

JASWANT SINGH & ANR.

v.

THE CUSTODIAN OF EVACUEE
PROPERTY, NEW DELHI

May 7, 1985

[A.P. SEN AND E.S. VENKATARAMIAH, JJ.]

East Punjab Evacuees' (Administration of Property) Act 1947 Sections 6 and 8 Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance 1949 (Ordinance No. XII of 1949, Section 15 Administration of Evacuee Property Ordinance 1949 (Ordinance No. XXVII of 1949), Sections 2(f), 7 and 17.

Decree holder—Properties of judgment debtor attached by Court on October 9, 1947—Judgment debtor declared evacuee and property vesting in Custodian Court auction sale of properties on October 16, 1948—Purchase by decree holder—Setting aside of sale by Custodian whether maintainable—Crucial dates—December 31, 1947 under Section 8(2) of 1947 Act—August 14, 1947 under section 17(2) of Ordinance XXVII of 1949—Applicability of.

Civil Procedure Code 1908!

Resjudicate—Principle—When is a subsequent proceeding barred—Test for determination.

Two brothers entered into an agreement to sell their interest in an Ice Factory situated at Rawalpindi and received the advance money. As the vendee failed to complete the transaction, a suit was filed by the brothers for specific performance of the agreement and for recovery of the balance consideration. The vendee remained exparate. A decree was passed by the Sub-Judge for the balance of the consideration money and the vendee was given liberty to apply to the court to get a regular sale deed. During the pendency of this suit the interest of one of the brothers was assigned in favour of the appellant who was impleaded in the suit. The vendee left India and was declared an evacuee. A Receiver was appointed for the properties of the vendee some of which were attached on October 9, 1947 and put to sale in execution, but at the instance of the auction-purchaser who became apprehensive on account of the judgment debtor being an evacuee, the sale was got set aside on July 10, 1948.

On July 17, 1944 an application was filed by the Custodian of Evacuee Property under the East Punjab Evacuees' (Administration of Property) Act 1947 claiming that the attached properties were evacuee properties and under s. 8 were exempt from attachment. This application was dismissed on July 19, 1948 on the ground that a Receiver was appointed by the court who was in possession of the properties, and no step was taken by the Custodian under s. 6.

A The attached properties were again brought to sale and on this occasion the appellant purchased the properties and the sale was confirmed on October 16, 1948. The East Punjab Act having been amended in 1948, another application was made by the Custodian under the amended s. 8(2) of the Act on December 11, 1948. This application was rejected on the ground that the said provision was not applicable to court sales of property attached prior to December 31, 1947.

B The Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance, 1949 was promulgated on July 10, 1949. The Custodian made an application under s. 15, on August 24, 1949 for setting aside the sale but this was dismissed for default on December 10, 1949. However, during the pendency of this application another Ordinance the Administration of Evacuee Property Ordinance 1949 (Ordinance No. XXVII of 1949) was promulgated with effect from October 18, 1949. The Custodian made an application on December 12, 1949 both under order 9, rule 9 of the Code of Civil Procedure 1908 and under s.17(2) of Ordinance No. XXVII of 1949 for restoration of the application dismissed for default on December 10, 1949, and for setting aside the sale. The sub-court restored the application on February 11, 1950 but after hearing the application on February 28, 1950 dismissed the same on March 24, 1950.

C The Custodian filed an appeal before the High Court against the order of the Sub-Judge, dated March 24, 1950, contending that the Sub-Judge had erred in not considering the effect of s. 17 of Ordinance XXVII of 1949, but the appeal was dismissed, on the ground that as the earlier order dated March 28, 1949 passed by the Sub-Judge on the basis of the East Punjab Act had become final, it was not open to the Custodian to reagitate the matter again after the promulgation of Ordinance No. XXVII of 1949.

D The Custodian filed a Letters Patent Appeal which was allowed by a Division Bench on December 30, 1963, on the ground that by virtue of s. 17 of Ordinance No. XXVII of 1949 the sale in favour of the decree-holder/auction-purchaser was liable to be set aside on the application made by the Custodian and the application made by the Custodian was not barred by the rule of *res judicata*. The court sale, under which one of the decree-holders had purchased the properties, was accordingly set aside.

E Dismissing the appeal of the auction purchaser.

