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MCO LEGALS

2nd June, 2020

CONSTRUCTIVE RES JUDICATA

1. Alluri China Bapanna vs. Sri Muttangi Jaggiah, 24.01.1939, AIR 1939 Mad 818, Relevant Paras at page 9 last para and page 10 first two paras

- The principle underlying Explanation IV to Section 11 of CPC is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided.

A copy of the judgment attached hereto at **page no. 2 to 11.**

2. Rajah Chattar Singh vs. Diwan Roshansingh, 08.03.1945, AIR 1946 Nag 277, Relevant Paras 40-43

- To invoke this doctrine, it will be necessary to show not only that the party could have raised defence in the former suit, but it must also be shown that it was bound to raise the defence in the earlier litigation.

A copy of the judgment attached hereto at **page no. 12 to 41.**

3. Devi Lal Modi vs. Sales Tax Officer, 07.10.1964, AIR 1965 SC 1150, Relevant Paras 8-12

- If a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party, in a subsequent proceeding with reference to the same matter.
- Applying this principle to writ-petitions, the Supreme Court held that a petition challenging the validity of a sales tax assessment in a writ petition could not be allowed to raise two pleas which had not been put forward in a previous writ petition relating to the same matter.

A copy of the judgment attached hereto at **page no. 42 to 46.**

4. Prem Lata v Lakshman Prasad, 23.04.1970 (1970) 3SCC 440, Relevant Paras 17-20

- The principle of constructive res judicata applies to the execution proceedings.
- Where the judgment debtor did not raise any objection as to limitation in regard to execution of decree, but asking for setting aside sale on the basis of revival of execution proceedings, he was barred by the principle of res judicata from questioning the order reviving execution proceedings.

A copy of the judgment attached hereto at **page no. 47 to 53.**

5. Nirmal E Horo v Jahan Ara, 26.04.1973, (1973)2SCC 189, Relevant Paras 8-9

- The principle of res judicata apply to the election proceedings.
- The knowledge about the ground of attack obtained from a witness during the course of trial is enough and failure to pursue the point in cross-examination would bring it within this explanation.

A copy of the judgment attached hereto at **page no. 54 to 57.**

6. State of UP vs. Nawab Hussain, 04.04.1977, AIR 1977 SC 1680, Relevant Paras 7-9

- An important plea which was within the knowledge of the respondent and could well have been taken in the writ petition, but he contented himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the Case against him in the departmental inquiry and that the action taken against him was mala fide.
- It was not permissible for him to challenge his dismissal, in the subsequent suit, on the other ground that 'he had been dismissed by an authority subordinate to that by which he was appointed.
- That was clearly barred by the principle constructive res judicata and the High Court erred in taking a contrary view.

A copy of the judgment attached hereto at **page no. 58 to 66.**

7. Shiromani GP Committee v Harnam Singh, 16.09.2003 (2003)11SCC 377, Relevant Paras 19

- Entire body of interested persons is barred by constructive res judicata from reagitating matters directly and substantially in issue in an earlier suit under section 92.

A copy of the judgment attached hereto at **page no. 67 to 80.**

8. Alka Gupta vs. Narendra Kumar Gupta, 27.09.2010, (2010)10SCC 141, Relevant Paras 20-24

- Constructive res judicata deals with the grounds of attack and defence which ought to have been raised, but not raised.
- It must be shown that the ground of attack or defence taken therein was such as could conveniently have been raised in the former suit, without leading to any confusion at the trial and without the risk of destroying the evidence led in support of the main allegation and the determination of the question that it ought to have been raised depending upon particular facts of each case.
- It is not sufficient that the ground of attack or defence might have been raised.
- It must also be established that it should have been raised and that the title in both the former and subsequent suits was the same.

A copy of the judgment attached hereto at **page no. 81 to 96.**

into force. This fact alone is an indication that the vacant site was not at the time of the mortgage a part of the compound of the existing house. If, as seems to be the case, it was a separate unit, a piece of land with no building upon it, though destined for building purposes, it would not, in my opinion, be properly described as house property and the inclusion of this site is therefore sufficient to prevent this mortgage from being immune from the operation of the Agriculturists Relief Act.

I find therefore that the petitioners (judgment-debtors) are entitled to have the decree scaled down in accordance with S. 8 of of the Act, the mortgage being one of 1924. The decree will therefore be amended accordingly. The petitioners will be entitled to their costs in this petition.

Leave to appeal is refused.

N. R. R. *Order accordingly.*

Appeal No. 82 of 1936.

King and Abdur Rahman, JJ.

24th January, 1939.

Alluri China BAPANNA and others ... *Appellants.*

v.

Sri Muttangi JAGGIAH *alias* Jaggarao Garu, and others ... *Respondents.*

Mortgage—Assignees of mortgagee's rights—Collection by one of them of his share of the mortgage debt—His non-liability to account to his co-assignees—Contract Act, S. 38.

On a devolution of a mortgagee's interest either on his legal representatives or on his assignees, the legal representatives or co-assignees would, at least amongst themselves, be entitled to recover their own shares and be able to give an acquittance to that extent only and not for the shares of other legal representatives or co-assignees. It would thus follow that if a co-assignee from a mortgagee is found to have realised his own share of the mortgage debt, he cannot be said to have been acting in the capacity of an agent or much less of a constructive trustee and any receipt by him cannot be considered to be a receipt on behalf of the others. The proposition laid down by the cases decided by the Madras High Court, that a co-mortgagee will be able to give by receiving the debt due under the mortgage an acquittance to the mortgagor proceeds on the principle that he is to be held to be a person to whom an offer of performance can be validly made by the promisor under S. 38 of the Contract Act and that by accepting the offer not only on his own behalf but on that of his co-promisees he would be deemed to have been acting as their agent to the extent of their shares in the mortgage and would therefore be liable to account to them. But that principle cannot be applied to the assignees of a mortgagee's rights who cannot be held to be joint promissees in the sense in which that expression has been used in the Contract Act.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O. S. No. 17 of 1934.

The Advocate-General and Mr. *K. Venkatarama Raju* for the Appellants.

Mr. *K. Rajah Ayyar* for the Respondents.

JUDGMENT.

(Delivered by Abdur Rahman, J.)

This appeal arises out of a suit instituted originally by one Muttangi Jaggiah *alias* Jaggarao Garu as one for dissolution of partnership and for accounts but really for the recovery of a proportionate share claimed by him and one Sitaramayya (6th defendant) from defendants 1 to 5 out of the money collected by them from the late P. Ramarayanim Garu, Rajah of Panagal, who had executed a mortgage deed for Rs. 1,16,650 on the 9th September 1913 in favour of the Rajah of Bhadhrachalam (Ex. I). This mortgage was assigned to the plaintiff, Sitaramayya (6th defendant) and the defendants (1 to 5) by the Rajah of Bhadhrachalam on the 6th July 1925 under Ex. II as the latter owed a sum of Rs. 80,000 to the plaintiff and Sitaramayya on a promissory note dated the 22nd March 1924 and a sum of Rs. 41,071-9-4 to the defendants 1 to 5 on a promissory note dated the 13th July 1923. The consideration for the assignment as given in the deed consisted of the entire debt of Rs. 41,071-9-4 payable to the defendants and a sum of Rs. 61,525-11-11 out of the debt payable to the plaintiff and Sitaramayya. The Rajah of Panagal paid a sum of Rs. 46,000 to the defendants on various dates between April 1926 and November 1930 expressly towards the share of the mortgage amount due to them and it is out of this sum that a proportionate share was claimed in this suit. Sitaramayya was impleaded as a defendant but was subsequently transposed as a plaintiff.

The plaintiff had come to Court with an averment that a partnership had been entered into between him and Sitharamayya on the one hand and the defendants 1 to 5 on the other on certain terms stated in paragraph 7 of the plaint. It was pleaded by him in the alternative that even if the agreement relating to the alleged partnership be found not to have been established, the defendants 1 to 5 would be liable as they were acting or must be deemed to have been acting on his behalf as well as on that of the 6th defendant and having given a partial discharge, which as co-mortgagees they were competent to do, they must be held to have acted and realised the money not only for themselves but also for the plaintiff and the 6th defendant. It was further urged that inasmuch as the money realised by the defendants 1 to 5 from the mortgagor was ordered to be appropriated first towards interest and the balance towards the principal in a suit instituted by the plaintiff and the 6th defendant on the basis of the mortgage deed, to which the defendants 1 to 5 were also parties, it was no longer open to them to contend that the money was realised by them for their own share and the money must in accord-

ance with the decree passed in that suit, be held to have been paid towards the mortgage as a whole.

The various positions taken up by the plaintiffs were denied by the defendants who set up an agreement, on the other hand, in paragraph 2 of the written statement to the effect that they had a prior right under it to collect the money due to them. It was also contended on their behalf that they were not co-mortgagees with the plaintiff and the 6th defendant, but the assignees of the mortgagee's rights, and could not be held to have been acting on behalf of the plaintiff and the 6th defendant or to be competent to give a discharge on the latter's behalf particularly when they had not realised any money from the mortgagor in excess of what was due to them. In the end it was pleaded on behalf of these defendants that the suit was barred by limitation.

The learned Subordinate Judge on a consideration of the evidence in the case found against the agreements pleaded by the parties but on an examination of the legal position they came to give a valid discharge on behalf of the plaintiffs and must therefore be taken to have collected the money not merely for their share but for that of the plaintiffs as well. Having regard to the provisions contained in S. 90 of the Indian Trusts Act, he held them to be constructive trustees and thus found them to have realised the money not only for their own benefit but also for that of the plaintiffs. The defendants were consequently ordered to render an account to the plaintiffs and to pay them their share of the money in proportion to what was due to them at the time when Ex. II was executed. The plea of *res judicata* was found against the plaintiffs and that of limitation against the defendants. Aggrieved by this decree the defendants have appealed.

It might be stated here that the plaintiff had instituted a suit (O. S. No. 21 of 1931) in the Court of the Subordinate Judge of Chittoor for the sale of the mortgaged properties, against the original mortgagor, the Rajah of Panagal. These defendants 1 to 5 were impleaded in that suit as defendants. This was decreed and although no contention was raised on behalf of the parties to the suit that the amount paid to the defendants 1 to 5 should be appropriated towards the interest due on the entire mortgage debt, the Court in decreeing the claim gave credit to the amount received by the defendants 1 to 5, towards the interest which was due on the mortgage bond. The decree was not appealed against and became final. This has given rise to the contention on behalf of the respondents that the money having been ordered to be credited by the Court decreeing that claim towards the interest due on the mortgage bond, it must be held to have been decided between the parties that the money realised by the appellants was on behalf of the respondents as well and the appellants were therefore precluded by the

rule of *res judicata* from raising any contention to the contrary in this suit under the provisions of S. 11 of the Code of Civil Procedure.

In regard to the agreements pleaded on behalf of the parties, no attempt was made before us by the learned Counsel for the respondents to canvass the finding arrived at by the lower Court against his clients. Nor do we think it likely that if an agreement was arrived at between the parties, it could have been on the terms stated in the plaint. The learned Advocate General however urged on behalf of the appellants that although the statement made by the 5th defendant as a witness could not in view of its inconsistency with what was pleaded on behalf of the defendants, be relied upon and was rightly rejected by the trial Court, yet the agreement mentioned in the written statement was to a large extent supported by some of the letters which were written on behalf of the plaintiffs themselves. The first letter to which our attention was drawn was a registered notice (Ex. IX) sent by the 1st plaintiff to the defendants asking how much was collected by them jointly or separately towards that deed. This was followed by another notice sent by the plaintiffs on the 27th February 1931 informing the 5th defendant that the plaint had been prepared and calling upon him to deposit Rs. 500 towards the costs of the suit which was to be filed by them against the mortgagor for the sale of the mortgaged property. The requisite Court-fee for that suit was of the value of Rs. 3,392 and yet they had asked the 5th defendant for a sum of Rs. 500 only, which would be approximately required to recover the balance of the money due to the defendants after giving credit to what had been realised by them from the mortgagor. This notice was expressly referred to by the Subordinate Judge in his judgment in O.S. No. 21 of 1931. From the fact that an agreement was being pleaded even by the plaintiffs, although the terms alleged on their behalf were undoubtedly different and bearing the two notices referred to above in mind it would appear to be more likely than not that there was some understanding either explicit or implied to the effect that the parties would be entitled to recover their shares from the mortgagor and as long as they did not realise anything in excess of their shares they would not be accountable to each other. The reasons given by the learned Subordinate Judge for the finding that no agreement was arrived at between the parties are not convincing. He was mainly persuaded to come to that decision as he found that the statement of the 5th defendant was contrary to what had been pleaded on his behalf. This criticism was perfectly justified but the other reasons which he has given are not very convincing. Having regard to all the circumstances we are rather inclined to the view that an agreement was, on some such terms as have been stated above, arrived at between the parties.

If this were all, we would have had to seriously consider if the material on the record was sufficient to reverse the finding arrived at by the lower Court in this respect but in view of the conclusion at which we have arrived in regard to the other points discussed by the learned Counsel for the parties it seems to us to be unnecessary to rest our judgment on this inference of fact. We propose to devote our attention to the main question involved in the second issue framed by the lower Court which concerns the plaintiffs' right to demand an account from the defendants for the collections made by them. Since the question of *res judicata* was argued with great persistence by the learned Counsel for the respondent, we would have to examine this contention in the course of this judgment. The question of limitation raised by the appellants stands however on a different footing. The decision depends on the finding whether the defendants are liable to account to the plaintiff. If they are found to be liable, it is apparent that the suit would not be barred by time. If on the other hand, they are found to be entitled to retain the amount realised by them from the mortgagor, the suit against them would, as they had realised the amount more than three years before the institution of the suit, be barred by limitation. It would therefore be unnecessary to give any finding on this question.

Turning our attention to the crucial question regarding the liability of the defendants to account we must point out that they were not co-mortgagees with the plaintiffs but only assignees of a mortgage executed by the Rajah of Panagal in favour of the Rajah of Bhadhrachalam. It is all the more necessary to keep this in view as the learned Subordinate Judge seems to have lost sight of this distinction and held that the parties to the suit were joint promisees under the mortgage deed (Ex. I) and must therefore be regarded as co-mortgagees. This is obviously not so. The definition of 'promisee' given in S. 2 of the Indian Contract Act must not be ignored. So far as the mortgage is concerned, the Rajah of Panagal was the promisor and the Rajah of Bhadrachalam the promissee. It was the Rajah of Bhadrachalam who could be said to have accepted the proposal made by the Rajah of Panagal. It may be that so far as the assignment of the mortgage is concerned, the Rajah of Bhadrachalam may be the promisor and the parties to this suit the promisees. We are not concerned here with the jural relationship which was brought into existence by the deed of assignment but by the original mortgage executed by the Rajah of Panagal. There can be no doubt that as between the Rajah of Panagal and the parties to this suit even if privity of estate is held to exist the former cannot be described to be the promisor and the latter not the promisees. The heirs of a promisee may be entitled to claim what their ancestor (the promisee) could have claimed, but by standing in his shoes they do not become, in the eye of the law, the promisees

themselves. Similarly an assignee of a promise may be able to claim what his transferor could have claimed but he would not become a promisee by reason of the assignment so far as the original promisee is concerned.

We have thus not to decide what the position would have been if a co-mortgagee had accepted payment from his mortgagor either in full or in partial satisfaction of the mortgage but what it is if a co-assignee realises a portion of the money due from the mortgagor when that portion does not exceed the recipient's share of the consideration for which the assignment was made in his favour. There is divergence of opinion between this and several other High Courts on the point whether a mortgage debt would be discharged by paying it to one of two or more mortgagees. It has been held by this Court that a payment to one would discharge the mortgage debt : *Barber Maran* v. *Ramana Goundan* (1), *Annapurnamma* v. *Akkaya* (2). The other High Courts have, on the other hand, taken the opposite view, *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (3); *Sitaram Apaji Kode* v. *Shridher Anant Prabhu* (4), *Jauhari Singh* v. *Ganga Sahai* (5), *Ray Satindranath Chowdhury* v. *Ray Jatindranath Chowdhury* (6), *Sukhlal* v. *Kanjman* (7), *Syed Abbas Ali* v. *Misri Lal* (8), *Mathra Das* v. *Nizam Din* (9). But no case has been brought to our notice, even of this Court, where a co-assignee or a co-heir may have been held entitled on behalf of the other co-mortgagees or co-heirs to give a complete discharge of a mortgage debt which has been assigned to or which devolved on the other co-assignees or co-heirs. The principle on which this Court has recognised the power of a co-mortgagee for giving a valid discharge of the whole mortgage debt was largely based on a consideration of S. 38 of the Indian Contract Act but a reference to this section would show that it is confined to the promisees as defined in the Act and not to his heirs or assignees. Indeed while expressing their opinion in the Full Bench case, both the learned Judges whose view prevailed in that case observed that the rule which they were applying to a co-mortgagee could not be extended to co-heirs. The same distinction was made in *Ahinsa Bibi* v. *Abdul Kader Sahib* (10) by no less an eminent Judge of this Court than Sir V. Bhashyam Ayyangar.

In view of these authorities an attempt was made by Mr. Rajah Iyer to distinguish these cases on the ground that they have gone only to the length of holding that the position of a co-heir or a legal representative is not the same as that of a co-mortgagee where the latter could and the former could not, give a valid discharge to a

(1) 20 Mad. 461.
(2) 36 Mad. 544 (F. B.)
(3) 34 Cal. 305.
(4) 27 Bom. 292.
(5) 41 All. 631.
(6) 31 C.W.N. 374.
(7) 28 A.L.J. 290.
(8) 5 Pat. L J. 376.
(9) (1917) P.C. 69=41 I.C. 921 (F.B.).
(10) 25 Mad. 26 at p. 39.

mortgagor. But he says that the same principle which has been held to apply to co-heirs or legal representatives cannot be made to apply to co-assignees on the ground that while the interest of a propositus devolves on his heirs by operation of law and independently of the deceased's desire, an assignor's interest is conveyed to an assignee by a volition of the former and can be favourably compared with the case of co-mortgagees where both decide to take a mortgage jointly. The distinction made between a co-heir and a co-assignee is in our opinion of no avail as from what we have already said in regard to the definition of a promisee used in the Indian Contract Act, it would be clear that under that definition, both of them would stand in the same position. If the term 'promisee' cannot be applied to a co-heir, or a legal representative, it can neither be held to apply to a co-assignee. The situation then seems to be that on a devolution of a mortgagee's interest either on his legal representatives or on his assignees, the legal representatives or co-assignees would be, at least amongst themselves, entitled to recover their own shares and be able to give an acquittance to that extent only and not for the shares of other legal representatives or co-assignees. It would thus follow that if a co-assignee is found to have realised his own share of the mortgage debt, he cannot be said to have been acting in the capacity of an agent or much less of a constructive trustee and any receipt by him cannot be considered to be a receipt on behalf of the others: *Ankalamma* v. *Chenchayya* (1). It may be that a devolution of interest upon co-heirs or co-mortgagees, may effect a severance of the mortgagee's interest between them [*Mahamed Ishaq* v. *Sheikh Akramul Huq* (2)] but if the theory of representation is correct, so far as the heirs are concerned, it would neither be illogical nor unsatisfactory to extend the same, although to a limited extent, to the assignees of a mortgage debt as well. The case in *Suniti Bala Debi* v. *Dhara Sundari Debi Chowdhurani* (3) cited by the learned Counsel for the respondent does not at all help him. We are not concerned here with the form in which the suit has to be filed. Nor are we concerned in this case with the rights of co-mortgagees *inter se* or with the release or redemption of any part of the security by one of the mortgagees. It was on these points that this case is an authority and not on those which are before us for decision in this appeal. The next case relied upon by him was that of *Lakshmi Narasimha* v. *Lakshmamma* (4). This is also not of much assistance as the co-mortgagee had in that case admittedly received more than his share of the debt and had, exceeding his rights, given a release in respect of the unrealised portion. He was therefore held, and rightly if we may say so with respect, to be incompetent to give a release to the mortgagor on behalf of his co-mortgagee or to receive any

(1) 41 Mad. 637=7 L.W. 221.
(2) 12 C.W.N. 84.
(3) 47 Cal. 175=11 L.W. 227 (P.C.)
(4) 25 M.L.J. 531.

money in excess of his share, which he was ordered to refund. The third case cited by Mr. Rajah Aiyar was that of *Ramachandra Iyer* v. *Sivarama Iyer* (1) where it was held by Pandrang Row J. that in the absence of a covenant to pay the amount due to any particular co-mortgagee a suit by one co-mortgagee for his share of the mortgage money was not maintainable and that the recital in the mortgage deed of the debts due to each co-mortgagee did not amount to an agreement by the mortgagors to pay the mortgagees separately. In view of the distinction that we have already tried to emphasise between the mortgagees and the assignees of a mortgagee this case is of no value to us here.

Reference was made in the end to English cases such as *Tyson* v. *Farclough* (2) where it had been held that a Court would regard a tenant-in-common who had received the rent as in the nature of a bailiff or an agent for his co-tenants-in-common respecting their shares of the rent. This proposition is in accordance with the cases decided by this Court where a co-mortgagee would be able to give, by receiving the debt due under a mortgage, an acquittance to the mortgagor. This is only because he is held to be a person to whom an offer of performance can be validly made by a promisor under S. 38 of the Indian Contract Act, and by accepting the offer not only on his own behalf but on that of his co-promisees, he would be deemed to have been acting as their agent to the extent of their shares in the mortgage and would therefore be liable to account to them. But the same principle cannot be applied to the assignees of a mortgagee's rights, who cannot be held to be joint promisees in the sense in which that expression has been used in the Indian Contract Act.

In view of what has been said it is unnecessary to consider the liability of a tenant-in-common when he has received income or rent in respect of the property of which he was a co-tenant with others but there is an authority of this Court where it had been held that a tenant-in-common would not be bound to share his receipts with another co-tenant if they did not exceed the recipient's proper share: *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi* (3).

In the present case, the realisation of the sum of Rs. 46,000 by the defendants was not in excess of what was due to them on account of principal and interest and was paid to them expressly by the mortgagor towards the debt due to them and for which they could give a complete discharge not as agents or trustees on behalf of the plaintiffs but in the capacity of co-assignees of the mortgagee's rights. They must consequently be held not to be liable to account for the sum realised by them.

The next question to decide is whether the defendants are barred by the principle of *res judicata* from contending that the sum of

(1) 44 L.W. 502. (2) 47 E.R. 955.
(3) 27 Mad. 465 at p. 477 (F.B.)

Rs. 46,000 was realised by them towards their share alone. It has been already observed that this contention was raised on behalf of the respondents on account of the decision in O.S. No. 21 of 1931 where the Subordinate Judge in decreeing the claim gave credit to the amount realised by the defendants towards the interest due on the mortgage bond although no such plea was raised by any party to that suit. (Vide plaint Ex. VIII and the written statement of the defendants Ex. III). The suit was filed by the plaintiffs for the whole of the amount due under the mortgage deed Ex. I, and the mortgagor had pleaded that a sum of Rs. 46,000 had been paid to the 11th defendant, (i.e., the 5th defendant in the present case) for which he had naturally asked for a credit. It was also pleaded on his behalf that the rate of interest stipulated in the deed was of a penal character. The copy of judgment has been exhibited and is marked as Ex. IV. A perusal of this judgment would show that not only was no issue framed in that suit on the question whether the payment received by the defendants should be credited towards the interest of the mortgage debt, but what is more, the only issue (issue IX) which was framed with the object of arriving at a finding in regard to the disputes between the plaintiffs and the present defendants was left undecided. In fact the Subordinate Judge has after stating the issue framed in the case started with the words "The only two questions that were agitated at the trial were (1) as regards interest claimed and (2) costs to be decreed and against which set of defendants." Holding that the interest claimed was not in the nature of a penalty and being of the opinion that the costs should be paid by the mortgagor and the present defendants in equal shares, he gave a finding in regard to issues 3 and 4, which related to the fact and the validity of payment pleaded by the mortgagor, in the following words: "As regards issues 3 and 4 it has to be found that payments pleaded are true and binding on plaintiffs in the sense they have to be given credit to."

