1912 was not made against Jugal Kishore and that so far as the latter is concerned the present application is the only application for execution. This contention I am unable to accept. As stated above the application was against the very firm against whom the decree was passed, and I have no doubt that it was intended to include all the persons who were mentioned in the decree as the members of the firm. It is further clear that the order of 1st October did not decide any matter which could operate as res judicata. Upon these facts I am of opinion that the application of 19th April 1917 should be viewed not as on application to initiate a new execution, but as an application for the revival of the previous proceedings which were interrupted by the order of 1st October, There is a mass of authority for treating such an application as one for the revival of the previous appliion, vide, inter alia, *Qamar-ud-din Ahmad* v. *Jawahir Lal* (1) and *Ghulam Jilani* v. *Yusaf Shah* (2).

But even if we regard the application of 1917 as a new application, I consider that under S. 15, Lim Act of 1908, the period during which the execution had been stayed by the order of the Court should be excluded. The terms of the aforesaid section as contained in the Limitation Act of 1908 are perfectly clear and the decree-holders are entitled to exclude the period from 1st October 1912 to 3rd April 1916 when it was decided that Jugal Kishore was not an insolvent and that there was nothing in the insolvency proceedings to prevent the decree-holders from taking steps for the recovery of the money from him. The judgment in *Ram Das* v. *Kanshi Ram* (3) cited by Mr. Tek Chand is not in point, because a perusal of the report shows that no order staying execution was passed in that case.

On both the grounds set out above the proceedings in execution are within time and I accordingly accept the appeal and setting aside the order of the lower Court return the case with the direction that proceedings for execution be taken against Jugal Kishore in accordance with law. The respondent must pay the costs of the appellant in this Court.

R.M./R.K. *Appeal accepted.*

(1) [1905] 27 All. 334=32 I. A. 102 (P. C.).
(2) [1894] 106 P. R 1894.
(3) [1912] 14 I. C. 335.

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BEVAN-PETMAN, J.

Kallan—Defendant—Appellant.

v.

Mohammad Mir and *others*—Plaintiffs and Defendants—Respondents

Second Appeal 566 of 1919, Decided on 12th November 1919, from decree of District Judge, Delhi, D/- 22nd December 1918.

Civil P. C. (1908), S. 11, Expl. 6—Representation suit—Subsequent suit by parties interested—Matter directly and substantially in issue in previous suit—Decision acts as res judicata.

Plaintiff sued on behalf of himself and the Mahomedan community for a declaration to the effect that the land sold by defendant 1 to defendant 2 was wakf and that the sale-deed was null and void. It appeared that in 1888 plaintiff on behalf of himself and the Mahomedan community had brought a similar suit against defendant 1 and one *I*.

Held: (1) that Expl. 6, S. 11, Civil P. C., was applicable to the case and it could not be contended that the parties to the two suits were not the same; (2) that the question whether the area in dispute was wakf or not was directly and substantially in issue in the earlier suits, and having been adjudicated upon could not be re-opened: 157 *P. R.* 1889 (*F. B.*) *Dist.*

[F 173 C 2; F 174 C 1]

W. B. O'Connor, *Cooper* and *Badur-ud-Din Kureshi*—for Appellant.

Moti Sagar and *Mohammad Iqbal*—for Respondents.

Judgment.—This judgment will cover Appeals Nos. 566, 627 and 628 of 1919. Appeal Nos. 566 and 627 arise out of a suit, No. 74 of 1917, and are separate appeals by two defendants. Suit No. 74 of 1917 was by S. Mohammad Mir and others on behalf of the Mahomedan community against Muzaffar Ali Khan and Kallan, the present appellants, for a declaration that two sales by Muzaffar Ali Khan to Kallan were void on the ground that the land sold was part of a graveyard and was wakf. The suit originally related to three sales and was valued at Rs. 1,200 but, apparently, to enable the plaintiffs to avail themselves of the plea of res judicata one sale was abandoned and the plaint was amended and limited to two sales, whereby the value of the suit was reduced to Rs. 750. Appeal No. 628 arises out of Suit No. 129 of 1917 which was instituted by S. Mohammad Mir on behalf of himself and the Mahomedan community against Muzaffar Ali Khan alone. This suit was for an injunction restraining the defendant from doing any

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acts against the interests of the Mahomedans in the graveyard either by alienating the lands, building thereon or otherwise.