F HELD: 1. Ordinance No. XXVII of 1949 was replaced by the Central Act i.e. Administration of Evacuee Property Act, 1950 with effect from April 17, 1950. Section 17 of the Central Act was substituted with retrospective effect by Administration of Evacuee Property (Amendment) Act, 1951. The only noticeable difference between s. 17 of the Central Act is that the date 'August 14, 1947' in s. 17(2) of Ordinance No. XXVII of 1949 is substituted by 'March 1, 1947'. In other respects, there is no material difference between the provision. [340 D; G]

2. In order to decide the question whether a subsequent proceeding is barred by *res judicata* it is necessary to examine the question with reference to the (i) forum or the competence of the Court, (ii) parties and their representatives, (iii) matters in issue, (iv) matters which ought to have been made ground for defence or attack in the former suit and (v) the final decision. [341 D]

In the instant case, there is no dispute that the parties and the properties involved in the proceedings in which the order dated March 28, 1949 was passed and in the proceedings commenced by the application which has given rise to this appeal are the same. The only point of difference; is that whereas in the former proceedings, the Custodian had relied upon the provisions of s. 8 of the East Punjab Act, in the present proceedings, reliance is placed on the provisions of s. 17(2) of Ordinance No. XXVII of 1949 and s. 17(2) of the Central Act. [341 E-F]

3. (i) The Sub-Judge had not referred to Ordinance No. XXVII of 1949 at all in his order. Sub-section (2) of Section 17 of Ordinance No. XXVII of 1949 was wider in scope and content than s. 8 East Punjab Act. A comparison of the two would show that whereas s. 8(2) of the East Punjab Act affected sales of the properties by court which had been attached after December 31, 1947, s. 17(2) of Ordinance No. XXVII of 1949 affected any transfer of evacuee property under orders of a court or any other authority made after the 14th day of August 1947. [342 C; D-F]

3. (ii) In the present case the properties in question had been attached by the court on October 9, 1947 which was a date anterior to December 31, 1947 which was the crucial date for purposes of s. 8(2) of the East Punjab Act but subsequent to August 14, 1947 which was the crucial date for purposes of s. 17(2) of Ordinance No. XXVII of 1949. It was not, therefore, open to the Custodian to contend in his application which was disposed of by the Order dated March 28, 1949 that the court sale was liable to be set aside. The cause of action for making that claim arose only after Ordinance No. XXVII of 1945 was passed. [342 G-H]

4. A cause of action for a proceeding has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other words to the media upon which the plaintiff or the applicant asks the court to arrive at a conclusion in his favour. [343 A-B]

5. In order that a defence of *res judicata* may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings. [343 B-C]

6. In the instant case, but for the new law contained in s. 17(2) of Ordinance No. XXVII of 1949 the Custodian would not have been able to question the court sale. It therefore cannot be said that the present proceedings are barred by the rule of *res judicata*, even though in both the proceedings the prayer made by the Custodian was that the sale of the properties in question should be set aside. [343 C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 648 of 1972.

From the Judgment and order dated 30.12.1963 of the Punjab Circuit Bench at New Delhi in Letter Patent Appeal No. 32-D of 1985.

S.C Malik, S.P. Mahajan and Harbans Singh for the Appellants.

Miss Halida Khatun and R.N. Poddar for the Respondents.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. Sardar Mela Singh and Sardar Hari Singh were brothers. They jointly owned an Ice Factory at Rawalpindi which was known as 'Sat Kar'ar Ice Factory'. They entered into an agreement on August 6, 1947 with one Saghir Ahmed, who was a resident of Delhi, to sell in his favour one-half of their interest in the said Ice Factory for a sum of Rs. 90,000 and received Rs. 5,000 by way of advance. Saghir Ahmed agreed to pay the balance of Rs. 85,000 and to complete the sale transaction within a month but he failed to do so. Saghir Ahmed having left India became an evacuee. Sardar Mela Singh and Sardar Hari Singh anticipating that Saghir Ahmed was likely to get possession of the Ice Factory on the basis of the agreement to sell executed in his favour instituted a suit *in forma pauperis* on October 1, 1947 in Suit No. 3 of 1947 on the file of the Senior Sub-Judge at Delhi for specific performance of the agreement to sell and *inter alia* prayed for a decree for a sum of Rs. 85,000 which was the balance of the consideration payable under the agreement to sell referred to above and for Rs. 5,000 as compensation for the loss caused by Saghir Ahmed in not completing the transaction of sale in time. They stated that on his paying the balance of consideration, a sale deed may be obtained from them by Saghir Ahmed. Saghir Ahmed remained *ex parte* and the suit was heard in his absence. On November 20, 1947 a decree was passed in the suit by the Sub-Judge, Ist

