

PETITIONER:
GOVINDBHAI GORDHANBHAI PATEL & ORS.

Vs.

RESPONDENT:
GULAM ABBAS MULLA ALLIBHAI & ORS.

DATE OF JUDGMENT 17/12/1976

BENCH:
SINGH, JASWANT
BENCH:
SINGH, JASWANT
RAY, A.N. (CJ)
BEG, M. HAMEEDULLAH

CITATION:
1977 AIR 1019 1977 SCR (2) 511
1977 SCC (3) 179

ACT:

Indian Contract Act, 1872, s. 56, doctrine of frustration, when applicable.

Bombay Tenancy and Agricultural Lands Act, 1948, s. 63(1), Permission for sale, whether administrative, judicial or quasi-judicial act.

Civil Procedure Code, doctrine of res judicata, whether applicable to proceeding dismissed for formal defect whether debars authority exercising concurrent jurisdiction from entertaining subsequent proceedings for same relief.

HEADNOTE:

The respondents agreed to sell their agricultural land to the appellants. The title deeds and possession of the land were given to the appellants and both parties jointly applied to the District Deputy Collector, Thana Prant, under s. 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, seeking permission for the sale. The permission was refused on the ground that the intending purchaser had failed to obtain a certificate from the Collector under Rule 36(f) of the Bombay Tenancy and Agricultural Lands Rules 1956, that he intended to take to the profession of agriculture and was capable of cultivating land personally. The appellants thereafter obtained the requisite sanction from the Additional Collector, Thana, in spite of the respondents' non-cooperation. A suit by the respondents for declaring the agreement void in law was decreed by the Trial Court. In appeal, the High Court opined that the Prant Officer's refusal to permit the sale had rendered the agreement impossible of performance. Allowing the appeal, the Court.

HELD: (1) The parties are governed by s. 56 of the Contract Act according to which a contract becomes void only if something supervenes after its execution which renders it impracticable or impossible of performance. The order of the Prant Officer was not of such a catastrophic character. [519A-C]

Satyabrata Ghose v. Mugneeram Bangur & Co. & Anr. [1954] SCR 310; Smt. Sushila Devi & Anr. v. Hari Singh & Ors. [1971] 2 S.C.C. 288 and Tamplin Steamship Co. Ltd v. Anglo-Mexican Petroleum products Co. Ltd. [1916] 2 A.C. 397, 403,

applied.

Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. [1942] A.C. 154 at 168, referred to.

(2) The function which the Collector or the authorised officer discharges under the proviso to s. 63(1) of the Bombay Tenancy and Agricultural Lands Act is an administrative one and not judicial or quasi-judicial. [519G-H]

The State of Madras v. C.P. Sarathy & Anr. AIR 1953 S.C. 53; A.K. Bhaskar v. Advocate General AIR 1962 Kerala 90; Shantanand v. Advocate General AIR 1955 All. 372; Shrimali Lal v. Advocate General AIR 1955 Raj. 166 and Abdul Kasim v. Md. Dawood AIR 1961 Mad. 242. similarity marked.

(3) The dismissal of a proceeding by an authority not on merits but merely on account of a formal defect will not attract the applicability of the general principles of res judicata and will not debar the authority exercising concurrent jurisdiction from entertaining the subsequent proceedings for the same relief and passing proper orders on merits. [520 F-H]

Putali Mehata v. Tulia I.L.R. 3 Bom. 223 and Pethaparmal v. Murugandi 18 Mad. 466, applied.
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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1860 of 1968.

(Appeal by Special Leave from the Judgment and decree dated the 29th January, 1968, of the Bombay High Court in Appeal No. 472/ 60).

R.P. Bhatt, B.R. Agarwala and Janendra Lal, for the appellants.

Sachin Chaudhary, Prakash Mehta, Ravinder Narain and K.L. John of M/s. 1. B. Dadachanji & Co. for the respondents.

The Judgment of the Court was delivered by--

JASWANT SINGH, J. This appeal by special leave which is directed against the judgment and decree dated January 29, 1968, of the High Court of Judicature at Bombay involves a question of the applicability or otherwise of the doctrine of frustration embodied in section 56 of the Contract Act which to use the words of Viscount Maugham in Joseph Constantine Steamship Line Limited v. Imperial Smelting Corporation Ltd. (1) "is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made" or to use the language of Mukherjea, J. in Satyabrata Ghose v. Mugneeram Bangut & Co. & Anr. (2) "is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence becomes within the purview of section 56 of the Indian Contract Act."

