, for Explanation IV further says that any matter which might and ought to have been raised on a previous occasion will be deemed to have been directly and substantially in issue on that previous occasion and in consequence it will not be permitted to be raised between the same parties on a subsequent occasion. The whole argument on behalf of the appellant is this, that the present respondents were parties to the previous suit and in that previous suit they could and ought to have pleaded that the building in suit which was sought to be demolished was in fact their property to the extent

of two-third share as they are now claiming and since they failed to raise that plea in the previous suit they cannot be permitted to raise it in the subsequent execution proceedings. Mr. Thapar for the respondents seemed to think that before a matter can be said to have been finally concluded between the parties under section 11, Civil Procedure Code, it must have been actually raised and actually decided and since the present plea of the respondents was never raised in the suit and never decided, the rule has no application to it. Such a view would be valid only if Explanation IV to section 11, Civil Procedure Code, were not there at all, but in the face of that Explanation the view is in my opinion not possible of acceptance, for if accepted it would leave nothing whatever in Explanation IV. What Explanation IV expressly provides for is precisely the contingency where a matter has not in fact been raised and, therefore, not decided but that matter is nevertheless concluded because it could and ought to have been raised. In my opinion, therefore, the only question for our consideration is whether the plea which the respondents are now seeking to raise could and ought to have been raised by them in the suit, and if the answer be in the affirmative then they are undoubtedly debarred from raising it now. Before considering this question, however, I might deal with one other argument raised by Mr. Thapar. His suggestion at one stage was that the present respondents were, really speaking, not parties to the suit in which the decree was made, but he did not subsequently stick to that position as it obviously did not suit him to say that the respondents were not parties to the suit, for in that case the respondents would not have had any right of even appealing against the decision of the executing Court in this case. What learned counsel, however, did maintain was that

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for the purposes of section 11, Civil Procedure Code, the respondents cannot be deemed to have been parties to the suit. This was merely an attempt to draw another distinction between one kind of defendants and another kind, and again in my opinion without any foundation. The fact of the matter is that the present respondents were defendants on the record of the suit. They were served in the suit to the satisfaction of the trial Court under orders of that Court and proceedings were taken *ex parte* against them. Mr. Thapar in this connection referred to the application made by the plaintiff in the suit on the 22nd of June 1946 in which it was said that some of the defendants including the present respondents need not be served as *ex parte* proceedings had already been taken against them. I do not see how that application at all affects the matter. The application was made with the object of persuading the Court to proceed *ex parte* against certain defendants. The Court did not agree and directed fresh notices to issue against those defendants and this was in fact done. We are not in the present case concerned with the regularity or irregularity of the proceedings in the suit nor are we competent to consider here whether the defendants in that suit were or were not properly served. We are merely interested in the fact that the present respondents were parties on the record of that suit and that fact in my opinion admits of no doubt. Mr. Thapar in this connection relied very strongly on *Rahmubhoy Hubibbhoy* v. *C. A. Turner and others* (1), which was affirmed on appeal by the Privy Council, *Rahimbhoy Habibbhoy* v. *Charles Agrew Turner* (2), but in that case the defendants in question had been joined in the suit solely and expressly for the purpose of 'discovery only' whatever that may mean, and the

(1) I.L.R. 14 Bom. 408
(2) I.L.R. 17 Bom. 341

High Court held as a matter of fact that he was not a party for the purposes of the suit, and their Lordships of the Privy Council decided the appeal on the footing that the defendant in question was not in fact a party to the suit while in the present case there is no doubt that the present respondents were parties to the previous suit. There is, therefore, no merit in Mr. Thapar's contention that the respondents cannot be bound by the previous decision on the ground of being not parties to the suit.

The question then remains whether in the previous suit the objecting respondents were bound to raise the plea they are now seeking to raise, for in that case alone would they be debarred from doing so now. The argument on behalf of the respondents is that in the previous suit there was no attack made on their rights in the building in suit and they were, therefore, not bound to say that they had any interest in it. I am, I must confess, not at all impressed by this line of reasoning. The plaintiff in the previous suit was seeking to have a particular building demolished on the ground that one of the joint owners had constructed it to the detriment of the other joint owners which he was not entitled to do. If, therefore, it was, as it is now claimed, that the present respondents had two-third share in that building. then it is impossible to agree that the relief sought by the plaintiff in the suit was not attack on the respondents' rights in the suit in building. It appears to me on the other hand that the rights of the respondents which they now claim in the building were directly in jeopardy in that suit. It is also clear that the plea now sought to be raised would have been a good defence to the suit on the part of the present respondents, and I have no doubt that the present respondents were in that suit bound to raise the plea they are now seeking

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to raise or run the risk of being debarred from doing so in any later proceedings. It is not difficult to imagine a case where a right claimed by a particular party in the subject-matter of a suit falls outside the scope of the suit in which case of course it would not be necessary for him nor even in some cases proper to plead his right in that suit. The most familiar instance of this is the case of a previous mortgagee in a suit by a subsequent mortgagee against the mortgagor in which case the paramount title of the prior mortgagee falls outside the scope of the litigation between the subsequent mortgagee and the mortgagor. *Mahim Chandra Gope* v. *Sailendar Chandra De and others* (1), relied upon by Mr. Thapar was such a case and so was the Privy Council decision in *Radha Kishun* v. *Khurshed Hossein and others* (2) and those cases lend no assistance to Mr. Thapar's argument. The question before us is whether in all the circumstances it can be reasonably said that the present respondents need not have in the previous suit pleaded that they had interest in the building, and it should not be ordered to be demolished, and considering the nature of the litigation and the nature of the relief sought by the plaintiff in that suit I have no hesitation in saying that the respondents could and ought to have raised this plea at that time. This plea was thus a matter directly and substantially in issue in the suit within the meaning of Explanation IV to section 11 of the Code of Civil Procedure, and that being so the respondents cannot in the execution proceedings be permitted to raise the plea which they failed to raise in the suit. In my opinion therefore, this appeal must be allowed and the order of the learned Single Judge set aside and that of the Courts below restored. The appellant should be allowed his costs throughout.

(1) A.I.R. 1934 Cal. 384
(2) A.I.R. 1920 P.C. 81