Class, Delhi against Saghir Ahmed, directing him to pay to Sardar Mela Singh and Sardar Hari Singh, the plaintiffs in the suit, a sum of Rs. 86,000 along with costs of Rs. 2967/8/. Saghir Ahmed was given liberty to apply to the court to get a regular sale deed executed by the plaintiffs. It may be stated here that during the pendency of the suit the interest of Sardar Mela Singh under the agreement had been assigned in favour of one Jaswant Singh, who was impleaded as plaintiff No. 3 in the suit. Thus Jaswant Singh became a decree-holder under the decree passed, as stated above. That on October 3, 1947 on an application made by the plaintiffs a Receiver was appointed by the court to take possession of some of the properties of Saghir Ahmed. That on October 9, 1947 on an application made by the plaintiffs certain immovable properties belonging to Saghir Ahmed, namely residential flats Nos. 5 and 7 together with some shops which were situated in Panchkuian Road, New Delhi and another immovable property situated in Ghee Mandi, Pahar Ganj, Delhi were attached before judgment. After the decree was passed by the court, the attached properties were put to sale in execution, but at the instance of the auction-purchaser, who apparently had become apprehensive on account of the status of Saghir Ahmed, who had become an evacuee, the sale was set aside on July 10, 1948. The Custodian of Evacuee Property, Delhi filed an application before the executing court on July 17, 1948 claiming that the attached properties were evacuee properties under the East Punjab Evacuees' (Administration of Property) Act, 1947 (East Punjab Act No. XIV of 1947) (hereinafter referred to as 'the East Punjab Act'), which was extended to Delhi also and that under section 8 of that Act all properties of which the Custodian had taken possession under section 6 thereof were exempt from attachment. That application was dismissed on July 19, 1948 on the ground that the Receiver appointed by the court was in possession of the properties and no steps had been taken by the Custodian under section 6 of that Act. The attached properties were again brought to sale and on this occasion the properties were purchased by Jaswant Singh, one of the decree-holders. The sale was confirmed on October 16, 1948. The East Punjab Act was amended in 1948. After such amendment sub-section (2) of section 8 of that Act, as extended to Delhi, read as follows:

"8.(2) All subsisting attachments of evacuees' property effected after 31st December, 1947 under orders of a Civil or Revenue Court or Officer or other authority shall cease to have any effect, and all sales, leases or other

A forms of alienation by any Court, Officer or authority of such property effected after the above mentioned date shall be liable to be set aside at the instance of the Custodian on an application filed before the Court, officer or authority which ordered the sale, lease or alienation, as the case may be, within three months of the coming into force of East Punjab Evacuees' (Administration of Property) (Second Amendment) Ordinance, 1948, or the date of the sale, lease or alienation whichever is later."

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C After the said amendment, the Custodian of the Evacuee Property made another application on December 11, 1948 before the learned Sub-Judge claiming that the sale of the properties by the court was ineffective since the sale had taken place after December 31, 1947. That application was rejected by the learned Sub-Judge holding that the said provision did not affect the court sales of properties which had been attached prior to December 31, 1947 and that in the instant case the properties that had been sold had been attached on October 9, 1947. The said order of the learned Sub-Judge was passed on March 28, 1949 and it became final.

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E Thereafter on June 13, 1949 the Governor-General of India passed an ordinance called the Administration of Evacuee Property (Chief Commissioners, Provinces) Ordinance, 1949 (Ordinance No. XII of 1949). Section 15 of that Ordinance provided—

"15. Exemption from attachment, sale etc.—

F (1) Save as otherwise expressly provided in this Ordinance, no property which has vested in the Custodian shall be liable to attachment, distress or sale in execution of a decree or order of a Court or any other authority, and no injunction in respect of any such property shall be granted by any Court or other authority.

G (2) Any attachment or injunction subsisting on the commencement of this Ordinance in respect of any evacuee property which has vested in the Custodian shall cease to have effect on such commencement, and any transfer on such property under the orders of a Court or any other authority made after such date as may be specified in this behalf with reference to any Province by the

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Central Government by notification in the Official Gazette, shall be set aside if an application is made to such Court or authority by or at the instance of the Custodian within three months from the commencement of this Ordinance.”