The facts giving rise to this appeal lie in a short compass and may be briefly stated: The respondents who are the owners of four plots of agricultural land admeasuring 7 acres and 13 gunthas and a bungalow standing thereon situate in village Majwade, near Pokhran Talao Road, Thana, having bought the same from Homi D. Dubash under a sale deed dated September 9, 1953 agreed to sell the same to the appellants in lieu of Rs. 25,000/- vide agreement dated May 16, 1957, relevant clauses whereof provided as follows :--

"5. If the purchasers shall insist on any requisitions or objections as to the title, evidence of title, conveyance, possession, receipt of rent or any other matters on

the abstract of or this agreement or connected with the sale which the Vendors shall be unable or on any ground unwilling to remove or comply with, the Vendors shall be at liberty notwithstanding any negotiation or litigation in respect of such requisition or objection, to give to the Purchasers or their Solicitors notice in writing of their intention to rescind the contract for sale unless such requisition or objection be withdrawn and if such notice be given and the requisition or objection be not withdrawn within ten days after the day on which the notice was sent, the contract shall, without further notice be rescinded. The Vendors shall thereupon return to the purchasers the deposit but without any interest, costs of investigating the title or other compensation or payment whatever.

(1) [1942] A.C. 154, 168. (2)
[1954] S.C.R. 310.
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6. if the title be not approved by the Purchaser's attorneys or if the purchase is not completed within the said period of two months owing to any default on the Vendors' part, it shall be at the option of the Purchaser to rescind this agreement and in that event the Purchaser shall be entitled to receive back the earnest money from the Vendors, together with out of pocket costs incurred in the preparation of this agreement and investigation of title, advertisement, Bataid, correspondence etc. But in case of the Vendors wilful default the Vendors shall also pay to the Purchasers interest at 6% per annum on the amount of earnest money from the date hereof till the date of return of the earnest money and all costs of the Purchasers.

7. If the sale is not completed within time provided for completion owing to the fault of the Purchaser, the Vendors shall be entitled to put an end to this contract and to forfeit the earnest money."

Pursuant to the aforesaid agreement, the respondents' attorneys delivered the documents of title to the appellants attorneys on May 17, 1957 for investigation of title and in the third week of May, 1957 the respondents gave possession of the aforesaid property to the appellants in part performance of the said agreement. On August 22, 1957, the respondents and the appellants made a joint application to the District Deputy Collector, Thana Prant, under section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as 'the Act') seeking permission to sell and purchase the aforesaid agricultural land. Section 63 of the Act reads:

"63. (1) Save as provided in this Act-

(a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any land or interest therein, or

(b) no mortgage of any land or interest therein, in which the possession of the mort-

gaged property is delivered to the mortgagee, shall be valid in favour of a person who is not an agriculturist (or who being an agriculturist will after such sale, gift, exchange, lease or mortgage, hold land exceeding two-thirds of the ceiling area determined under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 or who is not an agricultural labourer):

Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, on such conditions as may be prescribed"

It may be mentioned that the conditions alluded to in the proviso to the above quoted section 63 have been prescribed by Rule 36

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of the Bombay Tenancy and Agricultural Lands Rules, 1956 (hereinafter referred to as 'the Rules') the relevant portion whereof is to the following effect:

"36. Conditions on which permission for sale, etc., of land under section 63 may be granted.--

(1) The Collector or other officer authorised under the proviso to sub-section (1) of section 63 shall not grant permission for sale, gift, exchange, lease or mortgage of any land in favour of a person who is not either an agriculturist or agricultural labourer or who, being an agriculturist, cultivates personally land not less than the ceiling area whether as owner or tenant or partly as owner and partly as tenant unless any of the following conditions are satisfied.....

(f) the land is required for cultivating it personally by a person, who, not being an agriculturist, intends to take to the profession of agriculture and to whom the Collector after having regard to the order of priority mention in clause (c) of sub-section (2) of section 32-P, has given a certificate that such person intends to take to the profession of agriculture and is capable of cultivating land personally;"

By means of communication No. TNC.48 dated December 8, 1958, the Prant Officer, Thana, informed the respondents that their request to sell the aforesaid lands to appellant No. 1 could not be granted as the intending purchaser had not obtained the certificate from the Collector to the effect that "he intends to take to the profession of agriculture and is capable of cultivating land personally." On January 21, 1959, the respondents' attorneys wrote to the appellants informing them that no effect could be given to the aforesaid agreement of sale dated May 17, 1957 as the permission under the Act to sell the suit property had been refused by the Prant Officer by his letter dated December 8, 1958 (supra) for appellant No. 1's failure to obtain the certificate to the effect that he intended to take to the profession of agriculture and was capable of cultivating land personally. The respondents' attorneys also called upon the appellants by means of the said communication to return the title deeds adding that on the return of the title deeds, the earnest money paid by them at the time of execu-