The 9th issue reads as follows:

"Whether the agreement set out in paragraph 4 of the written statement of the defendants 7 to 11 is true and plaintiffs are bound to pay any amount as per schedule of expenses attached to the written statement of defendants 7 to 11 to them?"

This was not decided by the Subordinate Judge who observed:

"As regards issue 9, I have ruled that a consideration of this matter of dispute as between plaintiffs on the one hand and defendants 7 to 11 on the other, is not germane to this suit which is one for sale and the question may be left open. I therefore refrain from giving any finding on issue 9".

This was the only issue which might have settled the disputes raised by the present defendants and this the Court refused to adjudicate upon. How could it be seriously urged then that the matter was decided between the parties? The learned Counsel for the respondent however urged that it was incumbent on the defendants to

plead in that suit that the payment was realised by them for their own share. In other words he tried to bring his contention within Explanation IV of S. 11, Civil Procedure Code. But a reference to paragraphs 4 and 5 of the written statement filed by the defendants would show that the point that they were entitled to recover the money due to them before the plaintiffs could do so, was raised by them specifically. They had also pleaded in that suit that the mortgagor had paid a sum of Rs. 46,000 expressly towards their share and prayed for a direction in the decree that out of the balance of the money found due from the mortgagor they should be paid in the first instance. We fail to see what other plea could have been raised by the defendants. It was this plea which formed the subject matter of the 9th issue and was left undecided. The explanation IV imports a fiction into S. 11 of the Code of Civil Procedure. Having provided for a matter which might and ought to have been made a ground of defence or attack in a former suit it introduced a fiction that it shall not only be deemed to have been raised, but also to have been directly and substantially in issue in that suit. This would not have been however enough for the purpose of S. 11, Civil Procedure Code, until the matter was presumed to have been decided. It therefore imported a further fiction that it should also be deemed to have been heard and finally decided. In view of an express order by the Court that the matter would be left open, it is impossible to permit any such fiction to be introduced in this case. The contention is devoid of any force and must be repelled.

For the above reasons we allow this appeal and order the suit to be dismissed. The appellants will be entitled to their costs both in this and in the lower Court.

N. R. R. *Appeal allowed.*

Appeal No. 13 of 1937
and
Letters Patent Appeal No. 5 of 1938.

Venkataramana Rao and Newsam, JJ.

21st March, 1939.

Budhiraju SEETHAYAMMA (deceased) and others ... *Appellants.*

v.

VULLIPALEM *alias* Putrevu Jagannadha Rao and others ... *Respondents.*

Deed—Construction—Power of attorney—Authority to convey immoveable property—Conveyance of vested remainder—Validity.

Where a person authorises his wife by a power of attorney to sell his immoveable property and the wife acting under that power conveyed certain lands without specifying the extent of the interest possessed by the husband therein,

1945 SCC OnLine MP 72 : AIR 1946 Nag 277

Nagpur High Court

(BEFORE GRILLE, C.J. AND HEMEON, J.)

Raja Chattar Singh and another ... Plaintiffs Appellants;

Versus

Diwan Roshan Singh ... Defendant Respondent.

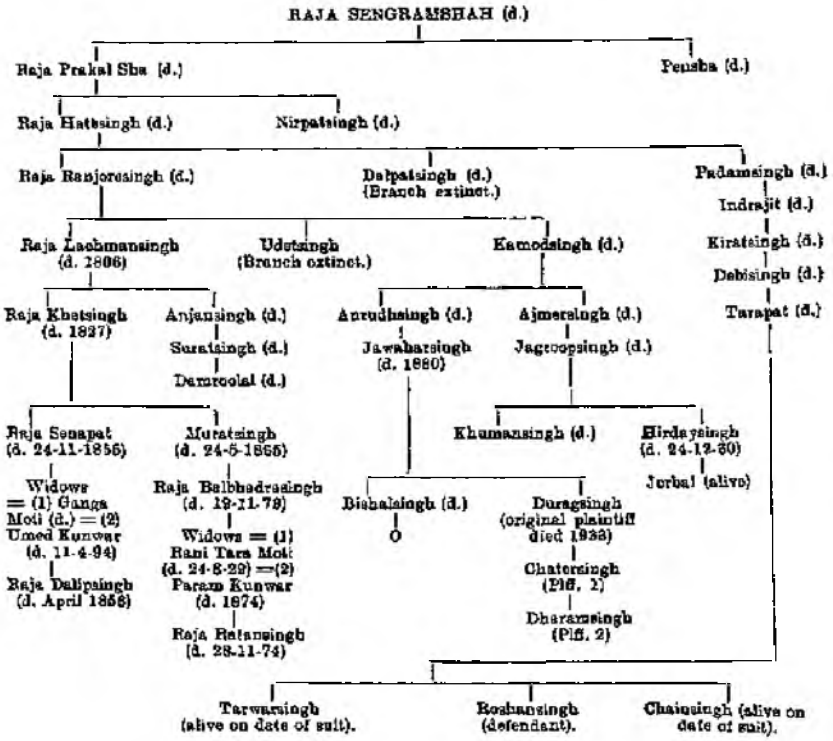
First Appeal No. 39 of 1938

Decided on March 8, 1945

JUDGMENT

1. The plaintiffs-appellants are Rajah Chattar Singh and his son Dharam Singh. Their claim for a declaration that Rani Tara Moti had not become absolute owner of 19 villages of the Dilehri estate, Narsinghpur sub-division, by adverse possession and that the respondent Roshan Singh was not entitled to hold the estate as against them after her demise, because Roshan Singh's possession from 25th July 1917 under a deed of gift was permissive and in Rani Tara Moti's behalf and did not affect the appellants' right of inheritance as also their claim for possession, was dismissed on 30th October 1937 by the Additional District Judge, Narsinghpur. The plaintiffs have accordingly appealed against that decision and with this appeal will be considered the grounds contained in the cross-objection filed by the respondent.

2. The following genealogical table demonstrates the relationship between the parties with whom we are concerned in this appeal:



3. Durag Singh, the original plaintiff, who died in 1933, was the father and grand-father respectively of the present appellants Rajah Chattar Singh and his son Dharam Singh and the son of Jawahar Singh who was, if the Raj Gond family to which they belonged was governed by Hindu law and the limited right of women under that law is excluded, entitled to succeed Rajah Ratan Singh on 29th November 1874 when he died from smallpox. Ratan Singh's father Rajah Balbhadra Singh who predeceased him on 26th August 1873 had two wives, viz., Paramkuar, Ratan Singh's mother, who also died in 1874, and Rani Tara Moti who lived until 24th August 1929 during the pendency of the suit. The Court of Wards took charge of the

estate in 1873 soon after the name of Rajah Ratan Singh had been entered in the revenue records in succession to his father and the estate continued under the Court of Wards until its release in 1903. On the death of Rajah Ratan Singh an enquiry regarding the right of succession was made by the revenue authorities and Rani Tara Moti, the step, mother of the last male holder, was recognised as the heir by them to a limited estate according to Hindu law and it has been found by the learned Judge of the trial Court that the intention of the Court of Wards was to remain in control of a limited estate in behalf of Rani Tara Moti whose name was duly mutated in the revenue records. On Rani Tara Moti's death this suit, which was brought to obtain a declaration when she was alive, was enlarged into a suit for possession of the estate. The defendant-respondent is Diwan Roshan Singh in whose favour the Rani executed a deed of gift, *vide* Ex. P-101, on 25th July 1917 in consequence of which his name was mutated in the revenue records. The trial Court has dismissed the suit on the ground that the claim for possession is time-barred and the question of limitation is the most

important question which we have to decide in this case. The other questions for decision will be subsequently stated and dealt with. In 1874, as we have already observed, the revenue authorities conducted an enquiry into the rights of succession. The report of the revenue enquiry is not available, but Ex. P-22 (page 898 of the paper book) is a letter, dated 7th December 1874 from the Deputy Commissioner announcing that he had ordered an enquiry regarding, the succession. Exhibit D-8 (page 647) shows that an enquiry was made by Pandit Gopalrao, Extra Assistant Commissioner, and contains the order that the name Mt. Tara Moti should be entered in place of the deceased boy and it must be presumed that the revenue authorities correctly ascertained that these Raj Gonds were governed by-Hindu law before they ordered the mutation

of Rani Tara Moti's name in the capacity of a Hindu woman entitled to succeed as such to the estate.

4. Turning now to the view taken at the relevant time by those who were likely to be closely concerned, we find that the re-cords of statements available at the time when mutation was sought are those of Mt. Rani Ganga Moti and Mt. Umed Kuar. These are contained in Exs. P-8 and P-9 at pp. 376 and 878 of the paper book. These ladies were the widows of Rajah Senapat who had died in 1855 and Mt. Umed Kuar was the mother of Rajah Dalip Singh who died in 1856. Rajah Senapat was the brother of Murat Singh who died on 24th May 1865 and Murat Singh was the father of Rajah Balbhadra Singh, husband of Rani Tara Moti. Certified copies of these statements were filed in a previous litigation which itself shows that the statements of Rani Tara Moti herself had disappeared from the record. Both of these statements show that these widows were in complete agreement with Rani Tara Moti. They both said: "My statement is the same as has been got recorded by Tara Moti" and they said this after asking that the name of Tara Moti and the name of a son of Jawahar Singh called Bishal Singh Durag Singh's elder brother, who "had been taken in adoption by Mt. Tara Moti" should be recorded. The report of Pandit Gopalrao is unfortunately not available but the order of the Deputy Commissioner shows that some objections which had been made on the score of the alleged adoption of Bishal Singh had not been decided and that the Deputy Commissioner considered the question of Bishal Singh's adoption foreign to a matter of mutation. It is to be noticed that the two widows of Rajah Senapat in the statements to which we have referred mentioned that Jawahar Singh would have the managership and both of them referred to Mt. Rani Tara Moti the step-mother of the deceased as one of the surviving heirs and to themselves as his paternal grand-mothers. They also included themselves in the category of heirs. It is obvious from their statements that it never occurred to them that Jawahar Singh was entitled to immediate possession of the estate and it is difficult, if not impossible, to suppose that if anyone concerned had the slightest idea that Jawahar Singh was entitled to immediate possession, some trace of it would not have been found in the order of the Deputy Commissioner.

5. The reasons for holding that although these Raj Gonds are not Hindus, they were governed by *Hindu law* or part of it will be set out at a subsequent stage of this judgment and here we pause to consider whether Tara Moti could in accordance with that law be an heir to the estate either in the capacity of Ratan Singh's stepmother or the wife and widow of Rajah Balbhadra Singh. Sarvadhikari at page 378 of his "*The Principles of the Hindu Law of Inheritance*," 1922, quotes on the authority of the Balam Bhatta, a 17th century commentary, the rule that step-mothers inherit in default of

natural mothers and at page 376 the dictum of Nanda Pandita in 1633 that a step-mother is entitled to claim the property of her step-son immediately after the brothers and sisters. Their Lordships of the Judicial Committee of the Privy Council have laid it down in 42 I.A. 155[1] that this Pandit's gloss must be accepted with caution and West and Buhler at p. 19 of "A *Digest of the Hindu Law of Inheritance, Partition and Adoption*," Edn. 4, 1919, remarked that the opinions of the compiler of the Balam Bhatta were held in comparatively small esteem and hardly ever brought forward by the Sastris if unsupported by other authorities.

6. *Macnaghten* at page 39 of vol. I of his 1827 edition of "*Reports of Cases* determined in the Court of Sudder Dewanny Adalat" criticised the opinion of the pandits in the 1801 case of *Narsinee Dibeh* v. *Hir Kishor Rai*[2] and noted that from the text of the Mitakshara and the argument on which the author preferred the mother before the father as successor to her son it was apparent that he meant the natural mother and not the step-mother. This *commentator's book on Hindu Law* was not available to us but we have no reason to suppose that he would have recorded a different opinion in it; and tribute to his "Principles and Precedents of Hindu Law" which was published in Calcutta in 1829 was paid by their Lordships of the Judicial Committee in 1846 in 4 M.I.A. 1[3] at p. 101, in 1903 in 25 All. 468[4] at p. 475, in

1921 in 44 Mad. 656[5] at p. 668. In 1869 Sir Thomas Strange in his "*Hindu Law*" Edn. 3, observed at page 144 that step-mothers, where they exist, are excluded from inheritance and a Full Bench of the Calcutta High Court held in (1862-64) W.R. (Special Number) 173[6] that a step mother cannot take by inheritance from her step-son according to the Mitakshara. This too was the view of Cowell in his "*Hindu Law*," Vol. II (1871), page 161 *et seq.*

7. The Allahabad High Court had in 3 All. 45,[7] 5 All. 311[8] and 16 All. 221[9] ruled to that effect and so also had the Madras High Court in 5 Mad. 29,[10] 5 Mad. 32[11] and 8 Mad. 107.[12] The rule in Bombay was and is, however, otherwise. It was held in 4 Bom. 188[13] and 19 Bom. 707[14] that a step-mother succeeds to the property of her step-son in preference to the step-son's paternal uncle's son. The isolated position of Bombay in this respect has been recognised by Sir Hari Singh Gour at p. 944, 4th edn., 1938, of his "*the Hindu Code*" and at p. 626, Edn. 10, 1938, of *Mayne's "Treatise on Hindu Law and Usage"* wherein there is the following passage:

> "According to the Mitakshara, it is clear that a step-mother cannot succeed to her step-son. It is equally clear that she is his *gotraja sapinda*. It would seem therefore that she could come in as such alter his male *sapindas*. Accordingly, in Bombay, she succeeds as the wife of a *gotraja sapinda*. But it is fairly well-settled that neither she nor the widow of any other *gotraja sapinda* is entitled to succeed as heir in any other province."

8. That the *lex loci* in the Central Provinces has been for many years the Benares School of Hindu Law is clear from the decisions in 1887 in 2 C.P.L.R. 18[15] and 11 C.P.L.R. 49[16] which were in 14 Nag. L.R. 82[17] relied on by Stanyon A.J.C. who added that the special rule of law under which females succeed in Bombay had no application to a case governed by the Benares School of Hindu Law and the Bombay School of Hindu Law was applicable only to Maratha Brahmins in Nagpur and other cases where it was specially found to be applicable. In or about 1874, however, the law on the point was far from settled. In 1862 the *Sadar Diwani Adalat*, North West Frontier Province, of which the Nerbudda territories formed part, had in S.D.A. (N.W.P.) 306,[18] decided that a step-mother was entitled to succeed, but 15 years later the Judicial

Commissioner held in Special Appeal No. 66 of 1877,[19] that although a step-mother could not take by inheritance as a mother she could do so as a wife and widow of the step-son's father. This finding was, however, reached after 1874 and was clearly influenced by the 1869 Bombay case in 6 Bom. H.C.R. 152[20] in which the view taken was that according to the Hindu law obtaining in Western India the wives of all *gotraja sapindas* and *samanodkas* had rights of inheritance co-extensive with those of their husbands immediately after whom they succeeded.

9. There was an even greater variety of opinions in the decisions which related to the parties concerned or members of their community. Although Durag Singh's claim succeeded in civil suit No. 84 of 1896 he, as Ex. P-4 shows, admitted that Tara Moti had a limited interest in the estate; but in civil Suit No. 12 of 1906 which was between the same parties in respect of the proprietary rights of 3 villages (not included in the 19 now in question) viz., Joba, Amheta and Bhawarjhir which Durag Singh claimed by right of succession, the District Judge, Narsinghpur, in decreeing his claim held that the parties were governed by the Benares School of Hindu Law under which the Rani could not be Ratan Singh's heir. In 1914, however, the then District Judge had in civil Suit No. 76 of 1911 which was between Durag Singh and the transferee of None Shah's heir held that she was entitled to the 19 villages in question as Ratan Singh's heir, but the Divisional Judge was in appeal, *vide* Ex. D-32, of the view that the stepmother was not an heir and this view was upheld by Batten, J.C. (then A.J.C.) in Second Appeal No. 679 of 1914: *vide* Ex. P-142.

In 1928 the Additional District Judge, Narainghpur, found in Civil Suit no. 6 of 1926 which was between Hirde Singh's son Jorabal Singh and the respondent Roshan Singh that in 1874 when the Rani entered into possession of the estate the law as understood in the Central Provinces Courts was that a step-mother could legally succeed to her step-son; and this finding was upheld in 1932 by a Division Bench of the Judicial Commissioner's Court.

10. In face of this conflict in decisions, it is essential for the purposes of determination to examine the conduct of the parties and the attitude of the authorities at and after the relevant time. After Rajah Balbhadra Singh's demise on 26th August 1873, the Tahsildar, Narsinghpur, reported on 17th November of that year to the Deputy Commissioner of the district that Tara Moti and Param Kunwar, whom he described as his only real heirs, desired Ratan Singh's name to be mutated in place of his and because of his minority to have the estate taken over by the Court of Wards. The Deputy Commissioner, as Ex. P-1 shows, mutated Ratan Singh's name on 19th November 1873 and management of the estate by the Court of Wards followed in due course. Ratan Singh died on 28th November 1874 and the Deputy Commissioner when intimating this, *vide* Ex. P-22, on 7th December 1874 to the Commissioner, Nerbudda Division, stated that he had ordered an inquiry to be made regarding succession to the estate. This inquiry was made by Pandit Gopal Rao, Extra Assistant Commissioner, and while it is regrettable that his report is not available it is clear from the Deputy Commissioner's order, *vide* Ex. D-8, dated 9th March 1875, that he refused to recognise the Rani's adoption of Jawahar Singh's 15 months old son Bishal Singh for the purposes of the reference and ordered the mutation of her name in place of Ratan Singh's. Light on the position taken in the inquiry by those concerned was provided by the statements contained in Exs. p-8 and 9 of Rani Ganga Moti and Rani Umed Kunwar respectively. These ladies were the widows of Rajah Senapat who died in 1855 and Rani Umed Kunwar was the mother of Rajah Dalip Singh who died about two years

later. Rajah Senapat's brother Murat Singh, who was the father of Rani Tara Moti's husband Rajah Balbhadra Singh, died in 1865. Both state-ments make it clear that Rani Tara Moti's statement which is not available differed in no way from theirs, that the three ladies regarded themselves as Ratan Singh's heirs, that they desired the mutation of the names of Rani Tara Moti and her adoptee Bishal Singh and that his father Jawahar Singh was to be the manager of the estate. It is also evident from these statements that the latter was not regarded as being entitled to immediate possession of the estate and, as already adumbrated, we find it difficult, if not impossible, to suppose that if he were so entitled his claim would have been flouted not only by the ladies and himself but by Pandit Gopal Rao and the Deputy Commissioner.

11. The Deputy Commissioner's order, *vide* Ex. P-2 or Ex. D-8, impliedly signified that he had accepted Pandit Gopal Rao's recommendation that Rani Tara Moti was Ratan Singh's heir but any doubts in the matter are dispersed by his letter, *vide* Ex. P. 24, of the same date in which he informed the Commissioner that "she is found to be the proper person to succeed" and proposed that as she was unfit to manage the estate in its then embarrassed condition it should remain under the Court of Wards. In the following year, i.e., 1876, the then Deputy Commissioner acting in behalf of the Court of Wards executed the lease deed Ex. P-103 under which the estate was leased to its creditor Mohanlal, a money-lender of Gadarwara, for a period of 18½ years in satisfaction of his debt of Rs. 88,000. The numerous references in that document to "the estate of the Rani," "her heirs and reversioners" and "her heirs or the heirs of the deceased Rajah Balbhadra Singh and Rajah Ratan Singh who may be her successors to the estate after her death" also indicate that she was regarded as an heir to the estate and that she had a limited interest in it. Jawahar Singh died in 1880 and in April 1888 his son Durag Singh, as Ex. P-188 shows, objected to the Rani's project of adopting Tarapat and the Deputy Commissioner directed the Tahsildar to explain to her that she should not appoint as her successor any person who was not her legal heir. The Tahsildar in compliance with this order went to Dilehri, interviewed her and found that the first heir was Durag Singh, then Khurnan Singh and after him Tarapat but that the Rani insisted on adhering to her selection of Tarapat on the ground that Durag Singh was a minor and Khuman Singh was a man of bad character. This explanation was not acceptable to the Tahsildar who considered

that the Rani was under the influence of her agents and he was directed to warn them by the Deputy Commissioner. The latter had also directed the Tahsildar to explain to the Rani that she was not to place on the *gadi* anyone who was not her legal heir and it is evident from the Tahsildar's report in Ex. P-188 that he represented to her that Durag Singh was her lawful heir. There was no suggestion in this matter that she was asserting any right to the estate as an absolute owner, although she was clearly enough essaying to exercise a right to adopt one of the heirs to it.

12. In 1896 she adopted the respondent Roshan Singh with the approval of the local authorities and the Court of Wards but Durag Singh filed Civil Suit No. 84 of 1896 to have the adoption declared illegal. In this action he succeeded on the ground that she had not been authorised by her deceased husband to make an adoption and the pleadings are of pertinent interest *vis-a-vis* her position in respect of the estate after Ratan Singh's demise. Durag Singh admitted in his plaint in that case that the Rani had inherited the estate but he claimed that he was entitled to it on her death as the nearest reversioner and heir to Ratan Singh and that Roshan Singh could not be

legally adopted as he was not the next reversioner. In the pleadings made in behalf of the Rani and Roshan Singh it was asserted that succession to the estate had always been determined by the ruling power and not by the rules of inheritance which obtained among Hindus or Gonds. The Rani who was examined on 15th January 1897 stated (p. 491 of the paper book):

> "I took Roshan Singh as a son and heir of my husband Balbahadui Singh and not as my own personal son and heir.... took Roshan Singh as a son to Balbahadui Singh and not as a son to Ratan Singh. The object in view is that the whole property left by my husband Balbahadur Singh possessed by me after his death should be inherited by Roshan Singh."

13. There was, significantly enough, no claim made by her that she had by then perfected her title to the property by adverse possession. This was a claim to come many years later and one which was presumably suggested to her by some legal practitioner. Her admissions pointed to the fact that she desired to vest her deceased husband's estate in Roshan Singh and were consistent with the view that she had entered it in 1874 as a female heir with a life interest. Again in her first written statement: *vide* Ex. P-151, in civil Suit No. 12 of 1906 which was instituted by Durag Singh for the possession of three other villages and in which she was defendant she vacillated between the positions that succession was determined by Government and that she was as Balbhadra Singh's widow his heir under Hindu law; but in her second written statement, *vide*. Ex. P-152, in that case she declared:

> "The defendant is the widow and heir of Raja Balbahadur and is entitled to the property. She claims it also as it was given to her by Rani Umed Kuar at the time of her death."