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On the basis of the above provision, the Custodian made an application before the Sub-Judge, Ist Class, Delhi on August 24, 1949 for setting aside the sale. That application was dismissed for default on December 10, 1949. But during the pendency of the said application the Governor-General had promulgated another ordinance called The Administration of Evacuee Property Ordinance, 1949 (Ordinance No. XXVII of 1949) hereinafter referred to as ‘Ordinance No. XXVII of 1949’ which came into force with effect from October 18, 1949.

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Ordinance No. XXVII of 1949 provided for the administration of evacuee property and for certain other matters connected therewith. Under clause (i) of section 2 (d) of Ordinance No. XXVII of 1949 a person, who on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances had left any place in any part of India for any place outside India, was treated as an evacuee. Saghir Ahmed, it is not disputed, was an evacuee falling within the said definition. Section 2 (f) of Ordinance No. XXVII of 1949 defined the expression ‘evacuee property’ thus :

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”2. (f) “evacuee property” means any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity), and includes any property—

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(1) which has been obtained by any person from an evacuee after the 14th day of August, 1947, by any mode of transfer, unless such transfer has been confirmed by Custodian, or

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(2) belonging to any person who, after the commencement of this Ordinance, does any of the acts specified in clause (e) of section 2, or in which any such person has any right or interest, to the extent of such right or interest, but does not include—

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A (i) any ornament and any wearing apparel, cooking vessels or other household effects in the immediate possession of an evacuee;

B (ii) any property belonging to a joint stock company the registered office of which was situated before the 15th day of August, 1947, in any place no forming part of Pakistan and continues to be so situated after the said date;”

C Section 7 of Ordinance No. XXVII of 1949 empowered the Custodian appointed thereunder to pass an order declaring any property, which satisfied the definition in section 2 (f) thereof as ‘evacuee property’ and on such declaration being made such property vested in the Custodian by virtue of sub-section (2) of section 8 thereof. It provided that where immediately before the commencement of

D Ordinance No. XXVII of 1949 any evacuee property had vested in any person exercising the powers of a Custodian under any law repealed by Ordinance No. XXVII of 1949, such evacuee property would on the commencement of Ordinance No. XXVII of 1949 be deemed to have vested in the Custodian appointed or deemed to have been appointed for the area under Ordinance No. XXVII of 1949 and would continue to so vest. It is again not disputed that the

E properties of Saghir Ahmed which had been attached in the suit and which had been sold through court had also vested in the Custodian under Ordinance No. XXVII of 1949 by virtue of section 8(2) thereof. It is now necessary to refer to the crucial provision in Ordinance No. XXVII of 1949 insofar as this appeal is concerned. Section 17 of Ordinance No. XXVII of 1949 read as follows :

F “17. (1) Save as otherwise expressly provided in this Ordinance, no property which has vested in the Custodian shall be liable to attachment, distress or sale in execution of an order of a Court or of any other authority, and no

G injunction in respect of any such property shall be granted by any Court or other authority.

H (2) Save as othewise expressly provided in this Ordinance, any attachment or injunction subsisting on the commencement of this Ordinance in respect of any evacuee property which has vested in the Custodian shall cease to have effect on such commencement, and any

transfer of evacuee property under orders of a Court or any other authority made after the 14th day of August, 1947, shall be set aside, if an application is made to such Court or authority by or at the instance of the Custodian within three months from the commencement of this Ordinance."

It may be noted that under sub-section (2) of section 17 of Ordinance No. XXVII of 1949 any transfer of evacuee property under orders of a court or any other authority made after August 14, 1947 was liable to be set aside if an application was made to such court or authority by or at the instance of the Custodian within three months from the commencement of Ordinance No. XXVII of 1949.

Now reverting to the narration of events, on December 15, 1949 the Custodian made an application dated December 12, 1949 both under Order 9, rule 9 of Code of Civil Procedure, 1908 and under section 17(2) of Ordinance No. XXVII of 1949 praying for restoration of the application which had been dismissed for default on December 10, 1949 and for setting aside the sale as provided by section 17(2) of Ordinance No. XXVII of 1949. The application dated August 24, 1949 was restored on February 11, 1950 and that application was heard on February 28, 1950. The application was dismissed on March 24, 1950.