tion of the aforesaid agreement would be returned to them. On March 4, 1959, the appellants' advocate wrote to the respondents' attorneys requesting them to authorise the appellants to approach the higher authorities for securing the necessary permission. On March 14, 1959, the respondents' attorneys wrote to the appellants' attorneys evasively replying that no useful purpose would be served by approaching the higher authorities having regard to the provisions of the Act. On the respondents' refusal to cooperate with the appellants in the matter of obtaining permission or sanction under the Act, appellant No. 1 made an application to the Collector, Thana District, Thana on April 8, 1959, bringing the above mentioned facts to his notice and requesting him to grant him a certificate of an agriculturist and the necessary permission to purchase the aforesaid plots of land. Acceding to the request of appellant No. 1, the Additional Collector. Thana

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by his order dated June 6, 1959 granted to the former the requisite certificate under Rule 36 of the Rules as also the permission to purchase the aforesaid plots of land from the respondents as required under section 63(1) of the Act read with Rule 36 of the Rules. The said order ran as follows :--

No.

CB/TNC, 1800

Collector's

Office, Thana,

Thana, 6th

June, 1959.

Read: Application of the applicant Shri G.G. Patel, dated the 8th April, 1959.

Read: Papers ending with Mamlatdar, Thana's No. TNC. SR. 400 dated the 11th May, 1959.

ORDER

A certificate is hereby granted to Shri Govindbhai Gordhanbhai Patel residing at House No. 404, Majiwade, Taluka Thana on his application dated 8th April, 1959 under subclause 'C' of clause 1 of Rule 36 that he intends to take to the profession of Agriculture. After having gone through the merits of the priority list mentioned in clause (C) of section 2 of section 32-P, through the Mamlatdar Thana, permission is hereby granted to Shri Govindbhai Gordhanbhai Patel to purchase the land mentioned below from Shri Ibrahim Ismail Jetpurwala etc. under section 63(1) read with Rule 36 under the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1955 on the conditions as mentioned under :-

Village	S. No.	H. No.	Area
Majiwade	415	Part	
6-51/4	289	2	(Part)
0-36 1/2	280	1	(Part)
0-7	280		4
0-5			

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Permission to purchase the land mentioned above is granted subject to the condition that if the applicant Shri G.G. Patel ceases to cultivate the land personally or transfers his interest in the said land by sale, gift, exchange, lease or mortgage without the previous sanction of the Collector, the permission given under sub-section (1) of section 63 shall be deemed to have been cancelled.

Sd/

For Addition-

al Collector,

Tha

na"

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On June 25, 1959, the appellants' attorneys addressed a communication to the respondents' attorneys forwarding therewith a copy of the aforesaid order No. CB/TEC/1800 dated June 6, 1959, made by the Additional Collector, Thana granting permission to appellant No. 1 for the purchase of the aforesaid plots of land and requesting the respondents to let them know as to when their clients would desire to complete the sale and further asking them whether they had got the property transferred to their names in the records of the Collector of Thana, whereupon the respondents' advocate by his letter dated June 30, 1959 addressed to the appellants' attorneys replied saying that his clients could not take notice of the aforesaid permission. Thereafter the respondents served a notice on the appellants on August 25, 1959 calling upon them to return the title deeds and to restore possession of the aforesaid property. Thereupon, the appellants' advocate wrote to the respondents attorneys on November 24, 1959 pointing out to them that appellant No. 1 having obtained the requisite sanction from the Collector, the respondents were bound to complete the sale and to execute the conveyance in favour of appellant No. 1 and that the aforesaid agreement could not be put an end to in the manner in which the respondents were attempting to do. Not heeding the aforesaid communication of the appellants dated November 24, 1959, the respondents filed a civil suit, being suit No. 36 of 1959 on November 17, 1959 in the Court of the Civil Judge, Senior Division, Thana, for declaration that the aforesaid agreement dated May 16, 1957 was void in law and of no legal effect and for possession of the aforesaid property as also for compensation at the rate of Rs. 150/- per mensem for wrongful retention of the property from June, 1957 till delivery of possession thereof. In spite of the stout resistance put up by the appellants, the trial Court decreed the suit in favour of the respondents subject to their paying to the appellants or depositing in Court the earnest money of Rs. 5,000/- and the compensation amount of Rs. 882.25 holding inter alia that the aforesaid agreement dated May 16, 1957 which was void ab initio being violative of section 63 of the Act was discovered by the respondents to be void in June, 1957 when they found that the permission under section 63 of the Act was necessary. Aggrieved by the judgment and decree of the trial Court, the appellants took the matter in appeal to the High Court of Bombay but their appeal remained unsuccessful. The High Court held that the aforesaid agreement to sell was not void ab initio as section 63 of the Act itself envisaged sale etc. in favour of a nonagriculturist with the permission of the Collector or an officer authorised by the State Govern-