In Suit No. 74 the case for the plaintiffs was that the land sold by Muzaffar Ali Khan was part of a larger area of 43,620 square yards which was wakf and which consisted of a dargah, or shrine, and land attached to it which was a graveyard. The defence was that the whole of this area was not wakf property, that some 2,000 square yards of land was wakf property and that the remainder was the private property of Muzaffar Ali Khan, of which he had already sold part, and that the portion sold to Kallan was his private property. On 30th May 1917 in the course of the proceedings Muzaffar Ali Khan made an important statement, in which he admitted that the area in dispute was 43,620 square yards. He also alleged that originally he had been owner of the whole land but that part of it had become a graveyard and urged that no one could be buried in the land without his permission and without payment or purchase. He also admitted that the whole of the land which was in dispute was shown in the revenue papers in 1866 as Government land. The first Court decided both suits in favour of the plaintiffs, on the ground that the matter was res judicata by virtue of a suit, No. 46 of 1888. The defendants appealed in both the cases, which appeals were dismissed by the lower appellate Court, that Court agreeing with the decision of the first Court. The defendants therefore now appeal to this Court.

The only point for decision is whether the two suits are barred by res judicata as found by the lower Courts. For this purpose it is necessary to compare Suit No. 46 of 1888 with the present suits. In the 1888 suit the parties were S. Mohammad Mir on behalf of himself and the Mahomedan community against Ibrahim Ali and Muzaffar Ali Khan, whilst in Suit No. 74 of 1917 the parties are S. Mohammad Mir and three others on behalf of the Mahomedan community, plaintiffs, and Muzaffar Ali Khan and Kallan, defendants. In Suit No. 129 of 1917 S. Mohammad Mir on behalf of himself and the Mahomedan community is the plaintiff and Muzaffar Ali Khan the defendant. Mr. Muharram Ali Chishti, on behalf of Muzaffar Ali Khan, urges that inasmuch as the parties are not the same, S. 11, Civil P. C., is not applicable but this contention is untenable. Kallan is a purchaser from Muzaffar Ali Khan and Expl. 6, S. 11, Civil P. C., also makes the point clear. I therefore overrule this contention.

The facts in the 1888 suit were that the defendant Ibrahim Ali had purchased a part of the graveyard from Muzaffar Ali Khan and had buried his wife there and had also enclosed with a wall certain existing graves and that the construction of that wall had injured other graves, including that of the father of the plaintiff. The case for the plaintiff was that the dargah, with the land attached to it, on which there were a large number of graves and which, including the shrines, measured 11 bighas 1 biswas was wakf property and that Muzaffar Ali Khan had no right to sell any portion of it and that Ibrahim Ali had no right to do the acts complained of. The defendant Muzaffar Ali Khan pleaded that he was the muttawali of the dargah, that the land connected with the dargah and used as a cemetery was not wakf, that the land had been gifted by the Emperor Jahangir to his ancestors and that from the time of the gift it had remained the property, and in possession, of his family, that he had the right to alienate the property for the purposes and safety of the tombs only and not for any dwelling purposes and that in accordance with the usage prevalent in other cemeteries in Delhi land measuring 2½ yards by 1½ yard was sold by him at the rate of Rs. 40 to persons desiring to bury their dead. The first issue in the suit was

"whether the land of the cemetery of the dargah where lies the disputed place is wakf or private property."

The Court decided issue 1 in favour of the plaintiff and held that the dargah including cemetery, etc., i. e. the whole area of 11 bighas 11 biswas was wakf property. Issue 1 in Suit No. 74 of 1917 is:

"Is the land in dispute (i. e. the whole 43,620 yards) a qabristan and was expressly made wakf for the purpose,"

Issue 2 is:

"Is the land wholly or partially waqf by reason of its being used as qabristan for the public, and if partially, how much."