14. Durag Singh's claim in that suit was decreed, *vide* Exs. D-80 and 31, on 21st March 1907 by the District Judge, Narsinghpur, and this, it would appear, induced the Rani to execute on 31st July 1908 the agreement Ex. P-102 under which she waived her claim to the estate, admitted that Durag Singh was entitled to it and consented to the appointment of Raja Bijaya Bahadur Singhji Dev and Rajah Shri Takhat Singhji Dev as panchas to make provision for her maintenance. This agreement, whatever the reasons for its execution may be, was not acted upon and Durag Singh's petition to have the estate taken over again by the Court of Wards on the ground of waste was dismissed, *vide* Ex. P-14, on 15th June 1912 by the Commissioner who held that no diminution of capital value had taken place. On 20th September 1916, as Ex. P-106 shows, Rani Tara Moti applied for the mutation of Roshan Singh's name in respect of Dilehti but without ultimate success. The Tahsildar had sanctioned the mutation of a mahal in Chhitapar, of Hirdepur and of the superior proprietary right of Mothegaon on 6th January 1917 but his order was set aside, *vide* Ex. P-10, on 31st March 1917 by the Deputy Commissioner on the grounds that there was no legal transfer to Roshan Singh and he could not be regarded as the Rani's adopted son in view of the civil Court decision that the adoption was illegal. The Deputy Commissioner's order was upheld, *vide* Ex. P-11, by the Commissioner on 11th June 1917.

15. On 25th July 1917, the Rani executed in Roshan Singh's favour the gift deed Ex. P-101 in which she declared for the first time that she had not inherited the estate but had by reason of her adverse possession for a period of more than 12 years become its absolute owner and was thereby entitled to gift it absolutely to Roshan Singh. To Hirde Singh who had expressly consented to the deed the village of Hirdepur was transferred

on the same day. On the basis of the deed of gift Roshan Singh's name was mutated in respect of the whole estate on 9th March 1918. In 1926 Hirde Singh claiming as Ratan Singh's next reversioner instituted Civil Suit No. 6 of 1926 against the Rani, Roshan Singh and Durag Singh in the Court of the Additional District Judge, Narsinghpur, for a declaration that the gift deed was void and that Roshan Singh was not entitled to retain possession after the Rani's death. The chief of the various defences in that case were that as the Rani had acquired an absolute interest in the estate by her adverse possession the gift made by her in Roshan Singh's favour was valid and Hirde Singh was estopped from challenging it as he had given his express consent to it. Hirde Singh's position in respect of this plea of estoppel was that his consent had been obtained by false and fraudulent representation and by the use of undue influence. The Court in decreeing in his favour on 30th November 1928 held that although the Rani's long possession was adverse to the rightful heirs it did not make her an absolute owner of the estate as she intended to hold it in the limited interest of a female and that although Hirde Singh's plea concerning fraud and false representation was not established he was not debarred from suing because the transfer being in the nature of a gift no question of legal necessity arose.

16. It was not without significance that when the Rani was examined as a witness on commission in that case, she at one place admitted, *vide* Ex. P-13, that she secured possession of the estate as Ratan Singh's stepmother but at another place declared that she had taken forcible possession of it. This second averment which was patently disingenuous was not accepted either by the Additional District Judge or by the Division Bench of the Judicial Commissioner's Court in First Appeal No. 6 of 1929. That Bench, in fact, *vide* Ex. D-104, upheld the view of the trial Judge that when the Rani entered into possession of the estate in 1874 she could, in accordance with the law as then understood in the Courts of the Central Provinces, be a legal successor to her step-son. The learned members of the Bench and the Court below made no reference to the deposition of Mr. H.C. Gupta who as C.W. 1 stated, *vide* Ex. D-12, as follows:

> "I have examined Hani Tara Moti as a Commissioner under the orders of the Court at Kareli. At the bottom of the first page on the reverse, there appears a statement of Rani Tara Moti to the effect that she did not claim the estate as mother of Raja Ratansingh nor as heir of Raja Balbhadra singh and after this she claimed as mother of Raja Ratansingh. Properly speaking the reply which was given subsequently is written in the beginning. So the order is reversed and I satisfied myself that she intended to say that she did not claim as the mother of Ratansingh."

17. Although Mr. Gupta when examined in the present case as D.W. 14 made a similar statement, we are not prepared to accept it. The deposition itself Ex. P-13 is complete; it contains his certificate that it was interpreted to and admitted to be correct by the Rani; the sequence of the sentences in if is in every way natural and the insertion of the words "Question" and "Answer" was, in accordance with practice, presumably inserted at the instance of the cross-examining counsel in view of the fact that the preceding replies represented a *volte face* from the position taken by her in the 1896 litigation and were adverse to his case. Further, Ex. D-12 and Mr. Gupta's statement as D.W. 14 were inadmissible in virtue of the provisions of Section 91 of the Evidence Act, which *inter alia* lays it down that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such matter except the document itself, or, secondary evidence of its contents in cases in which secondary evidence is admissible. In other words, the deposition itself Ex. P-13 and nothing else should have been regarded but the point is not of any great importance as the learned Additional District Judge omitted reference

not only to Mr. Gupta's statements but to this document.

18. The finding of the Division Bench in First Appeal No. 6 of 1929 cannot operate as *res judicata* but it was an authority of relevant value to the present case and we are, to say the least, astonished to discover that it was disregarded by the learned Additional District Judge. It was one, moreover, in which we concur, as it was clear from the history outlined above of the estate that the Rani did not enter into possession of it as a trespasser but as a limited heir of her step-son Ratan Singh; and it is manifest that a man who was so jealous of his rights as Durag Singh has been shown to be would have filed a suit for possession of the property if the Rani had not been the qualified heir to it. This view derives some support from the Chief Commissioner's judgment dated 7th March 1868, of which Ex. P-19 is a copy, in which he observed that on the death of Senapat's son who was his heir it might well be that in the circumstances of

the family the widows would be entitled to succeed under Hindu law, and more substantial support from the order dated 25th February 1873, *vide* Ex. P-50, of the then Chief Commissioner in which he expressed the view regarding Hirdepur that the widows were not entitled to more than a life interest in the shares awarded to them and could not be permitted to alienate them to anyone other than the Rajah. We now turn to the question of primogeniture and impartibility. That the custom of primogeniture and impartibility was set up in the pleadings is clear. Paragraphs 3 and 5 of the plaint run as follows:

> "3. The estate is impartible and the family of the plaintiff has always been governed by *Hindu Law of Benares School* varied in the matter of succession by the rules of primogeniture. According to the rules of primogeniture Raja Sangramsha, Raja Prakalsha, Raja Hatesingh, Raja Ranjor singh, Raja Lachhmansingh, Raja Khetsingh, Raja Senapat, Raja Dalipsingh, Raja Balbhadrasingh and Raja Ratansingh one after another, held the estate, and the junior members were given for maintenance either villages or annual cash allowances."
>
> "5. After the death of Rani Taramoti the plaintiff is entitled to inherit the estate according to the rule of primogeniture. The senior line being extinct, the plaintiff as senior most member of the next senior branch is entitled to inherit."

19. Rani Tara Moti in her written statement dated 22nd August 1929 denied that the estate was impartible or governed by the rule of primogeniture and maintained that there was no record of the application of the rule in the 30 years settlement and that no occasion for its application had ever arisen. A similar stand was taken by Roshan Singh in his written statement dated 10th March 1930. Durag Singh in his rejoinder dated 3rd April 1930 emphatically reasserted his claim that the estate was impartible and declared that the family had, like many other cognate Raj Gond families owning similar estates in the Central Provinces, always been governed by Hindu law varied in the matter of succession by the rule of primogeniture. These cognate estates were, he added, Chichli, Gangai and Pitehra in the Narsinghpur and Fatehpur, Bichpura, Nandipura, Tekripura and Shobhapur in the Hoshangabad district. On 10th April 1930, Roshan Singh's pleader evasively stated that it was not necessary for him to specify by what law or custom the parties were governed; and on the same day it was pleaded in Durag Singh's behalf that the rule of primogeniture extended to widows and mothers including step-mothers of the last male holder. Again on 14th August 1930 there was an oral statement in Durag Singh's behalf to the effect that the estate was impartible and a raj, that mutation had been effected in the Rani's name,

according to the custom of primogeniture, after Ratan Singh's death and that in virtue of that custom neither Hirde Singh nor his son Jorabal Singh was entitled to succeed. Roshan Singh in reply on 19th August 1930 denied that the estate was impartible or a *raj* or that the rule of primogeniture applied to the family and claimed that it was an ordinary malguzari estate the possessor of which assumed the title of *raja*. Finally on 9th September 1930 Durag Singh declared that the estate was by reason of this rule never held in succession by more than one person, partitioned by metes and bounds or alienated except by way of maintenance grants to the other members of the family.

20. It was thus clear that Durag Singh had specifically claimed that the estate was impartible and succession to it was governed by the rule of primogeniture. Issues 3A and 5C, D and E were framed thereafter and the Court below held that succession to the estate was governed by Hindu law as modified by the rule which did not exclude females. Khet Singh P.W. 1's statement, that the estate went to the eldest son of the eldest branch was supported by Chhunnudas (P.W. 2) who averred that Dilehri estate was impartible, that it would go to a senior wife even if she were the step-mother and that if there were no son, wife or mother it would pass to the eldest male of the senior branch. Thakur Harnam Singh P.W. 3's version was that the estate was not one which could be partitioned and it had a ceremony of enthronement. If, he continued, the raja died having two widows, the estate went to the senior; if he left a mother and step-mother but no wife it went to the senior whether she was his mother or step-mother and if he left no male issue it went to the eldest and the others were given maintenance. The evidence of Latkanprasad (P.W. 7) on this point was too jejune to warrant reliance, but Rewatiprasad (P.W. 17), an elderly witness, testified to having heard, from his elders that the owner of the estate? was called "Raja," the raj was impartible and went to the eldest son after the death of the father, if there was no son it went to the eldest member of the senior branch, failing him his widow became entitled to it and with her consent another Raja could be installed. The testimony of Rao Sheocharan Singh (P.W. 18) was *pro tanto* to the same

effect and Lachhman Singh (P.W. 19), who is related to Rani Tara Moti, declared that she had told him that the Dilehri *raj* went to the eldest member of the senior branch. Kamod Singh (P.W. 20), another relation of the Rani, had learned from her that the estate could not be divided and that Durag Singh as the member of the eldest branch would be owner after her. Durag Singh P.W. 21's evidence was to the effect that the estate was impartible, the eldest member of the branch succeeded to it and the members of the junior branches were given maintenance. The testimony of Lachhmanprasad (P.W. 22) was substantially the same and so was that of Dayashankar (P.W. 25). Prom the genealogical record produced by Debi Singh (P.W. 27), a bard whose ancestral business is to maintain such records of the Raj Gond Rajas of the Hoshangabad district (which now includes as a sub-division the former Narsinghpur district), it was seen that a single member of the family continued to inherit the family estate for 41 generations up to the time of Rajah Dalip Singh who died in 1856. A record which covers such a long period may not be entirely free from inaccuracy, but there is no reason to suppose that it was fabricated and the other side failed to show that its contents were untrue.

21. The genealogical table in para. 2 of the judgment also shows that Rajah Prakal Sha's son Rajah Hate Singh excluded Nirpat Singh and that Rajah Hate Singh's son Rajah Ranjore Singh succeeded him as Rajah. Of the latter's three sons Rajah Lachhman Singh alone inherited the estate and on his demise it passed to Rajah Khet

Singh who died in 1827, leaving two sons Rajah Senapat and Murat Singh. The contention that Rajah Senapat was younger than Murat Singh was not reiterated and the genealogical record produced by Debi Singh (P.W. 27) indicated that Rajah Senapat was the elder brother. It would also appear from the order, *vide* Ex. P-187, dated 24th November 1847 that Murat Singh's mother was Khet Singh's dahejwar (unmarried) and junior wife, that Murat Singh and she were in receipt of an allowance from Rajah Senapat and that they should, as in the past, render obedience to him. At the time of Rajah Senapat's demise in 1855, 14 members of the family were, as Ex. P-20 shows, in receipt of allowance from him and in 1877, *vide* Ex. P-21, 19 of his relatives including Murat Singh were in receipt of such allowances. Exhibit p-19, a copy of the judgment, dated 7th March 1868 of the Chief Commissioner in appeal filed by Balbhadra Singh and Senapat's widows, contains a reference-to the concerted admissions of the parties that the estate was in the nature of a majorat and that when Senapat sat on the gadi, his brother Murat Singh was in receipt of a separate allowance. The respondent Roshan Singh's great grandfather Kirat Singh was placed in possession of Biloni by Senapat in lieu of maintenance and it is-still in Roshan Singh's possession while Haradgaon which was given to Durag Singh's father Jawahar Singh for the same reason continues to be in the possession of the plaintiffs-appellants.

22. The practice of granting allowance for maintenance to junior members of the family indicates the impartible nature of the estate and the existence of a custom in it of succession by primogeniture. This conclusion is not without reinforcement. On 23rd September 1927 in the course of pleadings in civil Suit No. 6 of 1926 the legal representatives of the Rani and Roshan Singh had, *vide* Ex. P-30, specifically declared that the estate was impartible and governed by the rule of primogeniture. Their subsequent-resilements on this point could not demolish the effect of this pleading and it was significant that when Roshan Singh was examined as D.W. 20 in the present case he was compelled to admit that only one member of the family was known as the Rajah and his other statement that the Rajah was selected by the family and panchas was clearly made in order to bring his evidence into line with his case. In this he failed and his failure was marked by the fact that some of his own witnesses did not support it. Sardar Singh (D.W. 4) averred, for example, that in his Gangai section of the Raj Gond community the eldest son secures the Raj and he provides his relatives with maintenance; and Narayansingh (D.W. 19), who is related by marriage to Roshan Singh, admitted that the custom relating to succession was the same in the Dilehri group as that in the Gangai and four other groups. This witness also cited five instances which demons strated that in these groups the eldest sort excluded the younger sons in succession to the estate. The Dilehri group constitutes one of the principal families in the Narsinghpur region and there is in the 1856. "Report on the Land Revenue Settlement, of the Narsinghpur District, Nerbudda Division" at page 89 the following relevant passage:

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> "But the principal families as a rule still maintain the modified form of primogeniture which Mr. Molony wished to extend throughout the valley, though the growing custom of putteedaree tenure, and the full admission and record of all subordinate rights at the present settlement, seems to have raised up a general inclination among the cadets of these families to assert for themselves' a better position, which has in some cases led to family disunion and protracted litigation. These cases have ordinarily been decided in accordance with family custom, but the

tenure must in time die a natural death, as the increasing number of assignments to cadets swallow up more and more of the margin of profit to which the malgoozar has fo look for his own livelihood and the security of the estate."

23. After Senapat's demise in 1855, his minor son Dalip Singh succeeded to the Dilehri estate but it remained under the management of the Court of Wards and the proposal of the Deputy Commissioner in his letter, *vide* Ex. P-32 of 25th March 1856 to have the rent free tenure continued for the remaining period of the current settlement was not acceptable to Government and this tenure was resumed. Dalip Singh died meanwhile in April 1856 and the management of the estate continued to be carried out by Government until proprietary rights were conferred on members of the family in the 30 years settlement of 1863. Clause 11 of ex. D-29, a translation of a copy of the relevant *wajib-ul-arz* of that settlement, contains a recital that the cosharers were at liberty to effect a private partition of the estate among themselves or in the event of failure in that manner to resort to arbitration or to apply to the District Officers for the appointment of a capable *amin* (referee) for the purpose; and the respondent claimed that in virtue of this entry the estate was partible after if not before the settlement. This contention was countered by the other side which claimed that the *wajib-ul-arz* was a mere mechanical reproduction of the ordinary form of that document as used for the numerous villages which fell within the settlement sphere of operations and that it did not represent the actual and special state of affairs which existed in the estate as distinct from those which appertained to partible villages in the Narsinghpur district. This is a position which we in agreement with the learned Additional District Judge find ourselves bound to accept in view of the voluminous evidence on record which established the fact that the custom set down in cl. 11 of the *wajib-ul-arz* had no existence in the estate. The *wajib-ul-arz*, it is germane to Jadd, is the village administration paper and, as held in 2 N.L.J. 329[21] it does not create a right but merely records a custom.

24. The suggestion that the resumption of the revenue free tenure of the estate by Government in 1855 and the conferral of proprietary (malguzari) rights in the settlement 8 years later would operate to affect adversely the ancient custom of primogeniture succession was repelled by their Lordships of the Judicial Committee of the Privy Council in 24 N.L.R. 25[22] also a case from this Province, in which they ruled as follows:

"If an impartible estate existed as such from before the advent of British Rule, any settlement or regrant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom."

25. Their Lordships also held in that case:

"When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance, according to which custom the estate is to be held by a single member, and as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence."

26. That the evidence in the case before us satisfies these standards appears to be clear. It did not consist only of official reports and orders but it included an unequivocal admission in 1927 by the respondent and the Rani that the estate was

impartible and governed by the rule of primogeniture. On 10th April 1930 during the pendency of the present suit the respondent's legal representative significantly avoided specification of the law or custom by which the parties were governed; and of the witnesses examined in his behalf none set up a case contrary to the appellants' on this point while two of them, if not himself, supported the position of the other side. Then there was the oral evidence adduced by that side which included a genealogical record which demonstrated that a single member of the family in question had for 41 generations prior to 1856 inherited the family estate. Although there was no

instanee of female succession to the estate in question, it was shown from Exs. P-191 and 192, dated 28th May and 7th August 1898 respectively, that Rani Chandra Moti had inherited the Pitehra estate on the death of her husband Raj a Rajendra Singh on 23rd April 1898. There is, as their Lordships of the Judicial Committee of the Privy Council pointed out in 29 Cal. 828,[23] no inconsistency between a custom of impartibility and the right of the female to inherit and the general law must prevail unless it be proved that the custom extends to the exclusion of females. This rule was quoted with approval by their Lordships in a later Calcutta case viz., 42 Cal. 1179[24] at pp. 1191, 1192. The onus of proving a custom excluding females to succession to a separate impartible estate rests on the person who sets up the custom —10 Pat. 1[25]— but in the present case no custom of that kind was proved. The Rani was, therefore, entitled to succeed to the estate as the qualified heir of Ratan Singh and it was clear from the judgment of the learned Additional District Judge that his finding would have been to that order but for the fact that he, relying on 14 N.L.R. 82,[17] held that a step-mother could not succeed a step-son.

27. The finding of the Court below that the estate was alienable was not contested. It was based *inter alia* on the rule of their Lordships of the Judicial Committee of the Privy Council in 8 Cal. 199[26] at p. 206, which was relied on in 2 C.P.L.R. 141,[27] that the impartibility of a Raj does not, as a matter of law, make it inalienable and that the question of inalienability depends upon the family custom which must be proved. As in the case before us, there was no evidence to establish the inalienable nature of the estate or to indicate any custom of inalienability, the decision of the learned Additional District Judge was not open to challenge. Discussion regarding the question of the Rani's succession to her step-son has shown that when she entered the estate on his demise she was regarded as a limited owner not only by the revenue authorities but by Jawahar Singh who thereafter acted as her manager and it would be repugnant to reality to suppose that he would not have claimed the property if he had considered that she was not a qualified heir. The Court of Wards too would not have recognised her if he had been entitled to the estate and its recognition of her denoted beyond doubt that she had not entered as a trespasser. As she and others of her community were imbued with impressions of Hindu law, this entry would be accompanied by an idea of a limited and not one of an absolute estate. As she entered as an heir there was no question of her doing so professing to be the owner of a woman's estate or otherwise and Durag Singh in his suit in 1898 admitted that she had inherited it but claimed that he was the nearest reversioner. Before 1917 in fact there was nothing to indicate that she was prescribing an absolute title by adverse possession. In her statement in the 1897 case, there was no suggestion that she was acting in such a manner and the same applied to the stand taken by her in civil Suit No. 12 of 1906. The effect of the deed of agreement, Ex. P-102 executed by her in July 1908 will be examined hereafter, but it will suffice at this stage to remark that her conduct on that

occasion unmistakably pointed to the fact that she was not an absolute owner of the estate or was prescribing to it a title of that kind. Her first claim to such title appeared in 1917 in the deed of gift Ex. P-101 when she made the fantastic assertions that after Ratan Singh's demise she took possession of the estate as owner although she was not entitled to inherit it, that on this account mutation was effected in her name on 9th March 1875 and that 12 years later full proprietary rights had accrued to her.

28. This brings us to the question whether a woman governed by Hindu law can prescribe for herself a limited or an absolute title and if she has a limited estate, whether she can thereafter prescribe an absolute title. In 32 All. 189[28] it was held that where a Hindu female acquires a title to property by means of adverse possession, such property becomes her *stridhan* and descends as such to her heirs. Reference was made in another Allahabad case, *viz.*, 45 All. 729[29] to the rule of their Lordships of the Judicial Committee of the Privy Council in 22 Cal. 445

[30] that unless it was clearly shown that when the widow took possession she professed to do it as claiming only the limited estate of a widow it would be impossible to hold that the rights of the other claimants were not extinguished; and the learned Judges of the Allahabad High Court made the following observations:

> "In the present case, we have already said, there is nothing whatsoever to show how she got into possession. It may be that she got into possession claiming adverse title to the estate or it may be that she obtained possession surreptitiously or with the consent of the other members. So long, however, as the plaintiffs have not shown that she entered into possession of the estate with an assertion of only a limited interest, it seems to us impossible to hold that her possession had all along remained either permissive or qualified. Her subsequent conduct, namely, the execution of the mortgage-deeds, would rather go to show that she was all along treating herself as full owner of the property."

29. In an earlier Allahabad case, viz., 42 All. 152[31] their Lordships of the Judicial Committee of the Privy Council had held that a widow can by adverse possession acquire an estate in full ownership; and, as was pointed out in 46 All. 769,[32] it cannot be supposed that they in 5 Lah. 192[33] meant to lay down anything contrary to this. The widows in 5 Lah. 192[33] had taken possession on their husband's death and never claimed to have anything more than the limited estate of a female. The view taken in this Allahabad case was that where the widow of a joint Hindu family takes possession on the death of her husband of property which was in his possession during his lifetime, there is no presumption that the possession taken is merely that of the widow of a separatated Hindu; the nature of the widow's possession has to be determined by facts in each case, and if the facts indicate that the pos-session was adverse, the widow will, on the expiry of the prescribed period, acquire an absolute estate. This view was followed in 49 All. 713[34] in which 5 Lah. 192[33] was also distinguished on the ground that in that case at the time when the widow entered into possession she was entitled to the property as a widow and it was only subsequently that the birth of a posthumous son made her liable to dispossession.

30. A Division Bench, having further pointed, out in 7 Pat. 163[35] that in 5 Lah. 192[33] their Lordships had not said that the widow could not under any circumstances acquire any property for herself while holding her husband's estate, took the view that an interest acquired in a property by a Hindu-widow by adverse possession was her *stridhan* and not an accretion to her husband's estate unless it was shown that she took adverse possession of the property as representing her husband's estate. This

case, 46 All. 769,[32] and 49 All. 613[34] were relied on in A.I.R. 1933 Lah. 218,[36] in which Bhide, J. was of the view that where a widow claims the property as an absolute owner after the forfeiture of her estate by remarriage she may acquire such title by prescription after the lapse of the requisite period; and they adverse possession would date from the remarriage or from the date when she openly asserts her adverse title. A Hindu widow who had no right to a widow's estate but-remained in possession of the property for more than 12 years was in A.I.R. 1934 Lah. 270,[37] found to be an absolute owner, and in A.I.R. 1934 Lah. 683[38] a similar view was taken.