ment in that behalf subject to the conditions which may be prescribed and Rule 36 of the Rules prescribed only a certificate by the relevant authority to the effect that the intending purchaser intended to adopt the profession of an agriculturist. The High Court, however, opined that the aforesaid agreement became incapable of being performed on December 8, 1959 when the Prant Officer declined permission to the respondents to sell the property to the appellants. Rejecting the contention advanced on behalf of the appellants the effect that the aforesaid letter dated January 21, 1959 written by the respondents to the appellants did not terminate or rescind the agreement, the High Court further held that the said letter amounted to cancellation of the agreement.

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Appearing in support of the appeal, Mr. Bhatt, counsel for the appellants, has vehemently urged that the aforesaid order passed by the Prant Officer refusing permission to the respondents to sell the lands did not make the contract impossible of performance; that the said order was merely administrative in character and did not bar the making of the second application by the appellants under section 63 of the Act; that the said agreement was subsisting on June 25, 1959 when the appellants obtained the requisite permission and the certificate from the Additional Collector, Thana, and that section 56 of the Indian Contract Act was not attracted in the present case as the contract had not become impossible of performance.

Mr. Sachin Chaudhary, counsel for the respondents, has, on the other hand, contended that the agreement became impossible of performance and as such void on December 8, 1958, when the Prant Officer refused to permit the respondents to sell the suit property to the appellants, and that the Prant Officer who had co-ordinate jurisdiction with the Collector under section 63 of the Act having refused to grant permission to the respondents to sell the suit property by his order dated December 8, 1958, which was of quasi-judicial character and had not been set aside either in appeal or revision, it was not open to the Collector to grant the permission to the appellants.

Two questions arise for determination in this case---(1) whether the order of the Prant Officer dated December 8, 1958, rendered the aforesaid agreement dated May 16, 1957 impossible of performance and as such void under section 56 of the Indian Contract Act and (2) whether in view of the aforesaid order of refusal by the Prant Officer, Thana dated December 8, 1958, the Additional Collector, Thana, was not competent to grant the sanction and the certificate under section 63 of the Act and Rule 36 of the Rules. The answer to the first question depends on the construction of the expression 'impossible of performance' occurring in section 56 of the Indian Contract Act which lays down:

"56. An agreement to do an act impossible in itself is void--A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such

promise sustains through the non-performance of the promise."

The meaning of the aforesaid expression 'impossible of performance' as used in the above quoted section would be clear from the, following observation made by Lord Loreburn in *Tampfin Steamship*

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Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd(1) 403 which is generally considered to contain a classic and terse exposition of the law relating to frustration:

"The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible."

We find ourselves in complete accord with this view which also finds support from the decisions of this Court in *Satyabrata Ghose v. Mugneerarn Bangur and Co. and Anr.* (supra) and *Smt. Sushila Devi and Anr. v. Hari Singh and Ors.*(2) where it was held that the performance of a contract becomes impossible if it becomes impracticable from the point of view of the object and the purpose which the parties had in view and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do. It would be advantageous at this stage to refer to the following observations made by Mukherjee, J. *Satyabrata Ghose v. Mugneerarn Bangur and Co. and Anr.* (supra) which is a leading authority on the subject of frustration:

"The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

Although various theories have been propounded by the Judges and jurists in England regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract: in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is

said, make the performance of the contract impossible and the parties are absolved from the further

(1) [1916] 2 A.C. 397.

(2) [1971] 2

S.C.C. 288.

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performance of it as they did not promise to perform an impossibility."

In the instant case, there is no term or condition in the agreement in question which stipulates that the agreement would be treated as having become impracticable on the refusal of the Prant Officer to grant the permission under section 63 of the Act. The parties are, therefore, governed purely by section 56 of the Contract Act according to which a contract becomes void only if something supervenes after its execution which renders it impracticable. On the contention advanced on behalf of the respondents, the question that arises is whether the above quoted order of the Prant Officer, Thana Prant, dated December 8, 1958, rendered the contract impracticable. The answer to this question is obviously in the negative. The said order, it will be noted, was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance. A careful perusal of the order would show that it was neither conclusive nor was it passed on the merits of the aforesaid application. The permission was refused by the Prant Officer only on the technical ground that the appellants had not obtained the requisite certificate as contemplated by rule 36(f) of the Rules. It did not in any way prohibit the appellants from making a fresh application to the Collector, Thana Prant, who in view of the phraseology of section 63 of the Act read with clause (f) of rule 35 of the Rules appears to be the only authority competent to grant the requisite certificate. The said order also did not put any fetter on the appellants to apply to the Collector or the Additional Collector for grant of the requisite permission for sale and purchase of the land after obtaining the aforesaid certificate. We, are, therefore, clearly of the opinion that no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as, to attract section 56 of the Contract Act.