Against the order of the Sub-Judge, Ist Class, Delhi dated March 24, 1950 the Custodian filed an appeal No. 97 of before the High Court of Punjab and one of the grounds urged in the course of that appeal was that the learned Sub-Judge had erred in not considering the effect of section 17 of Ordinance No. XXVII of 1949 on the case. That appeal was dismissed by a Single Judge of the High Court of Punjab at Chandigarh on August 26, 1958.

The learned Single Judge dismissed that appeal on August 26, 1958 on the ground that as the earlier order dated March 28, 1949 passed by the Sub-Judge, Ist Class, Delhi on the basis of the East Punjab Act had become final, it was not open to the Custodian to re-agitate the matter again after the promulgation of Ordinance No. XII of 1949 by the Governor-General. Surprisingly, the learned Single Judge did not also refer to Ordinance No. XXVII of 1949 and the Administration of Evacuee Property Act, 1950 (Act XXXI of

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A 1950) (hereinafter referred to as the 'Central Act') which had replaced the said ordinance.

B Against the judgment of the learned Single Judge, the Custodian filed an appeal in Letters Patent Appeal No. 32-D of 1958 before the High Court of Punjab. That appeal was heard by a Division Bench and it came to be allowed on December 30, 1963. The Division Bench held that by virtue of section 17 of Ordinance No. XXVII of 1949 the sale in favour of the decree-holder/auction-purchaser was liable to be set aside on the application made by the Custodian and the application made by the Custodian was not barred by the rule of *res judicata*. The Division Bench accordingly set aside the court sale, under which one of the decree-holders had purchased the properties. This appeal by certificate is filed against the said decision of the Division Bench.

D Before dealing with the merits of the case, it is necessary to state that Ordinance No. XXVII of 1949 was replaced by the Central Act i.e. Administration of Evacuee Property Act, 1950 with effect from April 17, 1950. Section 17 of the Central Act was substituted with retrospective effect by the Administration of Evacuee Property (Amendment) Act, 1951 (Act XXII of 1951). Section 17(2) of the Central Act read as follows :

E "17. (2) Where, after the 1st day of March, 1947, any evacuee property which has vested in the Custodian or is deemed to have vested in the Custodian under the provisions of this Act has been sold in execution of any decree or order of any Court or other authority, the sale shall be set aside if an application in that behalf has been made by the Custodian to such Court or authority on or before the 17th day of October, 1950."

G The only noticeable difference between section 17 of Ordinance No. XXVII of 1949 and section 17 of the Central Act is that the date 'August 14, 1947' in section 17(2) of Ordinance No. XXVII of 1949 is substituted by 'March 1, 1947'. In other respects, there is no material difference between the provisions of Ordinance No. XXVII of 1949 and the Central Act insofar as the question which arises for consideration in this appeal is concerned.

H The main ground urged in support of the above appeal by the appellants of whom appellant No. 1, Jaswant Singh is the auction-

purchaser, is that the order dated March 28, 1949 passed by the Sub-Judge, Ist Class, Delhi having become final, it would operate as a bar to any enquiry into the application which had been made by the Custodian after the promulgation of Ordinance No. XII of 1949 and Ordinance No. XXVII of 1949. This ground is based on the principles underlying section 11 of the Code of Civil Procedure, 1908. That section provides that 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 that section provides that any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been directly and substantially in issue in such suit. It is well settled that in order to decide the question whether a subsequent proceeding is barred by *res judicata* it is necessary to examine the question with reference to the (i) forum or the competence of the Court, (ii) parties and their representatives, (iii) matters in issue, (iv) matters which ought to have been made ground for defence or attack in the former suit and (v) the final decision. In the instant case there is no dispute that the parties and the properties involved in the proceedings in which the order dated March 28, 1949 was passed and in the proceedings commenced by the application which has given rise to this appeal are the same. The only point of difference between them however is that whereas in the former proceedings, the Custodian had relied upon the provisions of section 8 of the East Punjab Act, in the present proceedings reliance is placed by him on the provisions of section 17(2) of Ordinance No. XXVII of 1949 and section 17(2) of the Central Act. Section 8 of the East Punjab Act which was relied on by the Custodian in the earlier proceedings stated that all subsisting attachments of evacuee property effected after December 31, 1947 under orders of a Civil or Revenue court or an officer or other authority would cease to have any effect, and all sales, leases or other forms of alienation by any court, officer or authority of such property effected after the above mentioned date were liable to be set aside at the instance of the Custodian on an application filed before the court, officer or authority concerned. The application made by the Custodian under that provision was dismissed by the Sub-Judge, Ist Class, Delhi as already mentioned on the