31. Reference has already been made to the Privy Council case in 22 Cal. 445[30] from Calcutta. In another Calcutta case, viz., 29 Cal. 664[39] their Lordships of the Judicial Committee ruled that when a widow of a member of a Mitakshara family, who would not, be entitled to anything more than maintenance out of his estate, obtains possession of the property but not as the result of an arrangement with the husband's heirs, her possession becomes adverse to them and their rights are barred at the expiration of 12 years from the date of the husband's death or the date of her taking possession thereafter. This rule was followed in A.I.R. 1927 Oudh 138[40] and in I.L.R. (1939) All. 713,[41] in which reference was made to that

case and other cases cited in this paragraph, a Division Bench held as follows:

> "There is no rule of law that whenever a Hindu widow is found in adverse possession of property she roust be deemed to be prescribing for a widow's limited estate only. Where a Hindu widow takes possession of property to which she is not entitled to succeed under the Hindu law, the question whether she acquires by prescription a limited estate or an absolute estate depends on the question of fact whether she claimed to take the property by succession to her husband (or to her son as the case may be) or not. If there is no evidence that she so limited her claim and professed to take possession as claiming only a limited estate, she takes an absolute estate; the burden of proving that she acquired only a limited estate is upon the party asserting it."

32. It is, therefore, clear that a woman governed by Hindu law can, although she has no right of succession to it, prescribe either for a limited or an absolute estate. This does not take us very far in the case before us in which the real question for determination is whether a woman who is governed by that law and has entered on an estate as a qualified heir can subsequently prescribe by adverse possession an absolute title to it. The Division Bench of the Judicial Commissioner's Court in finding that she cannot, relied, *vide* Ex. D-104, on 22 N.L.R. 175[42] in which it was held (page 178) that no adverse possession can run against a person until he becomes entitled to possession of property. This view was in accordance with the maxim of *law contra son valentem agere non currit prmscriptio*, that is to say, prescription does not run against a man during the time when he is unable to act, i.e., to take immediate possession. In 42 Bom. 714[43] Markby, J.'s definition of adverse possession in 4 Cal. 327[44] at page 329:

> "By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, of some person other than the true owner having a right to immediate possession."

33. Was quoted with approval and it was held that adverse possession did not begin to run against a reversioner until the death of a woman holding a limited estate.

34. Rustomji observes at page 1296 of vol. 2 of Edn. 5 of his "the *Law of*

Limitation" that the question whether a female entitled to a woman's limited estate can herself in the course of time acquire by adverse possession an absolute proprietary title against the last owner's reversionary heirs must, it seems, be answered in the negative. This principle was conceded in argument before their Lordships of the Judicial Committee of the Privy Council in 9 Luck. 421[45] at pages 425 to 426. A similar view was taken in 49 All. 779[46] and 50 All. 89.[47] A woman who has been lawfully holding an estate for life, whether under a will or the provisions of a special statute, e.g., the Oudh Estates Act, cannot, it was decided in 6 Luck. 282,[48] perfect her title to adverse possession and in 165 I.C. 322[49] a Division Bench were of the view that where under a special custom a widow was admittedly entitled to possess property as long as she lived, her possession, however long it lasted, could not be possession adverse to the alternate heirs so as to create an absolute right to the property in her favour after the expiry of 12 years.

35. In face of these authorities, with which we are in respectful agreement we are of the view that the Rani who held a limited estate in accordance with Hindu law could not prescribe an absolute title to it. As the deed of gift, was, moreover, executed on 25th July 1917, a period of 12 years had not been completed when the suit in its original form was filed on 20th June 1929 and an absolute title to the estate could not have been prescribed. It is true that the plaint was amended on 21st September 1929, a date more than 12 years after the execution of the deed of gift, but it was not open to Durag Singh to institute a suit for possession of the estate during the Rani's lifetime and he was in the original claim required to restrict his relief to declarations. Under Section 9 of the Limitation Act, however, no subsequent disability or inability to sue stops time once it has begun to run, but it was held in 62 Cal. 66[50] that assuming that the words "to sue" in this section include an application for delivery of possession the section contemplates cases where the cause of action is

cancelled by reason of subsequent events. Then there is Chitaley's observation at p. 437 of Vol. 1 of his "*The Indian Limitation Act*," Edn. 2, that it is a fundamental principle that limitation always implies an existing cause of action and that unless the cause of action for a suit has arisen, limitation for such suit cannot begin to run. Here, so far as the question of possession of the estate is concerned, the cause of action could not arise before the Rani's demise in 1929 and limitation would, under Article 141, Limitation Act, run from that date which fell, as we have seen, during the pendency of the suit.

36. It is well recognised that an owner's ignorance does not prevent, except in the case of concealed fraud, the running of time in the trespasser's favour, but this principle of law can have no application to a case such as this in which the Rani had from 1874 held a limited estate and the other party was not an owner but a reversioner. She was, as we have found, not a trespasser before the deed of gift was executed in 1917 and there could be no question of the running of time prior to that date on the alternative stand of adverse possession for an absolute title to the estate. Even after that date there was also no question of the running of time, as the Rani could not prescribe a title of that kind against a reversioner while she was duly in possession as a qualified heir and adverse possession could not begin to run against a reversioner before her demise. There was, therefore, no substance in the contentions based on the provisions of Section 9 of the Limitation Act.

37. The finding of the Court below that the question as to whether the parties were governed by Hindu law was *res judicata* in virtue of the decision in Civil Suit No. 84 of

1896 to the effect that they were governed by the Benares school of Hindu law was assailed on no less than five grounds by the respondent's learned counsel. First, there was the contention that the final judgment in a case is the only one which can operate as *res judicata* and that the final judgment in question, *vide* Ex. P-7, had not suggested that the Rani had a limited estate. Reliance was placed on 8 Cal. 631[51] in which it was held that where the decision of a lower Court is appealed to a special tribunal, which for any reason does not think fit to decide the matter, the question is left open and is not *res judicata*. The rule of their Lordships of the Judicial Committee of the Privy Council in 45 Cal. 442[52] was to the same effect and in it they quoted with approval the following observations of Lord Macnaghten in 24 Cal. 616[53]:

> "If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea of *res judicata*. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of appeal."

38. These observations were relied on by a Division Bench in 14 Luck. 277[54] in which it was decided that where the trial Court gives its findings on certain issues but on appeal the appellate Court disposes of the suit on one of the issues only and does not decide the other issues the decision of the trial Court does not operate as *res judicata* in a subsequent suit.

39. The nature and extent of the final judgment in civil Suit No. 84 of 1896 must, therefore, be examined. That suit was instituted by Durag Singh for a declaration that Rani Tara Moti's ad potion of Roshan Singh was invalid and it succeeded on the grounds that as the parties were governed by Hindu law, the Rani was not permitted to make a valid adoption to her deceased husband without his express authority and Roshan Singh and she had failed to-establish their allegation that they were governed by a special custom in this respect. Their appeal was dismissed by the Judicial Assistant to the Commissioner, Nerbudda Division, and when a second appeal was filed in the Judicial Commissioner's Court, it was held (*vide* Ex. P-6) that they were governed by the general principles of Hindu law and an opportunity was afforded to them of adducing evidence to show that there was a special custom which in their community permitted a widow to adopt a son without the express permission of her husband. Against the finding that such custom had not been established, the Rani and Roshan Singh preferred no objection and their appeal, *vide* Ex. P-7, was dismissed. It was, therefore, clear that it was finally decided that the parties were governed by Hindu law and that no custom existed by which a widow could evade the requirements of that law in the matter of adoption.

40. The question then is whether the judgment impliedly found that the Rani was entitled to a limited estate of which Durag Singh was the reversioner. There was, as we have seen, no express finding on the point, but in 15 Bom. 89[55] Farran, J. held that a suit was barred by the issue and decree in a former suit for the reason that although no actual finding on the issue was recorded, the decree passed necessarily involved a finding on it. In 48 All. 201[56] the view taken was that even if a point is decided by necessary implication, it operates as *res judicata* in subsequent proceedings; and a similar view was taken in 48 Bom. 638[57] and A.I.R. 1941 Nag. 346.[58] The institution of Civil Suit No. 84 of 1896 must, it would appear, have been contemplated under Section 42 of the Specific Relief Act, which deals with declaratory decrees and is linked

up with Article 118, Limitation Act, which prescribes the limitation in cases where a party sues to obtain a declaration that an alleged adoption is invalid or never in fact took place. Illustration (f) to Section 42 of the Specific Relief Act, viz.:

> "A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid."

41. Makes it clear that a suit such as civil Suit No. 84 of 1896 could only have been instituted by a reversioner against a limited owner and this view in confirmed by the contents of para. 6 of the plaint: *vide* Ex. P-190. It follows that the judgment in that case found by implication that the Rani had a limited interest in the estate and that Durag Singh was a reversioner of it.

42. The next question is whether or not declaratory decrees can operate as *res judicata*. In 37 Bom. 307[59] it was held that a decree of this kind did not so operate and in I.L.R. (1942) Bom. 14[60] Beaumont, C.J. observed that if the decree in the case before him was a declaratory decree it was not a decree finally decided within Section 11 of the CPC. Those decrees were not, however, passed under Section 42 of the Specific Relief Act, and, as was decided in A.I.R. 1936 Mad. 951,[61] a declaratory decree passed under that section was, apart from the provisions of Section 11 of the CPC, conclusive between the parties to it and persons litigating through them under Section 43 of the Specific Relief Act, and that although in a particular case such a decree may not operate as *res judicata* under this section the trial of the questions decided by the decree will be barred under the provisions of Section 43 of the Specific Relief Act. In that view we respectfully concur. There is an apparent conflict of views as to whether and how far a decision on an issue of law is *res judicata* as between the same parties in subsequent suits and Chitaley has at pp. 163-166 of Vol. 1 of his "*The Code of Civil Procedure* (5 [V] of 1908), 1944 edition," exhaustively analysed them and reached the following conclusion which is one with which we are in agreement:

> "In order to understand and solve this apparent conflict of views, it is necessary to see what exactly is meant by saying that a *point of law was in issue in a previous* suit. It is submitted, with respect, that what is meant is only that the *applicability or non-applicability of a rule of law to a given set of circumstances* was in question in the previous suit. Parties to a litigation have absolutely no concern in raising questions as to the existence of a particular rule of law or as to the nature thereof, except so far as such questions *affect the rights claimed or denied* in such litigation. An abstract question of law dissociated from and unconnected with such rights in litigation can never be of any *importance or value* to the parties and to the decision of the case and cannot therefore be deemed to have been *substantially in issue*. An examination of the decided cases in the light of the above observations will clearly show that there is really no conflict among them."

43. We would also quote Rankin, C.J.'s observations in 56 Cal. 723[62] at pp. 736, 737:

> "In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attacked on a particular point. On the other hand, it is plain from the terms of S. 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to

them *inter se*, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or re-contesting that which has been finally decided."

44. This Full Bench case was followed in I.L.R. 1940 Nag. 181[63] by Puranik, J. who held that a previous decision on a question of law is *res judicata* in a subsequent suit. Although we are in agreement with these authorities, we would point out that the previous decision was not on a question of law but on a mixed question of law and fact. Whether the parties were governed by Hindu law or, part of it would necessarily depend upon pleas and proof of facts in the case. The question whether a particular custom does or does not prevail in any particular tribe did not, according to a Division Bench in A.I.R. 1928 Lah. 779[64] stand on the same footing as a question of law; and in A.I.R. 1929 Cal. 677[65] the question whether Rajbansis of non-Hindu origin were governed by Hindu law was treated as a mixed question of law and fact, while in 52 Mad. 160[66] the view taken was that the question whether a given person is a Hindu or not is a question of fact. The suggestion made during the course of arguments that the Rani was a *pro forma* defendant in the 1896 case as she had no title after the adoption of Roshan Singh is without foundation, as the adverse decision deprived her of a son and she fought the matter out with great tenacity in three Courts. Although it is true that in that case Roshan Singh was sued as an adoptee and that in the present case he was sued as a donee, we consider that he was in both cases litigating under the same title. "Title" in this context refers, as was held in 10 Luck. 361[67] and A.I.R. 1941 Cal. 674,[68] to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his own interest or for himself as representing the interest of another or as representing the interest of others along with himself and it has nothing to do with the particular cause of action on which he sues or is sued. Roshan Singh was clearly enough) sued in both cases in his individual capacity, first as a person claiming the estate in virtue of ad potion and later as person claiming it in virtue of a deed of gift.

45. We are aware that in I.L.R. 1942 Bom. 798[69] Sen, J. held that a plaintiff who was adopted on two different occasions by a defendant was not litigating under the same title in the second suit, but we are of the view that the case is one which can be distinguished. The question for decision in both suits was whether the adoption was valid and the real basis for the view taken by the Division Bench was the fact that between the dates of the adoptions their Lordships of the Judicial Committee of the Privy Council had effected a change in the law of adoption by their decision in a case from Bombay. The plaintiff was litigating under the same title in both suits but the questions to be determined were not the same because of the intervening change in the law of adoption. Reliance was placed in 1926 A.C. 94[70] which rested on the interpretation of law in successive enactments and in it their Lordships observed:

> "The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision should not be disputed. The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not *eadeni qustio* and therefore the principle of *res judicata* cannot apply."

46. Their Lordships had in mind, it would appear, the duty of the Crown to the subject in the matter of assessment and did not suggest that in every case in which the cause of action is different a question of law previously decided between the parties and one which went to the root of both causes of action would not be *res*

judicata.

47. Explanation IV to Section 11 of the CPC, lays it down that any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter briefly (directly?) and substantially in issue in that suit. Although Civil Suit No. 84 of 1896 was one for a declaration that an adoption was invalid, it was one which could only have been brought by a reversioner against a limited owner and it was open to the defence to

assist it upon all possible grounds within its knowledge. The obvious and most puissant mode of defence to defeat the plaintiff's claim would have been the specific pleas that Durag Singh was a stranger to the estate and that the Rani was the limited or absolute owner whether by prescription or otherwise. Although her failure in this respect clearly indicated that the position taken by Roshan Singh and her in the present suit was not authentic, it does not necessarily follow that her omission in the earlier suit brought the matter within the purview of *res judicata*. She had resisted Durag Singh's claim on the ground that succession to the estate was determined by the ruling power, the adoption of Roshan Singh was not invalid according to family custom and had in fact been made with the sanction of the Local Government. This was in itself a complete reply to the plaintiff's action; and in A.I.R. 1933 Lah. 279,[71] Tekchand, J., relying on A.I.R. 1929 Lah. 872[72] held that for the applicability of Expl. IV it is not only necessary that the defendant could have raised the defence in reply to the former suit but it must also be shown that he was bound to do so. Civil Suit No. 84 of 1896 was not for possession of the estate but if it had been the Rani would have been bound to resist the plaintiff's claim by taking the plea that she had acquired an absolute title by adverse possession in 1886 i.e., twelve years after entry into the estate. As it was, the suit was merely for a declaration and a plea of adverse possession even if established would not have validated the impugned adoption. It follows that the decision in that suit did not debar the defence in the present suit: from raising the plea of adverse possession.

48. Although we are of the view that the decision in Civil Suit No. 84 of 1896 operates ??? *res judicata* and that the contention that the parties were not governed by Hindu law could not be reagitated, we are clear from the material before us that the finding in that suit was eminently correct. The Chief Commissioner in his order, *vide* Ex. P-19 in 1865, envisaged the possibility of the widows' succession under Hindu law on the death of Rajah Senapat's minor son Dalip Singh in 1856; and in 1873 the then Chief Commissioner recorded, *vide* Ex. P-50, the view that they were only entitled to a life interest in the village of Hirdepur. The specific stand taken by Durag Singh in civil Suit No. 84 of 1896, *vide* Ex. P-4, was that Rani Tara Moti, Roshan Singh and he were governed by Hindu law and customs and it was evident from the testimony in that case of *Rajah Bije Bahadur Singh*, *vide* Ex. P-95, his brother Khet Singh, *vide* Ex. P. 97, and Eupkuar, *vide* Ex. P-95, that the Raj Gonds in the regions with which we are concerned had adopted many Hindu customs. The Rani and Roshan Singh failed in that suit to prove that they were not governed by Hindu law but by special customs; and the adoption, in itself an indication that the Rani was acting in accordance with Hindu custom, was declared invalid as her husband had not expressly permitted her to make it. The Judicial Commissioner's Court also held, *vide* Ex. P-6, that the parties were governed by the general principles of Hindu law. Durag Singh in his plaint, *vide* Ex. D-35, and replication, Ex. D-34, in civil Suit No. 12 of 1905 relied on the fact that the Rani and he were governed by that law and it was significant that in the equivocal

written statement, *vide* Ex. P-157, filed by her there was the assertion—"The defendant being Raja Balbhaddarsingh's widow is his heir under Hindu law if the succession is governed by it...." This was followed by a statement, *vide* Ex. D-15, from Durag Singh in which he again declared that the parties were governed by the Mitakshara school of Hindu law which prevailed in this Province and the District Judge found, *vide* Ex. D-30, that the finding to that effect in Civil Suit No. 84 of 1896 operated as *res judicata*. The parties were also found to be governed by Hindu law in civil Suit No. 76 of 1911 by the District Judge and in civil Appeal No. 46 of 1914, *vide* Ex. D-32, by the Divisional Judge, Nerbudda Division, whose decision was upheld by the Judicial Commissioner's Court, *vide* Ex. P-142, in 1918. In statements filed in behalf of the Rani and Roshan Singh in civil Suit No. 6 of 1926 there were, as Exs. P-104 and 105 show, unequivocal admissions to the effect that the parties had adopted those principles of the Mitakshara school of Hindu law which related to succession and inheritance. In spite of these admissions one of the grounds taken in appeal was that the parties were not governed by that law, but this was rejected, *vide* Ex. D-104, by a Division Bench of the Judicial Commissioner's Court in 1932.

49. Although the Rani and Roshan Singh is the present suit reiterated the claim that the

community to which they belonged was not governed by Hindu law, they set up an alternative case in their pleadings which was founded on the assumption that they were so governed and the fact of their adoption of many Hindu customs was seen from the evidence of the following witnesses. Thakurprasad (d. W. 2), mukaddam of one of the villages in the Dilehri estate, averred that in Dilehri the deity Mahabir rests on a platform in a permanent shed and that the Laxminarayan temple at another village was endowed with land from the estate. The priests attached to it were, according to Eewatiprasad (P.W. 17), in control of the land. Mardansing (D.W. 8), who is related to Roshan Singh, stated:

> "We put on sacred thread and the ceremony is performed by a Brahmin. We observe pollution upon the death of a relative and offer *pindas* and water to the manes. He who can afford sends the bones of the dead to the Ganges at Allahabad. Hair and moustaches are shaved at deaths of elderly men. There is also the *mundan* ceremony of the children. Among the big folk of the community there is the gift of daughter by father ceremony and also among all the walking seven steps with the bride to confirm marriage."

50. The evidence of Diwan Sardar Singh (D.W. 4), Thakur Himmat Singh (D.W. 6), Nathu (D.W. 7), Udesingh (D.W. 8) and Jamunsingh (D.W. 9) was pro tanto to the same effect.

51. Nor would it appear that this adoption of Hindu customs was in any way recent. Two witnesses who had been examined in Civil Suit No. 84 of 1896 but died before Civil Suit No. 12 of 1906 stated (pages 666 and 667 of the paper book) that the Raj Gonds in the Narsinghpur district performed their ceremonies according to the Hindu *shastras* and claimed to be and were acknowledged as Hindus. Paragraph 80 of the settlement report of that district which was published in 1866 runs as follows:

> "The Raj Gonds wear the 'juneo' or sacred thread, and affect strict orthodoxy in the observance of the rites of the Hindoo religion, but have not been told enough to emancipate themselves altogether from the thrall of their ancestral gods, however anxious they may be to obtain recognition as members of the now more fashionable

faith. In some respects looked down upon by the purer Aryan races, who have almost supplanted them, they still retain all the influence inseparable from long descent and large estate, and are in fact the true aristocracy of this part of the country. The principal Raj Gonds in the Nursingbpur district, are the Rajahs of Cheechlee and Gangye, and the Dewan of Dilehree, but the Rajahs of Futtehpore in Hoshangabad also hold large tracts of land in the Gadurwara Tahsil."

52. The Gazetteer of the district which was published in 1906 contains (page 67) the remark that the Raj Gonds have adopted the religious and social observances of Hindus and wear the sacred thread.

53. The only conclusion which can be reached from all of this material is that the parties were governed by Hindu law or custom not only in the matter of ceremonial but in that of succession modified, as we have shown, by the rule of primogeniture. This decision is fortified by the fact that the Rani and Roshan Singh, who had as adumbrated specifically admitted in 1927 that they had adopted that part of the Hindu law which related to succession and inherit, and resiled from that position in 1929 and 1930 respectively at the outset of the present case but then failed to indicate the law or custom by which they were governed in these matters. In subsequent pleadings in their behalf there were the following evasive statements:

"It is not necessary to state by which law or custom the parties were governed. The parties are-not governed by any special custom regarding the rights of the female heirs. The defendant does-not base his title upon any custom or law. It is admitted that the Raj Gonds have adopted several Hindu customs such as the wearing of the sacred thread, giving cakes to the dead but the Hindu law does not become applicable to them thereby. In marriages among Raj Gonds some rites prevailing amongst Hindus and some rites peculiar to Gonds are observed. The defendant does not think it necessary to give further particulars of the custom. He has given the principal characteristics. That on the assumption that Gonds are not Hindus but have adopted the *Hindu law* of adoption as a part of their customary law, the question still remains whether that custom has persisted he their family for 37 years since 1896 when the decision relied upon for *res judicata* was given."

54. From these declarations it would appear that the defence avoided the task of indicating the law or custom by which it was governed but was constrained to admit that it had in some matters adopted Hindu customs. This avoidance continued in appeal and the respondent's learned counsel was when invited in the course of arguments-unable to specify the custom or law by which the parties were governed in the matter of succession and inheritance.

55. Rajah Senapat's widows Ganga Moti and Umed Kuar had held the villages Joba, Amheta and Bhawarjhir on account of maintenance during their lifetime and they were to revert to the owner of the estate on the deaths of the widows. Ganga Moti predeceased Umed Kuar who died on 11th April 1894 and Rani Tara Moti was on 18th August of that year recorded as the superior proprietress of the villages. In civil Suit No. 12 of 1906, however, Durag Singh sued

successfully for possession of them on the ground that he and not she was the lawful heir to them; and the respondent in the present case claimed that as Durag Singh had in Civil Suit no. 12 of 1906 failed to include the 19 villages now in question the present suit was barred under R. 2 of O. 2 of the CPC, which lays it down that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of a claim which he is entitled to make in respect of the cause of action, he shall not afterwards

sue in respect of the portion so omitted or relinquished. It is, therefore, not open to a plaintiff to split up parts really constituting the same cause of action and file different suits in respect of them. Here, however, the causes of action were not the same. The plaint, *vide* Ex. D-35, and Durag Singh's replication, *vide* Ex. D-34, in civil Suit no. 12 of 1906 did not make it entirely clear whether he claimed as the reversionary heir of Dalip Singh or Balbhara Singh, but it would appear from a supplementary replication, *vide* Ex. D-16, that his claim was as a reversioner after the deaths of the latter and his son Ratan Singh with the right of possession on the demise of Senapat's widows. The cause of action in that suit arose, therefore, on the death of Umed Kuar in 1894 whereas the cause of action in the case before us arose on the death of Rani Tara Moti and when Durag Singh instituted Civil Suit No. 84 of 1896 in respect of the villages at present in question, he admitted that he could not secure possession of them before the Rani's demise. It, therefore, follows that he was not in 1906 at liberty or required to maintain a consolidated action for relief in respect of all 22 villages and that the contention founded on O. 2, R. 2 possesses no merit.