The answer to the second question turns on the answer to two subsidiary questions (i) whether in according or declining to accord permission under the proviso to section 63 (1) of the Act, the Collector or the officer authorised by the State Government in that behalf acts in an administrative capacity or a judicial or a quasi-judicial capacity and (ii) whether the aforesaid order dated December 8, 1958 passed by the Prant Officer, Thana was one on merits or otherwise. Turning to the question (i), it has to be observed that there is nothing in section 63 of the Act to indicate that in exercising his jurisdiction under the proviso to sub-section (1) of the section, the Collector or the authorised officer has to act judicially or in conformity with the recognised judicial norms. There is also nothing in the aforesaid Section of the Act requiring the Collector or the authorised officer to determine any question affecting the right of any party. The function which the Collector or the authorised officer discharges under the aforesaid proviso is, therefore, an administrative one and not judicial or quasi-judicial. It will be apposite to advert to a few decisions 17 --1546 SCI/76

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bearing on the matter. In A.K. Bhaskar v. Advocate General(1) a full Bench of the Kerala High Court held that the decision of the Advocate General granting or refusing to grant the sanction under section 92 of the Civil Procedure Code was neither judicial nor quasijudicial notwithstanding the fact that he has to form an opinion and come to conclusion one way or the other. To the similar effect are the decisions of Allahabad and Rajasthan High Courts in Shantanand v. Advocate General(2) and Shrimali Lal v. Advocate General(3). In Abdul Kasim v. Md. Dawood(4) it was held that in granting or withholding sanction to file a suit under section 55(2) of the Muslim Wakfs Act, 1954, the Wakf Board does not act in, a judicial or quasijudicial capacity but only in an administrative capacity. In The State of Madras v.C.P. Sarathy and Anr.(5). It was held by this Court that the act of the Government in making a reference under section 10 of the Industrial Disputes Act was merely an administrative act and the fact that the Government before making a reference under section 10(1) of the Act had to satisfy itself on the facts and circumstances brought to its notice that an industrial dispute existed did not make the act judicial or quasi-judicial.

In regard to question (ii), it may be stated that although the Prant Officer may have been exercising concurrent jurisdiction with the Collector, Thana Prant, he did not pass any orders on the merits of the previous application made by the respondents and endorsed by the appellants seeking permission to sell and purchase the suit property. The order, as already stated, was passed by him on the ground that the intending purchaser had not obtained the certificate required under rule 36(f) of the Rules. It is well recognised that the dismissal of a proceeding by an authority not on merits but merely on account of a formal defect will not attract the applicability of the general principles of Res judicata and will not debar the authority exercising concurrent jurisdiction from entertaining the subsequent proceedings for same relief and passing proper orders on merits. (See Putali Meheti v. Tulja.(6) where the rejection of a previous suit for the plaintiff's omission to produce a certificate of the Collector under section 6 of the Pensions Act was held not to bar a second suit on the same cause of action, and Pethaperumal v. Murugandi(7) where rejection of the first suit for recovery of money for plaintiff's failure

(1) A.I.R. 1962 Ker. 90.

(2) A..I.R. 1955 All. 372

(3) A.I.R. 1955 Raj. 166.

(4) A..I.R. 1961 Mad. 244.

(5) A.I.R. 1953 S.C. 53

(6) I.LR. 3 Born. 223.

(7) 18 Mad. 466.

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to produce succession certificate was held not to bar a second proceeding for the same relief. We are, therefore, of the opinion that the previous order passed by the Prant Officer being merely an administrative order and not having been passed on the merits of the case, it did not, in the absence of a statutory prohibition, impair the power of the Collector to pass the impugned order on the merits of the matter under proviso to section 63 (1) of the Act on the grant of the requisite certificate under rule 36(f) of the Rules.

For the foregoing reasons, we allow the appeal, set aside the judgments and decrees passed by the Courts below and dismiss the respondents' suit but in the circumstances of the ease without any order as to costs.

M.P.

Appeal allowed.

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JUDIS