The suits, Nos. 74 and 129, were practically consolidated and these were the

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issues in both of those suits. It is urged by both Mr. O'Connor for Kallan and Mr. Moharram Ali Chishti for Muzaffar Ali Khan that the areas in dispute in the 1888 suit and in the present suit are not shown to be identical and whereas the actual area of 1888 was a plot of 21 feet by 22 feet, in Suit No. 74 of 1917 the two plots make a total of 300 square yards. Now the suit in 1888 related to khasra No. 399, measuring 11 bighas 11 biswas, and a gosha of 14 biswas, making a total of 12 bighas 3 biswas: and the settlement papers, which were then produced, show that it is one large plot including a dargah or shrine and a masjid.

In his application in the present suits the plaintiff asks for a map to be prepared of khasra No. 399 by the kanungo. Both parties had maps prepared of the total area in dispute and Muzaffar Ali Khan admitted in the Court that the plan of the plaintiff agreed with his plan in general form and outlines. Muzaffar Ali Khan also admitted as I have already pointed out, that the area in dispute had been entered in the revenue papers in 1866 as Government property. This is khasra No. 399. There is in my opinion no doubt whatever that the issue in the 1888 case and in the present cases with regard to the total area claimed by the plaintiff as wakf is the same and that the specific plots now sold were included in issue 1 in the 1888 case. We have now to see whether the decisions of the issues with regard to the total area being wakf or not was directly and substantially in issue in all these suits or whether the matter arose only incidentally. In my opinion the matter whether this total area was wakf or not is directly and substantially in issue in the present cases and was directly and substantially in issue in the 1888 case. It was necessary to decide this point before the rights of the parties with regard to the small areas actually in suit could be ascertained and settled. Mr. Muharram Ali Chishti has referred me to a number of rulings some of which have been dealt with in *Babu Lal* v. *Hari Bakhsh* (1) and some are not in point. It is unnecessary to deal with each and all of them. *Narain Das* v. *Faiz Shah* (2) relied on by him is clearly against him. It is doubtful whether the appellants can take the objection that the property in the present suits is different. This was not specifically urged in the lower Courts in the sense that the total areas dealt with were not the same. The other requirements of S. 11, Civil P. C., have been complied with. The Court which tried the 1888 suit was competent to try the subsequent suit and the decision on issue 1 in the 1888 suit was upheld on appeal. In his reply Mr. Muharram Ali Chishti has endeavoured to raise a new point for the first time to the effect that the injunction in so far as it restrains building cannot be res judicata; but this matter cannot be gone into at this stage. For the above reasons I dismiss all three appeals with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1918] 13 P. R. 1918=41 I. C. 479.
(2) [1889] 157 P. R. 1889 (F. B.)

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RATTIGAN, C. J. AND MARTINEAU, J.

Sain Das and *others* — Defendants — Appellants.

v.

Bishambhar Das and *another*—Plaintiffs and Defendants—Respondents.

First Appeal No. 1117 of 1915, Decided on 1st February 1919, from decree, First Class Sub-Judge, Amritsar, D/- 22nd February 1915.

Civil P. C. (1908), S. 11—Mortgagee suing for declaration that property is not liable to be sold free of his encumbrance—Defendants contending that one defendant alone was exclusive owner under will proved in another suit—Plaintiff not being party to that suit that decision could not be res judicata.

Plaintiffs sued for a declaration that certain property was not liable to attachment and sale in execution of a decree without preservation of their mortgagee rights. It was contended by the decree-holders that defendant 6 being the sole owner of the property under a will, the other members of the family had no power to mortgage it and that the execution of the will had been held to be proved in an earlier suit by defendant 6 against his father and uncle :

Held : (1) that the present plaintiffs not being parties to the earlier case, the finding as to the execution of the will could not operate as res judicata ; (2) that the execution of the will not having been proved, the plaintiffs were entitled to a decree. [P 176 C 1]

Nanak Chand—for Appellant.

Moti Sagar and *Tek Chand*—for Respondents.

Judgment.—This appeal and appeal No. 1118 arise out of two suits, the plaintiffs in which are mortgagees of certain property under two deeds executed

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