56. The deed of agreement, Ex. P-102, which was executed on 31st July 1908 contained no reference of any kind to an absolute title to the estate and purported on the other hand to be a recognition by the Rani of Durag Singh's right to the *Raj gadi*. This was remarkable in view of the Rani's right as a limited holder, but we are satisfied that when she executed it she did so voluntarily and was not compelled to execute it. It consisted of two parts, viz., the agreement itself and an exhaustive list of property. Both were signed by Durag Singh, the respondent Roshan Singh, and by Khuman Singh, Hirde Singh and Damrulal who were entitled to maintenance from the estate. Both contained the marks made by the Rani's seal and against each was a note by her agent Makundilal that it had been made by her. The first part was attested by five witnesses including Mardan Singh (D.W. 3) and the second part by Lal Chain Singh (deceased) and Gorelal (D.W. 21). The stamp had been purchased on 18th July 1908 by the Rani's agent Lokman who continued in her employ until he died in 1923 and Makundilal to whom we have referred remained in her employ or that of Roshan Singh until her death in 1929. The fact that she retained them in her service clearly demonstrated that they had not taken part in a transaction which she described in her pleadings as one which was entered into by her agents in collusion with Durag Singh.

57. There was no undue haste as to registration and in fact it took place on 3rd, 6th and 8th October 1908 before the Sub-Registrar Tatiaji Govind who went to the Rani's house at Dilehri, had her identified by two independent persons, viz., a patwari and schoolmaster, and took her thumb mark in their presence as well as the seal mark which was again attested by Makundilal. Rule 26 of the Registration Rules then in force was as follows:

> "It is of the first importance that the reality of admissions of execution should be placed beyond all doubt. It is not sufficient for the registering officer to have the document read out aloud in Court, the executant being asked whether having heard it read, he admits execution or not. The only effective way of testing the executant's knowledge of its contents or, in other words, of proving the reality of his admission, is to ask him (before the document is read aloud) to explain what its terms are, and then to compare his answer with its actual contents. Registering officers should adopt this procedure in all cases."

58. As these were the general requirements essential in respect of executant at that time, there is a strong presumption that they would not have been disregarded by the Sub-Registrar; and in 33 Cal. 537[73] their Lordships of the Judicial Committee of the Privy Council laid stress on the presumption that the work of registration is duly done. It was, however, not pleaded that the Rani was unable to comprehend the contents of the deed and Khetsingh (P.W. 1) and Ganpat (P.W. 4) were present when

it was read out to her before she executed it. Khetsingh went away at this stage but Ganpat who remained averred that the Rani had produced the seal from a box and given an instruction to Makundilal which resulted in the addition of the significant

endorsement "and Diwan Durag Singh shall first pay off the entire debt which may have been incurred by me," an endorsement which it is improbable to suppose Makundilal would have made if he had been acting in collusion with Durag Singh.

59. Although the Rani when examined in Civil Suit No. 6 of 1926 denied, *vide* Ex. P -13, her acceptance of the deed, she admitted that the panchas Bijay Bahadur Singh and Takhat Singh had drawn it up and come to Dilehri to show it to her; and Roshan Singh in Para. 8 of his written statement in the present case admitted that there had been a reference to arbitration on 31st July 1908, i.e., the date on which the deed was executed. He too was one of the executants and had not only signed it in two places but signed it for a third time when admitting execution over two months later on 8th October 1908 before the Sub-Registrar. He was not a minor then but 24 years of age and the Rani who was about 57 years of age could not be regarded as a simpleton. The had been considered fit five years previously to manage the estate and her statements, Exs. P. 98, P-13 and D-11, in civil Suit No. 84 of 1896, Civil Suit No. 6 of 1926 and Revenue Case No. 94 of 1916–1917 respectively, indicated that although she was a *pardanashin* lady and illiterate she had a mind which was agile, forcible and resourceful. This quality had not deserted her in 1920 when approaching the age of 70 she despatched a letter, *vide* Ex. P-168, which was remarkable for its vigour and realistic approach to money matters and the affairs of the estate. Nor was it in any way singular for her at her age to surrender a limited estate to the nearest reversioner. It would, if acted on, have resulted in her complete effacement, but as noted by Mulla at p. 208 of his "*Principles of Hindu Law*," Edn. 9, 1940, it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one, or, of all the reversioners nearest in degree if there are more than one at the moment.

60. In her and Roshan Singh's pleadings it was not asserted that either of them was the victim of undue influence and the Rani in fact expressly or impliedly stated that she was not apprised of the contents of the deed of agreement and that she had not executed it or admitted execution before the Sub-Registrar. Her version was, on the other hand, that when the panchas presented it to her she threw it away and she attributed the attempted fraud to the machinations of Durag Singh and her agents. The latter, however, were for the reasons already given not to blame and her admission of execution was duly taken by the Sub-Registrar. The seal twice used by her when the deed was executed was again used by her above her thumb mark at the time of registration. This was in 1908 and it was not denied that she had used it in 1906 twice in Ex. P-151 and twice in Ex. P-152. It was a seal which might have been in her possession as the name "Murat Singh" was cut in it and he was her husband's father. It is true that she used a different seal on the deed of gift, *vide* Ex. P-101, in 1917 but we find from the evidence of the respondent's witness Narayansingh (D.W. 19) that in addition to that seal she had the seal of Murat Singh. The latter, it would appear from the testimony of Dhansingh (P.W. 6), was made of brass and the former, according to Narayansingh (D.W. 19) was a rubber stamp.

61. It is true that the quantum of evidence adduced by Durag Singh to prove that the deed was read out or explained to the Rani was meagre, but the best witnesses on the question had all died before the stage of evidence was reached and the

circumstances outlined above inevitably pointed to the conclusion that she was fully seized of its contents both at the time of execution and at the time of registration. Her reason for entering into the transaction must have been her apprehension, whether inspired by Roshan Singh or not, that as a result of her defeat on 21st March 1907 by Durag Singh in the contest in civil Suit No. 12 of 1906 for superior proprietary rights in Joba, Amheta and Bhawarjhir she might also lose her rights in the other 19 villages. The idea of arranging for panchas to fix maintenance for Roshan Singh, Khuman Singh, Hirde Singh, Damrulal and herself would not in the circumstances be strange or far fetched and might well have been regarded by her as one which was based on reality and foresight. But whatever impelled her to enter into the agreement, it was not implemented and it would appear that she changed her mind after its registration. It was, therefore, of no effect although from an evidentiary angle it showed that in 1908 she not only did not claim an absolute title to, but acknowledged that Durag Singh was entitled to be Rajah of, the Dilehri estate.

62. The plaintiffs' suit was held to be time-barred by the Court below as Rani

Tara Moti did not hold a limited interest in the estate, but had prescribed a title to it by adverse possession and the plaintiffs' cause of action had accrued on Rajah Ratan Singh's death in 1874. Having held that these findings were wrong and that the Rani had a limited interest in the estate and was not the absolute owner, we have now to decide whether or not the suit was time-barred. Article 141, Limitation Act, 1908 (9 [IX] of 1908) prescribes *vide* page 1270, vol. 2, *Rustomji's "The Law of Limitation"* Edn. 5, limitation for suits in which it is sought to recover estates which, having once been estates in expectancy, have become vested in the heir of the last male holder on the determination of a limited estate held by a Hindu or Muhammedan female; and it is clear that if in the present case the Rani can be held to be a Hindu or that the word "Hindu" can in this context be held to apply to her as the community to which she belongs was governed in matters of inheritance by Hindu law, Article 141 was applicable and the suit was in time.

63. The distinction between a Hindu and a person who is subject to Hindu law is at times apt to be blurred, but the distinction is there. The Gonds have, as is well known, adopted in the course of time—whether for reasons of propinquity or snobbery—several Hindu usages and customs, but this does not make them Hindus either in the ethnological or complete theological sense. It is possible that some of them may have been so merged in the Hindu community that they are indistinguishable from its members but most of them still continue to retain their separate identity as a distinctive racial group. Stanyon, A.J.C. had in 2 N.L.J. 129[74] held that Gond is not a Hindu and in A.I.R. 1923 Nag. 317[76] Hallifax and Kotval, A.J.Cs. who took the same view added that it could of course be proved in the case of any particular Gond that his family or any large body of Gonds in which he was included had adopted any particular custom or all the principles of Hindu law by becoming converts to that religion or otherwise. These two cases were followed by Baker, J.C. in A.I.R. 1925 Nag. 353[76] and A.I.R. 1923 Nag. 317[75] was followed by Mohiddin and Macnair A.J.Cs. in A.I.R. 1930 Nag. 35[77] as well as by Macnair O.J.C. in 26 N.L.R. 111.[78] It will thus be seen that the highest civil tribunal of this province has consistently held that the Gonda are not Hindus. The suggestion that the Raj Gonds which are a branch of the Gonds had become Hindus was considered and rejected by Baker, J.C. in A.I.R. 1925 Nag. 353[76] and Stanyon, A.J.C. pointed out in 2 N.L.J. 129[74] that they had closely imitated Hindu customs, adopted Hindu names, taken to wearing the sacred thread and to offering

cakes to the dead after the manner of regenerate Hindus. It is true that according to Forsyth the Raj Gonds were in many cases the descendants of alliances between Rajput adventurers and Gonds, but Russell at page 63 of Vol. 3 of his "*Tribes and Castes of the Central Provinces*" pointed out that the term "Raj Gonds" practically comprised the land holding sub-division of the Gonds and any proprietor who was willing to pay for the privilege could probably get his family admitted into the group. The claim of the Raj Gonds to Rajput ancestry is referred to at page ??? of the Introduction to Edn. 2 (1870) of the *Gazetteer of the Central Provinces* and in page 160 of the Central Provinces volume of the Imperial Gazetteer there is the following passage:

> "The Raj Gonda.... may roughly be taken to be the descendants of Gond landed proprietors who have been formed into a separate sub-division and admitted to Hinduism with the status of a cultivating caste, Brahmans taking water from them. The elevation is justified by the theory that they have intermarried with Rajputs, but this has probably occurred only in a few isolated instances. Some Raj Gonds wear the sacred thread, and outdo Brahmans in their purificatory observances. But many of them are obliged once in four or five years to visit their god Bura Deo, and to place cow's flesh to their lips wrapped in a cloth, lest evil should befall their house."

64. In Sherring's "*Hindu Tribes and Castes*," Vol. 2, 1879, page 139, there is a reference to the fact that they are in spite of their adherence to Hindu usages, obliged occasionally to visit their own deities and even to put cow's flesh to their lips folded in cloth to ward off evil from their houses 13 years before this there appeared in the Settlement Report of the Narsinghpur district the passage which we have already quoted:

> "The Raj Gonds wear the 'juneo' or sacred thread, and affect strict orthodoxy in the observance of the rites of the Hindoo religion, but have not been told enough to emancipate themselves altogether from the thrall of their ancestral gods, however anxious they may be to obtain recognition as members of the now more fashionable faith. In some respects looked down upon by the purer Aryan races, who have almost supplanted them, they still retain all the influence inseparable from long descent and large estate, and are in fact the true aristocracy of this part of the country. The principal Raj Gonds in the Nursingpore district, are the Rajahs of Chheechlee and Gangye, and the Dewan of Dilehree, but the Rajahs of Futtehpore in Hoshangabad also bold large tracts of land in the Gadurwara Tehseel."

65. The effect of all of those authorities goes only to show that the Raj Gonds have risen in the social scale and have been regarded as Hindus of the cultivating classes; and we are clear that when the Civil Judge, Narsinghpur, found *vide*, Ex. P-4, that the parties in the present case were Hindus of a lower class he had been unduly influenced by the fact that they had adopted many of the Hindu customs. Our attention was drawn to a case in 20 N.L.J. 169[79] in which Niyogi, J. had held that the Korkus, another aboriginal tribe in this province were Hindus, but that view did not relate to the Gonds and it would appear from Stone, C.J.'s observations that he deprecated in a case of that kind a decision which was founded on considerations of theology. This brings us to the second question i.e., the interpretation of the word "Hindu" in Article 141, Limitation Act, 1908 (9 [IX] of 1908). If that word were taken literally in Article

128, it would, as was observed by a Division Bench in 23 Cal. 645[80] at pp. 663, 664 to the anomalous result that a Hindu servant of a Christian or a Mahomedan, to whom his master may have granted maintenance in consideration of his past services, would be entitled to 12 years limitation in respect of his claim, while a servant of the master's own nationality and creed would be entitled only to six years or three years in respect of a similar claim according as the deed in his favour was or was not registered. This decision was followed in 15 Pat. 151[81] at p. 161 by another Division Bench with regard to the interpretation of the word "Hindu," in Article 125 and we too are clearly of the view that this word in Article 141 must be taken to mean not only a person who is ethnologically a Hindu but also a person who has the legal status of a Hindu and is like Rani Tara Moti and her Kinsmen governed in the matter of inheritance by the Hindu law. Central Provinces Government Notification No. 2334–1612-V of 10th November 1931 was as follows:

> "Whereas the tribes known as the Bahrias or Bhumias, Gonds (including Raj-Gonds), Halbas, Kawars Korkus, Marias, Murias, Oraons and Pardhans dwelling in the Central Provinces have customary rules of succession and inheritance incompatible with the Indian Succession Act, 1925 (39 [XXXIX] of 1925), and it is inexpedient to apply the provisions of that Act to the members of those tribes:
>
> Now, in exercise of the powers conferred by sub-s. (1) of Section 3 of the Indian Succession Act, 1925 (39 [XXXIX] of 1925), the Governor in Council is pleased to exempt all Bharias or Bhumias, Gonds (including Haj Gonds), Halbas, Karwars, Korkus, Marias, Murias, Oraons and Pardhans dwelling in the Central Provinces from the operation of Ss. 5 to 49, 58 to 191, 212, 213 and 215 to 369 of the said Act retrospectively with effect from 16th March 1865:
>
> Provided that this notification shall not be held to affect any person in regard to whose rights a decision contrary to its effect has already been given by a competent civil or revenue Court."

66. The respondent's claim that in virtue of this notification the law applicable to Raj-Gonds was no longer either Hindu or the law contained in the Indian Succession Act and that they were subject to the customary rules of succession and inheritance with effect from 16th March 1865 cannot prevail. The proviso made it clear that the notification was not to affect a person in respect of whose rights a decision contrary to its effect had already been given in a civil or revenue Court and as there was a clear finding in Civil Suit No. 84 of 1896 that the parties were governed by Hindu law, the present case came within the purview of the proviso. It was not suggested in appeal or cross-objection that the finding of the learned Additional District Judge that Durag Singh and his father Jawahar Singh were of legitimate descent was wrong and we are clear that the defence imputation on this-point was both unwarranted and scandalous. In the result, the appeal succeeds and the cross-objection is dismissed. The appellants' costs in both Courts shall be borne by the respondent in addition to his own.

G.B./D.H.

67. *Appeal allowed.*

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1. ('15) 2 A.I.R. 1915 P.C. 15 : 37 All. 359 : 42 I.A. 155 : 29 I.C. 617 (P.C.), *Puttu Lal* v. *Mt. Parbati Kunwar*.

2. (1801) Select Rep. of Macnaghten, Vol. I Indian Decisions (Old Series) [Vol. VI] p. 39.

3. (1846) 4 M.I.A. 1 : 1 Suther 197 : 1 Sar. 313 (P.C.), *Rungama* v. *Atchama*.

4. ('03) 25 All. 468 : 30 I.A. 202 : 8 Sar. 465 (P.C.), *Sheo Shankar Lal* v. *Debi Sahai*.

5. ('22) 9 A.I.R. 1922 P.C. 71 : 44 Mad. 656 : 48 I.A. 280 : 61 I.C. 690 (P.C.), *Arumilli Ferrazu* v. *Arumilli Subbarayadu*.

[6] (1862-64) W.R. (Special Number) 173 : Beng. L.R. Sup. Vol. 67 (F.B.), *Lalla Jotee Lall* v. *Mt. Dooranee Kooer*.

[7] ('81) 3 All. 45, *Gauri Sahai* v. *Rukko*.

[8] ('83) 5 All. 311 (F.B.), *Jagat Narain* v. *Sheo Das*.

[9] ('94) 16 All. 221, *Rama Nand* v. *Surgiani*.

[10] ('82) 5 Mad. 29, *Kumaravelu* v. *Virana Goundan*.

[11] ('82) 5 Mad. 32, *Muttammal* v. *Vengalakshmi Ammal*.

[12] ('84) 8 Mad. 107 (F.B.), *Mari* v. *Chinnammal*.

[13] ('80) 4 Bom. 188, *Kesserbai* v. *Valab Raoji*.

[14] ('95) 19 Bom. 707, *Russoobai* v. *Zoolekhabai*.

[15] ('89) 2 C.P.L.R. 18, *Hiralal* v. *Tani Bai*.

[16] ('98) 11 C.P.L.R. 49, *Deorao* v. *Sakhu Bai*.

[17] ('17) 4 A.I.R. 1917 Nag. 7 : 14 N.L.R. 82 : 43 I.C. 943, *Ganoo* v. *Beni*.

[18] (1862) S.D.A. (N.W.F.) 306, *Bhuganee Daiee* v. *Gopalji*.

[19] Special Appeal No. 66 of 1877, D/- 31st May 1877, *Chanda Bai* v. *Govind Rao*.

[20] ('69) 6 Bom. H.C.R. (A.C.) 152, *Lakshmibai* v. *Jayram Hari*.

[21] ('20) 7 A.I.R. 1920 Nag. 42 : 54 I.C. 177 : 2 N.L.J. 329, *Sitaram* v. *Rakhadu*.

[22] ('28) 15 A.I.R. 1928 P.C. 10 : 24 N.L.R. 25 : 55 Cal. 403 : 55 I.A. 45 : 107 I.C. 7 (P.C.), *Martand Rao* v. *Malhar Rao*.

[23] ('02) 29 Cal. 828 : 29 I.A. 178 : 178 P.R. 1902 : 8 Sar. 351 (P.C.), *Ram Nundun Singh* v. *Janki Koer*.

[24] ('15) 2 A.I.R. 1915 P.C. 30 : 42 Cal. 1179 : 42 I.A. 192 : 30 I.C. 833 (P.C.), *Tara Kumari* v. *Chaturbbuj Narayan Singh*.

[25] ('30) 17 A.I.R. 1930 Pat. 417 : 10 Pat. 1 : 123 I.C. 770, *Amarendra* v. *Banamali*.

[26] ('82) 8 Cal. 139 : 8 I.A. 248 : 4 Sar. 290 (P.C.), *Raja Udaya Aditya Deb* v. *Jadab Lal Aditva Deb*.

[27] ('89) 2 C.P.L.R. 141, *Sardar Singh* v. *Ajit Singh*.

[28] ('10) 32 All. 189 : 5 I.C. 207, *Kashai Ram* v. *Mt. Amri*.

[29] ('24) 11 A.I.R. 1924 All. 88 : 45 All. 729 : 74 I.C. 869, *Uman Shankar* v. *Mt. Aisha Khatun*.

[30] ('95) 22 Cal. 445 : 22 I.A. 25 : 6 Sar. 523 (P.C.), *Lachhan Kunwar* v. *Manorath Ram*.

[31] ('19) 6 A.I.R. 1919 P.C. 60 : 42 All. 152 : 46 I.A. 197 : 55 I.C. 486 (P.C.), *Satgur Prasad* v. *Raj Kishore Lal*.

[32] ('24) 11 A.I.R. 1924 All. 740 : 46 All. 769 : 83 I.C. 754, *Kali Charan* v. *Mt. Piari*.

[33] ('24) 11 A.I.R. 1924 P.C. 121 : 5 Lah. 192 : 51 I.A. 171 : 80 I.C. 788 (P.C.), *Lajwanti* v. *Safa Chand*.

[34] ('28) 15 A.I.R. 1928 All 45 : 49 All. 713 : 102 I.C. 175, *Rikhdeo Tiwari* v. *Sukhdeo Tiwari*.

[35] ('28) 15 A.I.R. 1928 Pat. 220 : 7 Pat. 163 : 107 I.C. 151, *Suraj Balli Singh* v. *Tilakdhari*.

[36] ('33) 20 A.I.R. 1933 Lah. 218 : 141 I.C. 399, *Hassu* v. *Ibrahim*.

[37] ('34) 21 A.I.R. 1934 Lah. 270 : 150 I.C. 108, *Mukh Ram* v. *Sundar*.

[38] ('34) 21 A.I.R. 1934 Lah. 633 : 152 I.C. 773, *Khem Chand* v. *Krishan Kumar*.

[39] ('02) 29 Cal. 664 : 29 I.A. 132 : 8 Sar. 280 (P.C.), *Sham Koer* v. *Dah Koer*.

[40] ('27) 14 A.I.R. 1927 Oudh 138 : 99 I.C. 890, *Raj Bahadur* v. *Kanhaiya Bakhsh*.

[41] ('39) 26 A.I.R. 1939 All. 672 : I.L.R. (1939) All. 713 : 185 I.C. 783, *Ram Sarup* v. *Mohan Singh*.

[42] ('27) 14 A.I.R. 1927 Nag. 104 : 22 N.L.R. 175 : 100 I.C. 446, *Mt. Deshrani* v. *Kishoresingh*.

[43] ('18) 5 A.I.R. 1918 Bom. 142 : 42 Bom. 714 : 47 I.C. 153, *Malkarjun Mahadeo* v. *Amrita Tukaram*.

[44] ('79) 4 Cal. 327, *Bejoy Chunder Banerjee* v. *K.P. Mookerjee*.

[45] ('34) 21 A.I.R. 1934 P.C. 188 : 9 Luck. 421 : 61 I.A. 322 : 150 I.C. 810 (P.C.), *Abdul Latif* v. *Abadi Begam*.

[46] ('27) 14 A.I.R. 1927 All. 767 : 49 All. 779 : 102 I.C. 167, *Javitri* v. *Gendan Singh*.

[47] ('27) 14 A.I.R. 1927 All. 799 : 50 All. 89 : 102 I.C. 814, *Ram Surat Singh* v. *Badri Narain Singh*.

[48] ('30) 17 A.I.R. 1930 Oudh 481 : 6 Luck. 282 : 132 I.C. 753, *Abadi Begam* v. *Muhammad Khalil Khan*.

[49] ('37) 24 A.I.R. 1937 Oudh 4 : 12 Luck. 592 : 165 I.C. 322, *Irshadullah Khan* v. *Mt. Fakhira Begam*.

[50] ('35) 22 A.I.R. 1935 Cal. 333 : 62 Cal. 66 : 158 I.C. 191, *Jateendra Chandra* v. *Rebateemohan Das*.

[51] ('82) 8 Cal. 631, *Chunder Coomar Mitter* v. *Sib Sundari Dassee*.

[52] ('17) 4 A.I.R. 1917 P.C. 201 : 45 Cal. 442 : 44 I.A. 213 : 42 I.C. 959 (P.C.), *Abdullah Ashgar Ali Khan* v. *Ganesh Dass*.

[53] ('97) 24 Cal. 616 : 24 I.A. 50 : 7 Sar. 124 (P.C.), *Sheosagar Singh* v. *Sitaram Singh*.