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A ground that the attachment of the properties involved in the case had been effected prior to December 31, 1947 and, therefore, the sale of those properties was not assailable under section 8 of the East Punjab Act. The next application with which we are concerned in this appeal was filed by the Custodian on August 24, 1949 before the court. By then Ordinance No. XII of 1949 had been promulgated. Ordinance **B** No XXVII of 1949 which came into force on October 18, 1949 during the pendency of that application had repealed and replaced Ordinance No. XII of 1949, and therefore the Sub-Judge, Ist Class, Delhi should have taken into consideration the provisions of Ordinance No. XXVII of 1949 on March 24, 1950 when he disposed of the said application. As mentioned earlier, the learned Sub-Judge had **C** not referred to Ordinance No. XXVII of 1949 at all in the course of his order. Sub-section (2) of section 17 of Ordinance No. XXVII of 1949 was wider in its scope and content than section 8 of the East Punjab Act which arose for consideration at the time when the order dated March 28, 1949 was passed by the court. Section 17(2) of **D** Ordinance No. XXVII of 1949 which conferred a new right on the Custodian provided that any transfer of evacuee property under orders of a court or any other authority made after the 14th day of August, 1947 was liable to be set aside if an application was made to such court or authority by or at the instance of the Custodian within three months from the commencement of the Ordinance. A comparison of section 8(2) of the East Punjab Act with section 17(2) of **E** Ordinance No. XXVII of 1949 would show that whereas section 8(2) of the East Punjab Act affected sales of properties by court which had been attached after December 31, 1947, section 17(2) of Ordinance No. XXVII of 1949 affected any transfer of evacuee property under orders of a court or any other authority made after **F** the 14th day of August, 1947. In the present case the properties in question had been attached by the court on October 9, 1947 which was a date anterior to December 31, 1947 which was the crucial date for purposes of section 8(2) of the East Punjab Act but subsequent to August 14, 1947 which was the crucial date for purposes of **G** section 17(2) of Ordinance No. XXVII of 1949. It was not, therefore, open to the Custodian to contend in his application which was disposed of by the order dated March 28, 1949 that the court sale was liable to be set aside. The cause of action for making that claim arose only after Ordinance No. XXVII of 1949 was passed. A cause **H** of action for a proceeding has no relation whatever to the defence which may be set up, nor does it depend upon the character of the

relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in the other words to the media upon which the plaintiff or the applicant asks the court to arrive at a conclusion in his favour. In order that a defence of *res judicata* may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings. In the instant case but for the new law contained in section 17(2) of Ordinance XXVII of 1949 the Custodian would not have been able to question the court sale in question. Since the Custodian could not, therefore, have asked for the relief which he claimed in the application which has given rise to this appeal before March 28, 1949 it cannot be said that the present proceedings are barred by the rule of *res judicata*, even though in both the proceedings the prayer made by the Custodian was that the sale of the properties in question should be set aside. We are, therefore, of the view that the Division Bench was right in holding that the present proceedings were not barred by the rule of *res judicata*.

One other submission made on behalf of the appellants in this case is that no application had been made by the Custodian relying expressly upon section 17(2) of Ordinance No. XXVII of 1949. There is no substance in this submission because we find that there is a specific reference to the said provision in the application dated December 12, 1949, filed before the court of the Sub-Judge, Ist Class, Delhi on December 15, 1949. This application is referred to by the Sub-Judge at the commencement of this order dated March 24, 1950 while the application dated August 24, 1949 is referred to in the third paragraph of that order. It appears from that order that the Sub-Judge had consolidated both the applications and disposed them of together by the same order though he failed to apply the provisions of section 17(2) of Ordinance No. XXVII of 1949. Hence it cannot be accepted that no fresh application had been made after Ordinance No. XXVII of 1949 had come into force.

In the result, we affirm the decision of the Division Bench of the High Court of Punjab and dismiss the appeal.

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A We, however, make it clear that the setting aside of the court sale does not come in the way of any other remedy open to the decree-holders in the instant case to recover the amount which may be due to them under the decree from the judgment debtor or the Custodian or any other authority. Any proceedings that may be initiated by the decree-holders for realising the amount due to them, shall be disposed of by the concerned authority in accordance with law. There will be no order as to costs.

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Appeal dismissed.