[54] ('39) 26 A.I.R. 1939 Oudh 2 : 14 Luck. 277 : 177 I.C. 785, *Har Kishan Dass* v. *Satgur Prasad*.

[55] ('91) 15 Bom. 89, *Ramkrishna Jagannath* v. *Vithal Ramji*.

[56] ('26) 13 A.I.R. 1926 All. 71 : 48 All. 201 : 90 I.C. 83, *Dip Prakash* v. *Dwarka Prasad*.

[57] ('24) 11 A.I.R. 1924 Bom. 495 : 48 Bom. 638 : 83 I.C. 155, *Gadigappa* v. *Shidappa*.

[58] ('41) 28 A.I.R. 1941 Nag. 346 : 199 I.C. 537, *Mithoolal Girdharilal* v. *Jainarayan Bahadurlal*.

[59] ('13) 37 Bom. 307 : 17 I.C. 955, *Jagu Babaji* v. *Balu Laxman*.

[60] ('42) 29 A.I.R. 1942 Bom. 44 : I.L.R. (1942) Bom. 14 : 198 I.C. 550, *Vishnu Janardhan* v. *Mahadev Keshav*.

[61] ('36) 23 A.I.R. 1936 Mad. 951 : 166 I.C. 75, *Durgati Subbayya* v. *Anantaraju*.

[62] ('28) 15 A.I.R. 1928 Cal. 777 : 56 Cal. 723 : 115 I.C. 593 (F.B.), *Tarini Charan* v. *Kedar Nath*.

[63] ('38) 25 A.I.R. 1938 Nag. 195 : I.L.R. (1940) Nag. 181 : 175 I.C. 693, *Sheoram* v. *Seth Mulchand*.

[64] ('28) 15 A.I.R. 1928 Lah. 779 : 113 I.C. 99, *Ghulam Sarwar Khan* v. *Abdul Majid Khan*.

[65] ('29) 16 A.I.R. 1929 Cal. 577 : 118 I.C. 342, *N.N. Choudhuri* v. *N.N. Choudhuri*.

[66] ('28) 15 A.I.R. 1928 Mad. 1279 : 52 Mad. 160 : 111 I.C. 364, *Ratansi D. Morarji* v. *Administrator-General of Madras*.

[67] ('35) 22 A.I.R. 1935 Oudh 121 : 10 Luck. 361 : 153 I.C. 585, *Gaura Dei* v. *Mohammad Yasin Ali Khan*.

[68] ('41) 28 A.I.R. 1941 Cal. 574 : 198 I.C. 462, *Priombada Debi* v. *Johuri Lal*.

[69] ('42) 29 A.I.R. 1942 Bom. 322 : I.L.R. 1942 Bom. 798 : 203 I.C. 655, *Mahadevappa* v. *Dharmappa*.

[70] 1926 A.C. 94 : 95 L.J. P.C. 33 : 134 L.T. 335, *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*.

[71] ('33) 20 A.I.R. 1933 Lah. 279 : 146 I.C. 395, *Chiragh* v. *Gul Mohammad*.

[72] ('29) 16 A.I.R. 1929 Lah. 872 : 11 Lah. 99 : 121 I.C. 428, *Parshotam Singh* v. *Balwant Singh*.

[73] ('06) 33 Cal. 537 : 33 I.A. 60 (P.C.), *Gangamoyi Debi* v. *Troiluckhya Nath Chowdhry*.

[74] ('18) 5 A.I.R. 1918 Nag. 7 : 44 I.C. 435 : 2 N.L.J. 129, *Mt. Ujiyara* v. *Tilochand Gond*.

[75] ('23) 10 A.I.R. 1923 Nag. 317 : 19 N.L.R. 104 : 76 I.C. 980, *Vithoba* v. *Lal Singh*.

[76.] ('25) 12 A.I.R. 1925 Nag. 353 : 87 I.C. 1036, *Jankubai* v. *Paivati*.

[77.] ('30) 17 A.I.R. 1930 Nag. 35 : 118 I.C. 871, *Mt. Sarjabai* v. *Gangaram*.

[78.] ('30) 17 A.I.R. 1930 Nag. 57 : 26 N.L.R. 111 : 121 I.C. 650, *Miran* v. *Hanslal*.

[79.] ('37) 20 N.L.J. 159, *Ishakalli* v. *Thakur Prasad*.

[80.] ('96) 23 Cal. 645, *Girijanund Datta Jha* v. *Sailajanund Datta Jha*.

[81.] ('36) 23 A.I.R. 1933 Pat. 323 : 15 Pat. 151 : 163 I.C. 940, *Kanhya Lal* v. *Mt. Hira Bibi*.

(1965) 1 SCR 686 : AIR 1965 SC 1150 : (1965) 16 STC 303

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, C.J. AND K.N. WANCHOO, M. HIDAYATULLAH, RAGHUBAR DAYAL AND J.R. MUDHOLKAR, JJ.)

(With application for leave to urge additional grounds)

DEVILAL MODI ... Appellant;

Versus

SATES TAX OFFICER, RATLAM AND OTHERS ... Respondents.

Civil Appeal No. 249 of 1964*, decided on October 7, 1964

Advocates who appeared in this case :

U.M. Trivedi, Senior Advocate (R.C. Kochatta, S.G. Dafria, S.S. Khanduja, S.K. Manchanda and Ganpat Rai, Advocates, with him), for the Appellant;

B. Sen, Senior Advocate (I.N. Shroff, Advocate, with him), for the Respondents.

The Judgment of the Court was delivered by

P.B. GAJENDRAGADKAR, C.J.— The short question which this appeal raises for our decision is whether the principle of constructive res judicata can be invoked against a writ petition filed by the appellant Devilal Modi, who is the Proprietor of M/s Daluram Pannalal Modi, under Article 226 of the Constitution. The appellant has been assessed to Sales Tax for the year 1957-58 under the Madhya Bharat Sales Tax Act, 1950. He challenged the validity of the said order of assessment by a writ petition filed by him (No. 114/1961) in the High Court of Madhya Pradesh on 25th April, 1961. The High Court dismissed his writ petition and by special leave, the appellant came to this Court in appeal against the said decision of the High Court. On 8th March, 1963, the appellant's appeal by special leave was dismissed by this Court.

2. Thereafter, the appellant filed the present writ petition in the same High Court on 23rd April, 1963 (No. 129/1963). By this writ petition the appellant challenges the validity of the same order of assessment. The High Court has considered the merits of the additional grounds urged by the appellant on this occasion and has rejected them. In the result, this second writ petition filed by the appellant has been dismissed by the High Court on 29th April, 1963. It is against this decision that the appellant has come to this Court by special leave; and that raises the question as to whether it is open to the appellant to challenge the validity of the same order of assessment twice by two consecutive writ petitions under Article 226.

3. It appears that the Madhya Bharat Sales Tax Act, 1950. under which the impugned order of assessment against the appellant to pay sales tax for the year 1957 -58 has been passed, was repealed by the Madhya Pradesh General Sales Tax Act, 1958 on 1st April, 1959. It was on 31st December, 1960 that a notice was issued to the appellant by the Assistant Commissioner of Sales Tax under the 1958 Act. This notice recited that the Assistant Commissioner was satisfied that the appellant's sales during the period from 1st April, 1957 to 31st March, 1958 had escaped assessment and thereby the appellant had rendered himself liable to be reassessed under Section 19(1) of the Act. Pursuant to this notice, fresh assessment proceedings were started against the appellant in respect of the sales in the year 1957-58, and as a result of the said proceedings, an order was passed on 31st March, 1961, imposing an additional tax on the appellant to the extent of Rs 31,250 for the year in question and a penalty of Rs 15,000. It is this order which is the subject-matter of both the writ petitions.

4. In his first writ petition, the appellant had substantially raised two contentions.

He had urged that though Section 30 of the Act had made provision for the delegation of the duties of the Commissioner, in fact by his order passed by the Commissioner in pursuance of the said authority, he had delegated to the Assistant Commissioner his power under Section 19, but not his duties; and the said delegation, therefore, made the proceedings taken by the Assistant Commissioner invalid in law. The other contention raised by the appellant against the validity of the said order was that it was in respect of sales which had been assessed earlier under the Act of 1950 and the same could not be reassessed under the subsequent Act. It is true that the said earlier assessment had been subsequently cancelled by an order made under Section 39(2) of the Act of 1958; but it was argued that the said order of cancellation was itself invalid. Both these contentions were rejected by this Court, with the result that the appeal preferred by the appellant was dismissed with costs.

5. It appears that at the hearing of the appeal before this Court. Mr Trivedi for the appellant sought to raise two additional points, but he was not permitted to do so on the ground that they had not been specified in the writ petition filed before the High Court and had not been raised at an earlier stage. While refusing permission to Mr Trivedi to raise the said points, this Court indicated what these points were. The first of these two points was that under Section 19(1) of the 1958 Act only those sales could be reassessed which were chargeable to tax under that Act and the sales brought to tax under the impugned order were in respect of sale of sugar, a commodity the sale of which was not chargeable under the Act. The other point was that the penalty which had been imposed against the appellant by the impugned order under Section 14 of the Act of 1950 was illegal inasmuch as the said Act had been repealed and the right to impose a penalty under it had not been saved by the saving Section 52 of the 1958 Act. Since this Court had refused permission to Mr Trivedi to raise these two additional grounds, it was observed in the course of the judgment that the Court did not express any opinion as to their tenability on the merits.

6. The present writ petition raises these two contentions and as we have already indicated, the High Court has examined them on the merits and has rejected them. That is how the question which arises for our decision is, is it permissible to the appellant to attack the validity of the same order imposing a Sales Tax and penalty on him for the year 1957-58 by two consecutive writ petitions? In other words, is the principle of constructive res judicata applicable to writ petitions of this kind or not?

7. Mr Trivedi for the appellant has strenuously contended that where a citizen seeks for redress from the High Court by invoking its high prerogative jurisdiction under Article 226, it would be inappropriate to invoke the principle of res judicata against him. What the appellant contends is that he has been exposed to the risk of paying a large amount by way of sales tax and penalty when the said liability has not been lawfully incurred by him and the impugned order is contrary to law. It is a case of deprivation of property of the citizen contrary to law, and the High Court should allow a citizen who feels aggrieved by an illegal order to challenge the validity of the impugned order even by a second writ petition as he has sought to do in the present case.

8. There can be no doubt that the fundamental rights guaranteed to the citizens are a significant feature of our Constitution and the High Courts under Article 226 are bound to protect these fundamental rights. There can also be no doubt that if a case is made out for the exercise of its jurisdiction under Article 226 in support of a citizen's fundamental rights, the High Court will not hesitate to exercise that jurisdiction. But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Article 226 cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the

decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fairplay and justice, vide *Daryao* v. *State of U.P.*[1].

9. It may be conceded in favour of Mr Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred.

10. In regard to orders of assessment for different years, the position may be different. Even if the said orders are passed under the same provisions of law, it may theoretically be open to the party to contend that the liability being recurring from year to year, the cause of action is not the same; and so, even if a citizen's petition challenging the order of assessment passed against him for one year is rejected, it may be open to him to challenge a similar assessment order passed for the next year. In that case, the court may ultimately adopt the same view which had been adopted on the earlier occasion; but if a new ground is urged, the court may have to consider it on the merits, because, strictly speaking, the principle of res judicata may not apply to such a case. That, in fact, is the effect of the decision of this Court in *Amalgamated Coalfields Ltd.* v. *Janapada Sabha, Chnindwara*[2]. In that case, this Court had occasion to consider the question about the applicability of constructive res judicata to proceedings taken by the appellant, the Amalgamated Coalfields Ltd. challenging the tax levied against it for different periods. The petition first filed by it for challenging the validity of the tax imposed against it for one year was dismissed by this Court in *Amalgamated Coalfields Ltd.* v. *Janapada Sabha, Chhindwara*[3]. At the time when the appeal of the Amalgamated Coalfields Ltd. was argued before this Court, some new points of law were sought to be raised, but this Court did not allow them to be raised on the ground that they should have been raised at an earlier stage. When a similar order was passed against the said Company for a subsequent year, the said additional points were raised by it in its petition before the High Court. The High Court held that it was not open to the Company to raise those points on the ground of constructive res judicata and that brought the Company to this Court in appeal by special leave. This Court held that the High Court was in error in holding that the principle of constructive res judicata precluded the Company from raising the said points. Accordingly, the merits of the said points were considered and in fact, the said points were upheld. In dealing with the question of constructive res judicata, this Court observed that constructive res judicata was an artificial form of res judicata enacted by Section 11 of the Code of Civil Procedure and it should not be generally applied to writ petitions filed under Article 32 or Article 226. It was in that connection that this Court also pointed out that the appeal before the Court was in relation to an assessment levied for a different year, and that made the doctrine of res judicata itself inapplicable. Mr Trivedi contends that in dealing with writ petitions, no distinction should be made between cases where the impugned order of assessment is in respect of the same year or for different years; and in support of this contention, he relied on the general observations made by this Court in *Amalgamated Coalfields Ltd.*[2] In our opinion, the said general observations must be read in the light of the important fact that the order which was

challenged in the second writ petition was in relation to a different period and not for the same period as was covered by the earlier petition.

11. As we have already mentioned, though the courts dealing with the questions of the infringement of fundamental rights must consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of res judicata altogether in dealing with writ petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgments pronounced by this Court are binding and must be regarded as final between the parties in respect of matters covered by them, must receive due consideration.

12. The result of the decision of this Court in the earlier appeal brought by the appellant before it is clear and unambiguous, and that is that the appellant had failed to challenge the validity of the impugned order which had been passed by the Assistant Commissioner against him. In other words, the effect of the earlier decision of this Court is that the appellant is liable to pay the tax and penalty imposed on him by the impugned order. It would, we think, be unreasonable to suggest that after this judgment was pronounced by this Court, it should still be open to the appellant to file a subsequent writ petition before the Madhya Pradesh High Court and urge that the said impugned order was invalid for some additional grounds. In case the Madhya Pradesh High Court had upheld these contentions and had given effect to its decision, its order would have been plainly inconsistent with the earlier decision of this Court, and that would be inconsistent with the finality which must attach to the decisions of this Court as between the Parties before it in respect of the subject-matter directly covered by the said decision. Considerations of public policy and the principle of the finality of judgments are important constituents of the rule of law and they cannot be allowed to be violated just because a citizen contends that his fundamental rights have been contravened by an impugned order and wants liberty to agitate the question about its validity by filing one writ petition after another.

13. The present proceedings illustrate how a citizen who has been ordered to pay a tax can postpone the payment of the tax by prolonging legal proceedings interminably. We have already seen that in the present case the appellants sought to raise additional points when he brought his appeal before this Court by special leave; that is to say, he did not take all the points in the writ petition and thought of taking new points in appeal. When leave was refused to him by this Court to take those points in appeal, he filed a new petition in the High Court and took those points, and finding that the High Court had decided against him on the merits of those points, he has come to this Court; but that is not all. At the hearing of this appeal, he has filed another petition asking for leave from this Court to take some more additional points and that shows that if constructive res judicata is not applied to such proceedings a party can file as many writ petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine or finality of judgments pronounced by this Court would also be materially affected. We are, therefore, satisfied that the second writ petition filed by the appellant in the present case is barred by constructive res judicata.

14. The result is, the appeal fails and is dismissed. There would, however, be no order as to costs.

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* Appeal by Special Leave from the Judgment and Order dated 29th April, 1963 of the Madhya Pradesh High Court in Misc. Petition No. 129 of 1963

[1] (1962) 1 SCR 574

[2] (1963) Supp I SCR 172

[3] (1962) 1 SCR 1

against the claim made by the Government of India does not strengthen the rights of the claimant to relief. Unless there is evidence to show that the inlets were territory over which the Maharao of Kutch had sovereign rights, acceptance of the award is not required to be implemented by the constitutional amendment. The total area of the inlets, we are informed by Counsel on both sides, does not exceed 25 square miles. In the turbulent times which preceded the occupation of Sind by the East India Company in 1843 or even thereafter it is unlikely that authority was exercised by the Maharao of Kutch over these inlets. It appears from some of the maps that at the extremities the inlets are very narrow ; and roads cross these inlets from Nagar Parkar, which is of the shape of a peninsula into the mainland of Sind. It is difficult to accept that at any time effective sovereign authority could have been exercised over these inlets by the Maharao of Kutch. There is no evidence of exercise of any such right, before or after the occupation of Sind. There being no evidence of exercise of sovereign authority by the Maharao of Kutch, this Court cannot treat it as part of Indian territory.

101. On that view the claim made by the claimants that in implementing the award of the International Tribunal an attempt is made to cede any part of the territory which formed part of the State of Kutch before 1948, or was in de facto occupation and in respect of which sovereign authority was exercised by the Maharao of Kutch. The award does no more than define on the surface of the earth a boundary which has at all material times remained indefinite, because of the nature of the terrain, the shifting nature of the border of what was called Rann, the highly discrepant and conflicting claims made from time to time by the British authorities as well as the Kutch State authorities before the State merged with the Dominion of India in 1948, and the presistent refusal of the British authorities, though there were several occasions to demarcate the boundary between Sind and the Rann of Kutch.

102. The appeals and the writs are dismissed.

103. There will be no order as to costs in the appeals and the writ petitions.

1970(3) Supreme Court Cases 440

(From Madras High Court)

[BEFORE A. N. RAY AND I. D. DUA, JJ.]

PREM LATA AGARWAL .. Appellant ;

Versus

LAKSHMAN PRASAD GUPTA AND OTHERS .. Respondents.

Civil Appeal No. 350 of 1970, decided on April 23, 1970

Limitation Act, 1908 (9 of 1908)—Section 15(1)—Connotation of "Prescribed"—Section 48, C. P. C., Applicability.

Limitation Act, (1908)—Section 14—Applicability of—Good faith and due diligence if made out—Constitution of India—Article 136—New plea—Abandonment of plea in Lower Court.

Code of Civil Procedure, 1908 (5 of 1908)—Section 11—Res judicata Principle—Applicability to execution proceedings.

Code of Civil Procedure, 1908 (5 of 1908)—Section 38—Simultaneous execution if competent.

(*i*) The expression 'prescribed' would apply not only to limitation prescribed in the first schedule to Limitation Act but also to limitation prescribed in general statutes like the Code of Civil Procedure.

Relies on Kannappa Chetty, (1951) 2 Mad LJ 668 : AIR 1952 Mad 185 (FB).

(*ii*) The effect of Section 48 C.P.C. is not to supersede law of limitation with regard to execution of decrees. An application for execution of decree would first have to satisfy Article 182 and it would also have to be found out as to whether Section 48 C.P.C., operated as a further bar. (Note : Section 48 has now been deleted from the Code). (Para 17).

Where sale was set aside by reason of mandatory provisions of statute (the U.P. Encumbered Estates Act) the High Court rightly held that the decree holders prosecuted the execution case in good faith and with due diligence and so they were entitled to protection under Section 14 of the Limitation Act. It is not open to the Judgment-debtors to reopen the question of bad faith having abandoned it before the Division Bench of the Madras High Court. (Paras 15 and 16)

(*iii*) The principle of res judicata applies to execution proceedings. The Judgment-debtors did not raise any objection as to limitation in regard to execution of the decree before the Civil Judge at Allahabad. On the contrary they asked for setting aside the sale on the basis of revival of execution proceedings. The revival of execution was not challenged and the judgment-debtors are thereby barred by the principle of res judicata from questioning directly or indirectly the order dated 13th May, 1959 reviving the execution proceedings. (Para 18)

(*iv*) Simultaneous execution proceedings in more places than one is possible but the power is used sparingly in exceptional cases by imposing proper terms so that hardship does not occur to judgment-debtors by allowing several attachments to be proceeded with at the same time.

Appeal *dismissed.*

The Judgment of the Court was delivered by

RAY, J.—This appeal is by special leave from the judgment dated 21st March, 1966 of the Madras High Court dismissing the appeal preferred by the appellant against the decree holders' application for execution of the decree.

2. The appellant is one of the judgment-debtors brought on record as legal representative of a deceased judgment-debtor Lala Baijnath Prasad. Respondent No. 1 Lakshman Prasad Gupta was one of the plaintiffs. Pratap Chand and Basudeb Prasad respondents Nos. 2 and 3 respectively are the sons of a judgment-debtor Girdharilal Agarwala.

3. The plaintiff respondent Lakshman Prasad Gupta was married to the sister of Lala Bansilal. Bansilal belonged to the joint family which consisted inter alia of the appellant's father. There were five branches of the said joint family of the judgment-debtors, three whereof were at Banaras, Calcutta and Naini and the other two were the branches of the descendants of Mohanlal and of Lala Baijnath Prasad, father of the appellant, respectively. The said joint family had valuable properties in and around the town of Arrah in Bihar. There are alleged to be valuable properties of the joint family also at Allahabad, Banaras, Bombay, Calcutta and Madras.

4. Some time in the year 1926 Lala Pratap Chand, one of the descendants of Mohanlal who was a grand-uncle of Lala Bansilal filed a partition suit in the Court of the Subordinate Judge at Allahabad. A preliminary decree was passed in the said partition suit on 14th February, 1927. An appeal was preferred and it was dismissed. An amicable settlement was arrived at in the partition suit on 13th January, 1931, for partition of the properties into five equal lots and allotment of the shares. Thereafter a Commissioner was appointed

in the partition suit to go into accounts and prepare five lots. The branches inter se raised disputes as to liability for loans alleged against the joint family. The Commissioner prepared his report on 18th May, 1936. Final decree was passed on 13th January, 1939. An appeal was preferred against the said final decree in the partition suit to the High Court at Allahabad. The appeal was disposed of on 6th December, 1949.

5. The plaintiff Lakshman Prasad Gupta and six others filed Suit No. 76 of 1937 in the Court of the First Subordinate Judge at Arrah in Bihar and obtained a decree on 20th July, 1938, for Rs. 18,540 and for costs Rs. 1,840/4/- aggregating Rs. 20,380/4. This decree was against Banwarilal and other members of the joint family to which the appellant's father belonged. The decree was transferred from Arrah to the Court of the Civil Judge at Allahabad where on 2nd June, 1941, the decree-holder commenced execution proceedings marked as Execution Petition No. 38 of 1941. In that execution petition the decree-holders prayed for attachment and sale of Shri Krishna Desi Sugar Works at Jhusi, known as the Jhusi Sugar Mills in the District of Allahabad which belonged to the joint family.

6. The execution proceedings were according to the decree-holders stayed under orders of the Allahabad High Court and after the stay order was vacated, the execution proceedings were revived on 13th May, 1950. The Jhusi Sugar Mill was attached on 11th July, 1952, and it was sold on 19th February, 1955 The sale was set aside on 31st May, 1955, pursuant to objections of the judgment-debtors that the Jhusi Sugar Mills could not be sold because of the provisions of the U.P. Encumbered Estates Act, 1934. It may be stated here that some time in the month of September, 1935, Baijnath Prasad filed an application before the Collector of Allahabad for protection and relief under the U.P. Encumbered Estates Act of 1934 and it was registered as Encumbered Estates Suit No. 25 of 1935.

7. Thereafter the decree-holders on 17th March, 1956, made an application in the Arrah Court for transfer of the decree. On 6th June, 1956, the Subordinate Judge at Arrah transferred the decree to the Madras High Court. On 13th August, 1956, the decree-holders filed in the Madras High Court an application for attaching the properties of the joint family. This application in the Madras High Court is the subject-matter of the present appeal.

8. The matter was heard first by the Master of the High Court of Madras who held that the application for execution was barred by limitation. An appeal from the decision of the Master was heard by the learned Single Judge of the Madras High Court who held that the application was not within the mischief of bar of limitation. Thereafter Letters Patent Appeal was heard by a Division Bench of the Madras High Court. The appeal is from the Bench decision upholding the judgment of the learned Single Judge.

9. Before the Master of the Madras High Court the contention on behalf of the judgment-debtors was that the decree was passed on 20th July, 1938 and therefore the execution petition filed on 13th August, 1956, was barred by limitation. The decree-holders on the other hand contended that the execution of the decree which commenced on 2nd, June, 1941, before the Civil Judge at Allahabad was stayed till the end of 1949, and was revived on 13th May, 1950 and finally disposed of on 31th May, 1955 and, therefore, the execution petition filed on 13th August, 1956, was within time. The Master held that the decree-holders had failed to prove as to from what point of time the execution of the decree was stayed pursuant to the order of the Allahabad High Court and also the time when the stay was vacated. The application for execution was

therefore found by the Master of the Madras High Court to be barred by limitation.

10. The learned Single Judge of the Madras High Court referred to the revival of execution proceedings before the Civil Judge at Allahabad on 13th May, 1950 and also the finding of the Civil Judge at Allahabad who in passing the final order on 31st May, 1955, setting aside the sale of the Jhusi Sugar Mill stated that the execution proceedings were stayed by orders of the High Court at Allahabad. The Civil Judge at Allahabad set aside the sale because of the mandatory provisions of Sections 7(2) and 9(5) of the U.P. Encumbered Estates Act. The Madras High Court placed reliance on Exhibits P-2, P-3 and P-3A on the question of stay of execution proceedings. It may also be stated here that the judgment-debtor did not dispute the translation of those Exhibits P-3 and P-3A. The exhibits set out the orders of the Civil Judge at Allahabad. Exhibit P-2 is the judgment, dated 31st May, 1955, passed by the Civil Judge setting aside the sale of the Jhusi Sugar Mill. Exhibits P-3 and P-3A comprise the orders passed by the Civil Judge. The three relevant orders in Exhibits P-3 and P-3A are dated 18th August, 1941, 23rd August, 1941 and 30th August, 1941, in the said execution proceedings.

11. The order, dated 18th August, 1941, was to the effect that the receivers were to be informed about the execution proceedings and their objections, if any. The receivers were the receivers in the Partition Suit No. 4 of 1926. The said order further recited that the orders of the High Court at Allahabad in the partition suit were also received in the executing court. The order, dated 23rd August, 1941, recited that the execution application of the decree-holder was presented in the presence of the lawyers of the decree-holder and the receivers. Further, the order was that the request for permission should be submitted in Suit No. 4 of 1926, namely, the partition suit of the defendants judgment-debtors. The order dated 30th August, 1941, recorded by the Civil Judge at Allahabad was inter alia as follows :

> "The proceedings remain stopped on account of the injunction of the High Court. Hence it was ordered that receivers should be informed accordingly. Further steps will be taken after getting permission."

These orders are relied on by the decree-holder to substantiate the case of stay of execution proceedings.

12. The contention which was advanced before the Madras High Court and repeated in this Court was that there was no absolute stay of the execution of the decree. It was amplified to mean that the execution proceedings before the Civil Judge at Allahabad related only to one property and therefore the decree-holders would not be entitled to claim benefit of exclusion of time by reason of partial stay of execution proceedings at Allahabad. The Madras High Court rightly found that there was no evidence that the judgment-debtors were possessed of other properties in Allahabad where the decree was being executed. The Madras High Court rightly held that the decree-holders were restrained by injunction issued by the Allahabad High Court from executing the decree and were therefore entitled to claim the benefit of Section 15 of the Limitation Act in respect of the period of stay of execution of the decree.

13. It was contended by counsel for the appellant that the decree-holder could start execution proceedings in Madras or in other States where the judgment-debtors had properties. Simultaneous execution proceeding in, more places than one is possible but the power is used sparingly in exceptional

cases by imposing proper terms so that hardship does not occur to judgment-debtors by allowing several attachments to be proceeded with at the same time. In the present case, however, the important features are that a partition suit was instituted in the year 1926 among the defendants and receivers were appointed of the properties. The judgment of the Allahabad High Court, dated 6th December, 1949, disposing the appeals filed by the parties in the partition suit directed inter alia :

> "that the parties will be put in possession of the immovable properties at once, but the two receivers will be legally discharged only after they have accounted for the period they were in charge of the properties."

Counsel for the decree-holder rightly relied on this portion of the judgment of the Allahabad High Court that this would fortify the construction that there was stay of execution of the decree.

14. In the present case, the effect of the order passed by the Allahabad High Court was recorded by the Civil Judge, Allahabad, in his judgment, dated 31st May, 1955, to amount to stay of execution proceedings. The order of the Civil Judge, Allahabad, dated 30th August, 1941, was that "proceedings remain stopped on account of the injunction order issued by the High Court". In the Madras High Court the parties proceeded on the basis of the order as recorded by the Civil Judge at Allahabad. The order indicates that the stay of execution proceedings was in unqualified terms, namely, that the execution proceedings were stopped. It is not possible to spell out any order of partial stay in the facts and circumstances of the present case as was contended by counsel for the appellant. The order is on the contrary to the effect that there was an absolute stay of execution proceedings. It is, therefore, manifest that the execution proceedings before the Civil Judge at Allahabad were stayed and the decree-holder was rightly found by the Madras High Court entitled to the benefit of exclusion of time during which the execution was stayed.

15. Though the judgment-debtors did not question before the Master of the Madras High Court the bona fides of the decree-holder in prosecuting the execution proceedings, that contention was advanced before the learned Single Judge of the Madras High Court. The learned Single Judge of the Madras High Court held that the decree-holders commenced execution proceedings for sale of the Jhusi Sugar Mill for realisation of the decretal amount but the attempt of the decree-holder failed because of the objections of the judgment-debtors under the provisions of the U.P. Encumbered Estates Act. The sale was set aside by reason of the mandatory provisions of the statute. The learned Single Judge of the Madras High Court rightly held that the decree-holders prosecuted the execution case in good faith and with due diligence and were entitled to protection under Section 14 of the Limitation Act.

16. Before the Division Bench of the Madras High Court no argument was advanced touching the bona fides or good faith with which the execution proceedings were carried on. Counsel for the appellant repeated the contention that the decree-holders were guilty of lack of good faith and diligence. It is not open to the judgment-debtors to advance that contention having abandoned the same before the Division Bench of the Madras High Court. We are furthermore of opinion that the conclusion of the learned Single Judge of the Madras High Court on that point is correct.

17. The other question which arose before the Madras High Court was whether Section 15 of the Limitation Act, 1908, would apply to limitation prescribed in statutes other than the Limitation Act. Section 48 of the Code

of Civil Procedure until its amendment on the passing of the Limitation Act, 1963, enacted that the decrees of the Civil Courts were to be executed within 12 years and not after that. The present case is governed by Section 48 of the Code of Civil Procedure as it stood prior to the deletion of that section along with the passing of the Limitation Act, 1963. In Section 15 of the Limitation Act, 1908, it is enacted that in computing the period of limitation prescribed for any suit or application for a decree, execution of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded. In the Madras High Court it was argued that the word 'prescribed' occurring in Section 15 of the Limitation Act could apply only to cases of limitation prescribed by the First Schedule to the Limitation Act, 1908, with the result that the benefit of exclusion of time by reason of operation of stay could not be availed of in cases of limitation prescribed by Section 48 of the Code of Civil Procedure. The Madras High Court relied on the decision in *Kandaswami Pillai* v. *Kananappa Chetty*, (1951) 2 Mad LJ 668=(AIR 1952 Mad 186) (FB), which held that the expression 'prescribed' in Section 15(1) of the Limitation Act would apply not only to limitation prescribed in the First Schedule to the Limitation Act but also to limitation prescribed in general statutes like the Code of Civil Procedure. That is the correct statement of law and counsel for the appellant did not advance any contention to the contrary. It may, however, be stated that the effect of Section 48 of the Code of Civil Procedure is not to supersede the Law of Limitation with regard to execution of decrees. The Limitation Act prescribes a period of limitation for execution of decrees. Section 48 of the Code of Civil Procedure dealt with the maximum limit of time provided for execution, but it did not prescribe the period within which each application for execution was to be made. An application for execution was to be made within three years from any of the dates mentioned in the third column of Article 182 of the Limitation Act, 1908. An application for execution of a decree would first have to satisfy Article 182 and it would also have to be found out as to whether Section 48 of the Code of Civil Procedure operated as a further bar.

18. In the present case, these was stay of execution proceedings. On 13th May, 1950, the execution proceedings were revived. The judgment-debtors did not challenge the order, dated 13th May, 1950. The judgment-debtors impeached the sale only on a ground covered by the U.P. Encumbered Estates Act, 1934. The judgment-debtors further in impeaching the sale of Jhusi Sugar Mills did not advance before the Civil Judge at Allahabad any contention that any of the orders of the Civil Judge at Allahabad reviving the execution proceedings, attaching the Jhusi Sugar Mill and directing the sale of the Sugar Mill was barred by limitation. The principle of res judicata applies to execution proceedings. The judgment-debtors in the present case did not raise any objection as to limitation in regard to execution of the decree before the Civil Judge at Allahabad. On the contrary the judgment-debtors asked for setting aside the sale on the basis of revival of execution proceedings. The revival of execution was not challenged and the judgment-debtors are thereby barred by the principle of res judicata from questioning directly or indirectly the order, dated 13th May, 1950, reviving the execution proceedings.

19. When the appellant made the application for special leave, the appellant referred to an affidavit affirmed by the appellant's father on 12th February, 1957, in the execution proceedings in the Madras High Court. The copy of the said affidavit annexed to the petition for special leave in this Court is in seven paragraphs. In Paragraph 6 of the said affidavit it is

alleged that the decree is against 5 branches and the plaintiff Lakshman Prasad in collusion with the other branches excluded the other four branches and chose to proceed only against the appellant's branch though the other four branches were possessed of vast properties. The further allegations in Paragraph 6 of the said affidavit are that the object of the plaintiff is to harass only one branch and the application is not bona fide. The plaintiff respondent in answer to the petition for special leave affirmed an affidavit in this Court that Paragraph 6 in the said affidavit was an interpolation and was not at all in existence in the affidavit filed in the Madras High Court. The plaintiff respondent obtained a photostat copy of the said affidavit filed in the Madras High Court. The photostat copy established that Paragraph 6 was not there and further that the affidavit was affirmed at Allahabad on 12th February, 1957 and not at Madras. Furthermore, the affidavit was explained to the deponent Baijnath Prasad as will appear from the photostat copy as annexed to the petition, whereas in the copy annexed to the petition for special leave there was no such statement. It is a serious matter that the appellant asked for relief on the basis of false copies of affidavits. An explanation was suggested in the affidavit of the appellant that the copy was annexed in accordance with the draft that had been sent by the Madras lawyer. It is beyond comprehension as to how an incorrect copy would be sent by the Madras lawyer. Counsel for the appellant realised the gravity of the situation and conceded that the matter should be proceeded with on the basis as if Paragraph 6 did not exist. The appellant is guilty of lack of uberrima fides. We have therefore proceeded on the basis that Paragraph 6 did not exist in the copy of the said affidavit.

20. The Madras High Court upheld the order of the learned Single Judge entitling the decree-holder to the exclusion of the period spent in prosecuting prior infructuous execution proceedings before the Civil Judge at Allahabad. The decree-holder was allowed to proceed with the execution proceedings and the Madras High Court remitted the matter to the Master to consider the questions indicated in the judgment and the judgment-debtors were allowed to raise objections to the executability of the decree apart from those of limitation as indicated in the judgment of the learned Single Judge. We are of opinion that the Madras High Court is right in holding that the decree-holder is entitled to the benefit of exclusion of time during which the execution proceedings were stayed by the order of the Allahabad High Court and the decree-holder proceeded with the said execution proceedings in good faith and with due diligence.

21. For these reasons we are of opinion that the appeal fails. The appellant will pay the costs to the respondents.

1970(3) Supreme Court Cases 446

(From Patna High Court)

[BEFORE J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.]

CHANDRA KANT MISSIR AND OTHERS .. Appellants;

Versus

BALAKRISHNA MISSIR AND OTHERS .. Respondents.

Civil Appeal No. 144 of 1967, decided on March 6, 1970

Res judicata—Joint family property—Suit in 1914 for partition and separate possession—Award by arbitrators appointed by consent

(1973) 2 Supreme Court Cases 189

(From Patna High Court)

[BEFORE D. G. PALEKAR AND A. ALAGIRISWAMI, JJ.]

SHRI NIRMAL ENEM HORO ... Appellant;

Versus

SMT. JAHAN ARA JAIPAL SINGH ... Respondent.

Civil Appeal No. 1465 of 1972, decided on April 26, 1973

Civil Procedure Code, 1908 (5 of 1908)—Section 11, Explanation 4—Constructive res judicata—Knowledge of a fact by the party making the defence—Supreme Court at the earlier stage not accepting the plea being a new plea not raised in courts below—Same plea being brought before the Supreme Court for the second time—Appellant contending that the point could be discovered only when respondent appeared in witness-box in Supreme Court in previous appeal and therefore that could not be raised in courts below.

Held, plea having been finally disposed of by Supreme Court previously, it is not open to re-agitate it between the parties in a subsequent proceeding. (Para 9)

N. E. Horo v. *Jahan Ara Jaipal Singh*, (1972) 1 SCC 771, *referred to.*

Appeal *dismissed.*

The Judgment of the Court was delivered by

Palekar, J.—This appeal arises from an Order, dated April 21, 1972, passed by the Patna High Court in Election Petition No. 9 of 1971 setting aside the election of the appellant at the instance of the respondent Mrs. Jahan Ara Jaipal Singh.

2. On January 21, 1971, the Election Commission of India issued a Notification calling on the 51 Khunti Parliamentary Scheduled Tribes Constituency of Ranchi to elect a Member of the Lok Sabha in the vacancy caused by the dissolution of the Lok Sabha in the month of December, 1970. The last date for filing nominations was February 3, 1971 and the date of scrutiny of nominations was February 4, 1971. Nearly fourteen persons filed their nominations—two of them being the appellant, Mr. Horo, and the respondent, Mrs. Jaipal Singh. It appears one of the candidates objected to the nomination of Mrs. Jaipal Singh on the ground that she was not a member of a Scheduled Tribe. That objection was considered by the Returning Officer who upheld the objection and rejected her nomination paper. In due course the election was held and the appellant, Mr. Horo, was declared elected. The petition namely Election Petition No. 9 of 1971 was filed by Mrs. Jaipal Singh on the ground that her nomination paper had been illegally rejected since by her marriage with the late Mr. Jaipal Singh who was admittedly a member of the Munda Tribe, she had obtained the status of a Munda which is one of the Scheduled Tribes recognized under the Constitution. She alleged that according to the Munda customary law when a Munda is married outside the Munda Tribe and his marriage is accepted by the Munda Tribe, he continues to be a member of that Tribe and his wife acquires membership of the Tribe and becomes a member of her husband's family. She alleged that though she was not formerly a member of that Tribe she, on her marriage to Mr. Jaipal Singh in 1954 according to the rites and rituals of the Mundas, in the presence of the elders and other members of the Tribe, had been accepted within the fold of that Tribe as

a Munda and hence was not liable to be disqualified for election in the special Tribal Constituency. The appellant contested the petition on several grounds. But most of the grounds were covered by judgments between the same parties in a previous Election Petition filed by Mrs. Jaipal Singh. That petition came finally to this Court and is reported as *N. E. Horo* v. *Jahan Ara Jaipal Singh*.[1]

3. The report shows that after the death of Mr. Jaipal Singh who was a member of Parliament from the Constituency referred to above, the Election Commission had on May 1, 1970, called upon that Constituency to elect a member to the Lok Sabha. Several persons filed nomination papers Mr. Horo and Mrs. Jaipal Singh being two of them. Objection was raised to Mrs. Jaipal Singh's nomination then also on the ground that she was not a member of the Munda Scheduled Tribe. That objection was upheld by the Returning Officer. After the polling, Mr. Horo was declared elected and on July 8, 1970, Mrs. Jaipal Singh filed the election petition objecting to the election on the ground that her nomination paper had been rejected illegally. That was Election Petition No. 2 of 1970. When that petition was pending in the High Court, the Lok Sabha was dissolved, and, as already pointed out, the Election Commission called upon the Constituency on January 21, 1971, to elect a new member of the Lok Sabha. Thereupon Mr. Horo applied to the High Court to dismiss the election petition because it was now infructuous as a result of the dissolution of the Lok Sabha. The learned Judge refused to do so and heard the petition and came to the conclusion that Mrs. Jaipal Singh was entitled to be treated as a member of the Munda Tribe. But before the decision, this second contest arose between the same parties and the nomination paper of Mrs. Jaipal Singh was again rejected by the Returning Officer on the same ground on which that had been rejected by the Returning Officer in 1970. The Returning Officer did not have the benefit of the finding of the High Court at that time.

4. Since the High Court decision in the previous Election Petition No. 2 of 1970 went against Mr. Horo, he appealed to this Court. But he failed in that appeal because this Court agreed with the High Court that once the marriage of a Munda male with a non-Munda female is approved or sanctioned by the Parha Panchayat they become members of the community. This Court held that even if a female is not a member of the Tribe by birth, she having married a Tribal after due observance of all formalities and after obtaining the approval of the elders of the Tribe, would belong to the Tribal community to which her husband belongs on the analogy of the wife taking the husband's domicile. This Court's judgment was rendered on February 2, 1972, and was available to the learned Judge of the High Court when dealing with the present election petition namely Election Petition No. 9 of 1971 and naturally the points in controversy before him became very limited. There was the judgment of this Court before him which held that Mrs. Jaipal Singh had become a Munda by reason of her marriage to the late Mr. Jaipal Singh and since her nomination had been improperly rejected on the ground that she was not a Munda, the election of Mr. Horo was liable to be set aside.

5. In appeal before us Mr. Anthony appearing for Mr. Horo tried to persuade us that the judgment of this Court in the previous petition requires to be reconsidered—the contention being that Mrs. Jaipal Singh who was a Christian could not change her ethnic group by merely marrying a Munda.

1. (1972) 1 SCC 771.

That point had been considered at great length by this Court and we do not think there is any good reason for a review of that decision by a larger Bench.

6. The only point on which argument was addressed to us was on the finding that a certain ground put forward by Mr. Horo was barred by constructive res judicata. It was contended by Mr. Anthony that the principle of constructive res-judicata did not apply to the ground put forward, and, hence, in the absence of a trial on merits of that ground the Order passed by the learned Judge setting aside the election was wrong. We shall first state what the ground was and then decide whether the ground was available to Mr. Horo for re-agitation.

7. It appears that Mrs. Jaipal Singh is a Ceylonese Tamil Christian. Her first marriage was with Mr. Curtis. But that marriage ended in a divorce. In the course of her evidence in the previous petition, namely, Election Petition No. 2 of 1970 it seems to have been elicited that she had married Mr. Jaipal Singh on May 7, 1954 and that the decree nisi had been made absolute on May 6, 1954. It was contended before the learned Judge that in view of Section 57 of the Indian Divorce Act, 1869 Mrs. Jaipal Singh could not enter into a second marriage until after the expiry of six months from the date the decree had been made absolute. The learned Judge pointed out that this very point had been taken before the Supreme Court in the previous petition and, therefore, must be deemed to have been finally decided. The learned Judge was of the opinion that the bar under Section 57 of the Indian Divorce Act, 1869 was a matter which might and ought to have been made a ground of defence in the former election petition and consequently it was deemed to be a matter directly and substantially in issue in the previous election petition and, therefore, cannot be allowed to be raised in the present petition.

8. This Court's judgment in the previous petition clearly goes to show that this Court refused to entertain this ground as it had not been pleaded or pressed before the trial court. Mr. Anthony, appearing for Mr. Horo in that appeal, had distinctly raised this point as is seen from Para 11 of the judgment at Page 1844 of the report. That point was disposed of by this Court with these observations to be found in Para 12.

> "As regards the first point it was never canvassed or argued before the High Court. No plea was taken by Shri Horo in the written statement that there could be no valid marriage between the respondent and late Shri Jaipal Singh owing to the provisions contained in Section 57 of the Indian Divorce Act, 1869 until after the lapse of a period of six months from the date the decree of divorce was made absolute. None of the issues which were framed by the High Court involves the question now sought to be agitated based on the provisions of Section 57 of the Indian Divorce Act. It appears that advantage is sought to be taken from the statement of the respondent about the dates when the decree absolute was granted when the marriage took place between the respondent and late Shri Jaipal Singh. In the absence of any pleadings or issues no material has been placed on the record to show that in view of the provisions of Section 57 of the aforesaid Act there could not be a valid marriage according to the Munda customary law. It must be remembered that the respondent contracted a marriage with late Shri Jaipal Singh according to Munda rites and ceremonies and not as one Christian marrying another Christian. Nor was the matter pursued in cross-examination of the respondent and she was not asked as to how

she could get over the bar of Section 57 in the way of remarriage before the expiry of the prescribed period. In these circumstances we do not consider that such a point can be allowed to be agitated for the first time before this Court."

9. The above passage goes to show that the point was finally disposed of. Some snap answers given by the respondent in her evidence in that case were sought to be exploited in this Court for the purpose of supporting a new argument under Section 57 of the Indian Divorce Act, 1869 although there was no plea either in the pleadings or in the arguments before the learned Judge who decided the petition. The observations proceed on the basis that it was open to the parties to put forward the plea which Mr. Horo later put forward before the Supreme Court and since the same was not done, this Court could not permit the plea to be taken for the first time in this Court. It is not as if this Court kept the matter open for re-agitation. It definitely ruled out the plea because it was not pressed before the learned Judge who dealt with the election petition. Mr. Anthony submitted that the question of res judicata does not arise under Explanation 4 of Section 11 of the Code of Civil Procedure because the expression "any matter which might and ought to have been made ground of defence" postulates knowledge of a fact by the party making the defence. He further submitted that Mr. Horo could not possibly know about the past of Mrs. Jaipal Singh and his only source of knowledge at the time was Mrs. Jaipal Singh herself. The answer to this is already given in the judgment. If Mr. Horo's source of information was Mrs. Jaipal Singh when she was in the witness-box it was open to him as pointed out in the judgment to pursue the cross-examination with a view to show that the bar under Section 57 of the Divorce Act would be effective. Even after getting the two dates in the course of the evidence no body thought of Section 57, which may either be because counsel appearing for Mr. Horo then or Mr. Horo himself did not believe the dates given by Mrs. Jaipal Singh to be accurate or because they did not want to make any capital of the snap answers given in the course of the evidence since the point was not raised in the pleadings nor put in issue. The judgment clearly suggests that it was open to agitate the matter before the High Court hearing the petition on the basis of Section 57. But the point was not pressed and must be deemed to have been given up. That was why this Court did not allow the point to be raised in appeal. In these circumstances it is not open to re-agitate it between the parties in a subsequent proceeding.

10. No other point was pressed before us and therefore the appeal will have to be dismissed with costs.

(1973) 2 Supreme Court Cases 192

(From Punjab High Court)

[BEFORE D G PALEKAR AND A. ALAGIRISWAMI, JJ.]

RAM LAL AND OTHERS ... Appellants;

Versus

M/S. PIARA LAL GOBINDRAM AND OTHERS ... Respondents.

Civil Appeal No. 1248 of 1967, decided on May 3, 1973

of the land which belongs to the lessor can be regarded as part of the wealth of the assessee. The position would undoubtedly be different where a payment is made by an assessee which is an application of a part of the price received by him. Where such is the case, the whole of the price would represent the net realisable worth of the asset in the hands of the assessee and what is paid out by the assessee would be merely a disbursement made after the price reaches the assessee as his own property. That was the position in *Pandit Lakshmi Kant Jha* v. *Commissioner of Wealth Tax, Bihar*[4] where the question arose whether the expenditure in connection with brokerage, commission or other expenses which would be liable to be incurred by the assessee in effectuating a sale would be deducible from the market value of the shares in determining their value for the purpose of assessment to wealth tax. This Court held that in computing the value of the shares, the assessee is not entitled to deduction of brokerage and commission from the valuation of the shares as given in the Stock Exchange quotations or quotations furnished by well known brokers. It was pointed out by this Court that: "it is not . . . the amount which the vendor would receive after deduction of this expense, but the price which the asset would fetch when sold in the open market which would constitute the value of the asset for the purpose of Section 7(1) of the Act". Obviously, this view was taken because the entire price, when received, would belong to the assessee and payment of brokerage and commission would be merely application of part of the price in meeting expenditure necessary for affectuating the sale and hence it would not be deducible in ascertaining the net realisable worth of the shares in the hands of the assessee.

9. We are, therefore, of the view that the question referred by the Tribunal must be answered in the negative and it must be held that in determining the value of the leasehold interest of the assessee in the land for the purpose of assessment to wealth tax, the price which the leasehold interest would fetch in the open market were it not encumbered or affected by the burden or restriction contained in clause (13) of the lease deed, would have to be reduced by 50 per cent of the unearned increase in the value of the land on the basis of the hypothetical sale on the valuation date. The appeal accordingly fails and must be dismissed with costs.

(1977) 2 Supreme Court Cases 806

(BEFORE Y. V. CHANDRACHUD, P. K. GOSWAMI AND P. N. SHINGHAL, JJ.)

STATE OF U. P. .. Appellant;

Versus

NAWAB HUSSAIN .. Respondent.

Civil Appeal No. 2339 of 1968†, decided on April 4, 1977

4. (1974) 3 SCR 126: 1973 SCC (Tax) 468.

†Appeal by Special Leave from the Judgment and Order dated March 27, 1968 of the Allahabad High Court in Second Appeal No. 2352 of 1963.

Civil Procedure Code, 1908 — Section 11 — Constructive res judicata — Available to the defendant in a suit when the plaintiff could have raised the plea in the writ petition filed by him earlier and which was dismissed — Constitution of India — Article 226

The respondent, a sub-inspector of police, was dismissed from service by the D.I.G. The respondent challenged the dismissal in a writ petition to the High Court on the ground that he was not afforded a reasonable opportunity, but the petition was dismissed. He then filed a suit and raised an additional plea that since he was appointed by the I.G. of Police, the D.I.G. was not competent to dismiss him. The appellant State contended, inter alia, that the suit was barred by constructive res judicata by virtue of the decision in the writ petition. The trial Court and the first appellate Court held that the suit was not barred, but dismissed it on the ground that the D.I.G. was competent to dismiss the respondent. In second appeal, the High Court held that the suit was not barred and that the D.I.G. was not competent to dismiss the respondent.

Allowing the appeal to the Supreme Court on the ground of res judicata

Held:

In **Devi Lal Modi** v. **Sales Tax Officer, Ratlam** the Supreme Court held that on considerations of public policy to prevent multifariousness of legal proceedings between the same parties, the rule of constructive res judicata postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he could not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action and that this rule applies also where the prior proceeding is a writ proceeding. In **Gulabchand Chhotalal Parikh** v. **State of Bombay** the Supreme Court while holding that principle of res judicata applies when the prior proceeding is a writ proceeding observed, "We have not considered whether the principles of constructive res judicata can be invoked by a party to the subsequent suit . . .". This observation was made because the Supreme Court had already held in **Devilal Modi's case** that the principle of constructive res judicata applies in such cases and it was not necessary to reiterate it in **Gulabchand's case** as the question did not arise there. The High Court was therefore wrong in concluding from this observation in **Gulabchand's case** that the principle of constructive res judicata was not applicable when the prior proceeding was a writ petition and that it was competent to the respondent to raise the additional plea in the subsequent suit, even though it was available to him in the writ petition filed by him but was not taken by him therein. (Para 7)

Marginson v. *Blackburn Borough Council*, (1939) 2 KB 426, 436; *Greenhagh* v. *Mallard*, (1947) 2 All ER 255, 257; *Ex parte Thompson*, 6 QB 720; *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, (1962) 1 SCR 1; *Amalgamated Coal Fields Ltd.* v. *Janapada Sabha*, 1963 Supp 1 SCR 172; *Daryao* v. *State of U. P.*, (1962) 1 SCR 574, *referred to.*

Devilal Modi v. *Sales Tax Officer, Ratlam*, (1965) 1 SCR 686, *followed.*

Gulabchand Chhotalal Parikh v. *State of Bombay*, (1966) 2 SCR 647, *explained.*

L. Jankirama Iyer v. *P. N. Nilakanta Iyer*, 1962 Supp 1 SCR 206, *distinguished.*

Civil Procedure Code, 1908 — Section 11 — Res judicata — Nature and basis of the principle of — Constructive res judicata an amplication of the general principle

The principle of estoppel **per rem judicatam** is "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been

adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata.

But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process. This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has some times been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle.

S-M/3562/CL

Advocates who appeared in this case:

G. N. Dikshit, Senior Advocate (*O. P. Rana*, Advocate, with him), for the Appellant,

E. C. Agarwala, Advocate, for the Respondent.

The Judgment of the Court was delivered by

SHINGHAL, J.—Respondent Nawab Hussain was a confirmed Sub-Inspector of Police in Uttar Pradesh. An anonymous complaint was made against him and was investigated by Inspector Suraj Singh who submitted his report to the Superintendent of Police on February 25, 1954. Two cases were registered against him under the Prevention of Corruption Act and the Penal Code. They were also investigated by Inspector Suraj Singh, and the respondent was dismissed from service by an order of the Deputy Inspector General of Police dated December 20, 1954. He filed an appeal, but it was dismissed on April 17, 1956. He then filed a writ petition in the Allahabad High Court for quashing the disciplinary proceedings on the ground that he was not afforded a reasonable opportunity to meet the allegations against him and the action taken against him was mala fide. It was dismissed on October 30, 1959. The respondent then filed a suit in the Court of Civil Judge, Etah, on January 7, 1960, in which he challenged the order of his dismissal on the ground, inter alia, that he had been appointed by the Inspector General of Police and that the Deputy Inspector General of Police was not competent to dismiss him by virtue of the provisions of Article 311(1) of the Constitution. The State of Uttar Pradesh traversed the claim in the suit on several grounds, including the plea that the suit was barred by res judicata as "all the matters in issue in this case had been raised or ought to have been raised both in the writ petition and special appeal". The trial Court dismissed the suit on July 21, 1960, mainly on the ground that the Deputy Inspector General of Police would be deemed to be the plaintiff's appointing authority. It however held that the suit was not barred by the principle of res judicata. The District Judge upheld the trial Court's judgment and dismissed the appeal on February 15, 1963. The respondent pre-

ferred a second appeal which has been allowed by the impugned judgment of the High Court dated March 27, 1968, and the suit has been decreed. The appellant State of Uttar Pradesh has therefore come up in appeal to this Court by special leave.

2. The High Court has taken the view that the suit was not barred by the principle of constructive res judicata and that the respondent could not be dismissed by an order of the Deputy Inspector General of Police as he had been appointed by the Inspector General of Police. As we have reached the conclusion that the High Court committed an error of law in deciding the objection regarding the bar of res judicata, it will not be necessary for us to examine the other point.

3. The principle of estoppel *per rem judicatam* is a rule of evidence. As has been stated in *Marginson* v. *Blackburn Borough Council*[1], it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata.

4. But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell, L.J., has answered it as follows in *Greenhalgh* v. *Mallard*[2]:

> I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous

1. (1939) 2 KB 426 at p. 437.
2. (1947) All ER 255 at p. 257.

litigant. That is why this other rule has some times been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle.

5. These simple but efficacious rules of evidence have been recognised for long, and it will be enough to refer to this Court's decision in *Gulabchand Chhotalal Parikh* v. *State of Bombay*[3] for the genesis of the doctrine and its development over the years culminating in the present Section 11 of the Code of Civil Procedure, 1908. The section, with its six explanations, covers almost the whole field, and has admirably served the purpose of the doctrine. But it relates to suits and former suits, and has, in terms, no direct application to a petition for the issue of a high prerogative writ. The general principles of res judicata and constructive res judicata have however been acted upon in cases of renewed applications for a writ. Reference in this connection may be made to *ex parte Thompson*[4]. There A. J. Stephens moved for a rule calling upon the authorities concerned to show cause why a mandamus should not issue. He obtained a rule nisi, but it was discharged as it did not appear that there had been a demand and a refusal. He applied again saying that there had been a demand and a refusal since then. Lord Denman, C.J., observed that as Stephens was making an application which had already been refused, on fresh materials, he could not have "the same application repeated from time to time" as they had "often refused rules" on that ground. The same view has been taken in England in respect of renewed petitions for *certiorari*, *quo warranto* and prohibition, and, as we shall show, that is also the position in this country.

6. We find that the High Court in this case took note of the decisions of this Court in *L. Janakirama Iyer* v. *P. M. Nilakanta Iyer*[5]; *Devilal Modi* v. *Sales Tax Officer, Ratlam*[6] and *Gulabchand Chhotalal Parikh* v. *State of Bombay* (supra) and reached the following conclusion:

> On a consideration of the law as laid down by the Supreme Court in the above three cases I am inclined to agree with the alternative argument of Sri K. C. Saxena, learned Counsel for the plaintiff-appellant, that the law as declared by the Supreme Court in regard to the plea of res judicata barring a subsequent suit on the ground of dismissal of a prior writ petition under Article 226 of the Constitution is that only that issue between the parties will be res judicata which was raised in the earlier writ petition and was decided by the High Court after contest. Since no plea questioning the validity of the dismissal order based on the incompetence of the Deputy Inspector General of Police was raised in the earlier writ petition filed by the plaintiff in the High Court under Article 226 of the Constitution and the parties were never at issue on it and the High Court never considered or decided it, I think it is competent for the plaintiff to raise such a plea in the subsequent suit and bar of res judicata will not apply.

We have gone through these cases. *Janakirama Iyer's* was a case where the suit which was brought by defendants 1 to 6 was withdrawn during the pendency of the appeal in the High Court and was dismissed. In the mean time a suit was filed in a representative capacity under Order 1

3. (1965) 2 SCR 547: AIR 1965 SC 1153.
4. 6 QB 720.
5. (1962) Supp 1 SCR 206: AIR 1962 SC 633.
6. (1965) 1 SCR 686: AIR 1965 SC 1150: (1965) 1 SCJ 579.

Rule 8 C.P.C. One of the defences there was the plea of res judicata. The suit was decreed Appeals were filed against the decree, but the High Court dismissed them on the ground that there was no bar of res judicata. When the matter came to this Court it was "fairly conceded" that in terms Section 11 of the Code of Civil Procedure could not apply because the suit was filed by the creditors defendants 1 to 6 in their representative character and was conducted as a representative suit, and it could not be said that defendants 1 to 6 who were plaintiffs in the earlier suit and the creditors who had brought the subsequent suit were the same parties or parties who claimed through each other. It was accordingly held that where Section 11 was thus inapplicable, it would not be permissible to rely upon the general doctrine of res judicata, as the only ground on which res judicata could be urged in a suit could be the provisions of Section 11 and no other. That was therefore quite a different case and the High Court failed to appreciate that it had no bearing on the present controversy.

7. The High Court then proceeded to consider this Court's decisions in *Devilal Modi's case* (supra) and *Gulabchand's case* (supra). *Gulabchand's* was the later of these two cases. The High Court has interpreted it to mean as follows :

> It was held that the decision of the High Court on a writ petition under Article 226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter. As appears from the report the above was the majority view of the Court and the question whether the principles of constructive res judicata can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceedings was left open. The learned Judges took care to observe that they made it clear that it was not necessary and they had not considered that the principles of constructive res judicata could be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

As we shall show, that was quite an erroneous view of the decision of this Court on the question of constructive res judicata. It will help in appreciating the view of this Court correctly if we make a brief reference to the earlier decisions in *Amalgamated Coalfields Ltd.* v. *Janapada Sabha, Chhindwara*[7] and *Amalgamated Coalfields Ltd.* v. *Janapada Sabha, Chhindwara*[8], which was also a case between the same parties. In the first of these cases a writ petition was filed to challenge the coal tax on some grounds. An effort was made to canvass an additional ground, but that was not allowed by this Court and the writ petition was dismissed. Another writ petition was filed to challenge the levy of the tax for the subsequent periods on grounds distinct and separate from those which were rejected by this Court. The High Court held that the writ petition was barred by res judicata because of the earlier decision of this Court. The matter came up in appeal to this Court in the second case. The question which directly arose for decision was whether the principle of constructive res judicata was applicable to petitions under Articles 32 and 226 of the

7. (1962) 1 SCR 1 : AIR 1961 SC 964 : (1962) 1 SCJ 445.

8. (1963) Supp 1 SCR 172 : AIR 1964 SC 1013.

Constitution and it was answered as follows :

> It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same ground which was urged on the earlier occasion is placed before the Court in another form. The grounds now urged are entirely distinct, and so, the decision of the High Court can be upheld only if the principle of constructive res judicata can be said to apply to writ petitions filed under Article 32 or Article 226. In our opinion, constructive res judicata which is a special and artificial form of res judicata enacted by Section 11 of the Civil Procedure Code should not generally be applied to writ petitions filed under Article 32 or Article 226. We would be reluctant to apply this principle to the present appeals all the more because we are dealing with cases where the impugned tax liability is for different years.

It may thus appear that this Court rejected the application of the principle of constructive res judicata on the ground that it was a "special and artificial form of res judicata" and should not generally be applied to writ petitions, but the matter did not rest there. It again arose for consideration in *Devilal Modi's case* (supra). Gajendragadkar, J., who had spoken for the Court in the second case of the *Amalgamated Coalfields Ltd.* spoke for the Court in that case also. The petitioner in that case was assessed to sales tax and filed a writ petition to challenge the assessment. The petition was dismissed by the High Court and he came in appeal to this Court. He sought to make some additional contentions in this Court, but was not permitted to do so. He therefore filed another writ petition in the High Court raising those additional contentions and challenged the order of assessment for the same year. The High Court dismissed the petition on merits, and the case came up again to this Court in appeal. The question which specifically arose for consideration was whether the principle of constructive res judicata was applicable to writ petitions of that kind. While observing that the rule of constructive res judicata was "in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure", this Court declared the law in the following terms :

> This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action ; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time ; and that plainly is inconsistent with considerations of public policy to which we have just referred.

While taking that view, Gajendragadkar, C.J., tried to explain the earlier decision in *Amalgamated Coalfields Ltd.* v. *Janapada Sabha, Chhindwara* (supra) and categorically held that the principle of constructive res judicata was applicable to writ petitions also. As has been stated, that case was brought to the notice of the High Court, but its significance appears to have been lost because of the decisions in *Janakirama Iyer* v. *P. M. Nilakanta Iyer* (supra) and *Gulabchand's case*. We have made a reference to the decision in *Janakirama Iyer's case* which has no bearing on the present controversy, and we may refer to the decision in *Gulabchand's case* as well. That was a case where the question which specifically arose for consideration was whether a decision of the High Court on merits

on a certain matter after contest, in a writ petition under Article 226 of the Constitution, operates as res judicata in a regular suit with respect to the same matter between the same parties. After a consideration of the earlier decisions in England and in this country, Raghubar Dayal, J., who spoke for the majority of this Court, observed as follows :

> These decisions of the Privy Council well lay down that the provisions of Section 11, C.P.C. are not exhaustive with respect to an earlier decision in a proceeding operating as res judicata in a subsequent suit with respect to the same matter inter parties, and do not preclude the application to regular suits of the general principles of res judicata based on public policy and applied from ancient times.

He made a reference to the decision in *Daryao* v *The State of U. P.*[9] on the question of res judicata and the decisions in *Amalgamated Coalfields Ltd.* v. *Janapada Sabha Chhindwara* and *Devilal Modi's case* (supra) and summarised the decision of the Court as follows :

> As a result of the above discussion, we are of opinion that the provisions of Section 11, C.P.C. are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial.

He however went on to make the following further observation :

> We may make it clear that it was not necessary, and we have not considered, whether the principles of constructive res judicata can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

It was this other observation which led the High Court to take the view that the question whether the principle of constructive res judicata could be invoked by a party to a subsequent suit on the ground that a plea which might or ought to have been raised in the earlier proceeding but was not so raised therein, was left open. That, in turn, led the High Court to the conclusion that the principle of constructive res judicata could not be made applicable to a writ petition, and that was why it took the view that it was competent for the plaintiff in this case to raise an additional plea in the suit even though it was available to him in the writ petition which was filed by him earlier but was not taken. As is obvious, the High Court went wrong in taking that view because the law in regard to the applicability of the principle of constructive res judicata having been clearly laid down in the decision in *Devilal Modi's case*, it was not necessary to reiterate it in *Gulabchand's case* as it did not arise for consideration there. The clarificatory observation of this Court in *Gulabchand's case* was thus misunderstood by the High Court in observing that the matter had been "left open" by this Court.

8. It is not in controversy before us that the respondent did not

9. (1962) 1 SCR 574 : AIR 1961 SC 1457 : (1962) 1 SCJ 702.

raise the plea, in the writ petition which had been filed in the High Court, that by virtue of clause (1) of Article 311 of the Constitution he could not be dismissed by the Deputy Inspector General of Police as he had been appointed by the Inspector General of Police. It is also not in controversy that that was an important plea which was within the knowledge of the respondent and could well have been taken in the writ petition. but he contended himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the case against him in the departmental inquiry and that the action taken against him was mala fide. It was therefore not permissible for him to challenge his dismissal, in the subsequent suit, on the other ground that he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the principle of constructive res judicata, and the High Court erred in taking a contrary view.

9. The appeal is allowed, the impugned judgment of the High Court dated March 27, 1968, is set aside and the respondent's suit is dismissed. In the circumstances of the case, we direct that the parties shall pay and bear their own costs.

(1977) 2 Supreme Court Cases 814

(BEFORE V. R. KRISHNA IYER, R. S. SARKARIA AND JASWANT SINGH, JJ.)

KANTA GOEL .. Appellant;

Versus

B. P. PATHAK AND OTHERS .. Respondents.

Civil Appeal No. 764 of 1977†, decided on April 1, 1977

Rent Control and Eviction — Delhi Rent Control Act (59 of 1958), Sections 14A and 25B — Government servant evicted from Government premises — Can invoke Section 14A for evicting a tenant from his own premises but cannot invoke provision to evict more than one tenant holding different premises under him — Words and phrases — 'In his name', 'let out by him' apply to owner and his heir

Rent Control and Eviction — Landlord — Who is ..

Rent Control and Eviction — Co-owners — Need not join in eviction proceedings initiated by one of them

A portion of the first floor of a building was let out by the owner to the appellant. The owner died leaving 3 sons and a daughter (respondents). The 1st respondent who was in occupation of a government allotment was required by government to vacate those premises. He took proceedings under Section 14A, Delhi Rent Control Act, 1958, against the tenant of the other portion of the first floor and after evicting that tenant kept those premises vacant. Thereafter, he again took proceedings under Section 14A against the appellant. The other respondents did not join with the 1st respondent, and the 1st respondent claimed that he became the sole owner of the first floor under the will of his father followed by a portion between himself and his brother. The appellant contended

†Appeal by Special Leave from the Judgment and Order dated January 21, 1977 of the Delhi High Court in Civil Revision 654 of 1976.

8. We are in respectful agreement with the above statement of law. Consequently, it is not permissible for the appellant to contend to the contrary. That apart, we are also of the view that a judgment or decree passed as a result of consensus arrived at before court, cannot always be said to be one passed on compromise or settlement and adjustment. It may, at times, be also a judgment on admission, as in this case.

9. Considering the facts and circumstances of the case, we find that there are no adequate reasons on merits also to call for interference in a second appeal. The so-called questions formulated cannot be considered to be even questions of law and, at any rate, not substantial questions of law, as required under Section 100 CPC. The courts below have concurrently rejected the claim of the plaintiff-appellants on pure findings of fact based upon relevant evidence and nothing survived for consideration at all in such an appeal. Further, the respondent's side alone appears to have been saddled with additional liabilities under the decision of the High Court, though on the basis of admission made by counsel appearing for parties. There is nothing said against the counsel, who appeared for parties, and no allegations have been made also attributing any impropriety to their action. Therefore, we are not persuaded to agree with the submissions made on behalf of the appellants.

10. The appeals, therefore, fail and shall stand dismissed. No costs.

(2003) 11 Supreme Court Cases 377

(BEFORE DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.)

SHIROMANI GURDWARA PARBANDHAK COMMITTEE .. Appellant;

Versus

MAHANT HARNAM SINGH C. (DEAD), M.N. SINGH AND OTHERS .. Respondents.

Civil Appeals Nos. 3348-49 of 1993†, decided on September 16, 2003

A. Sikh Gurdwaras Act, 1925 (Punjab Act 8 of 1925) — Ss. 16(2) and 7 — Whether an institution is a Sikh gurdwara — Onus of proof is on the person who asserts the same — Hence, SGPC which asserted that the institution was a Sikh gurdwara has to prove the same (Para 17)

S.G.P. Committee v. *M.P. Dass Chela*, (1998) 5 SCC 157, *followed*

Hem Singh v. *Basant Das*, AIR 1936 PC 93 : 63 IA 180, *distinguished*

B. Sikh Gurdwaras Act, 1925 (Punjab Act 8 of 1925) — S. 16(2) — Sikh gurdwara — Conditions for constituting — Sine qua non for, is that there should be established a Guru Granth Sahib

† From the Judgment and Order dated 13-9-1991 of the Punjab and Haryana High Court in FAOs Nos. 532 of 1981 and 6 of 1982

The sine qua non for an institution to be treated as a Sikh gurdwara is that there should be established a Guru Granth Sahib, and the worship of the same by the congregation, and a Nishan Sahib. There may be other rooms of the institution made for other purposes but the crucial test is the existence of a Guru Granth Sahib and the worship thereof by the congregation and Nishan Sahib. Unless the claim falls within one or the other of the categories enumerated in sub-section (2) of Section 16, the institution cannot be declared to be a Sikh gurdwara. (Paras 14 and 15)

Pritam Dass Mahant v. *Shiromani Gurdwara Prabandhak Committee*, (1984) 2 SCC 600 : AIR 1984 SC 858; *Shiromani Gurdwara Parbandhak Committee* v. *Bagga Singh*, (2003) 1 SCC 619, *relied on*

C. **Civil Procedure Code, 1908 — Ss. 11 and 92 — Sikh gurdwara — Representative suit — Bar of res judicata and issue estoppel — Dera claimed to be maintained by Nirmala Sadhus — In a suit under S. 92 filed by two persons in representative capacity for removal from mahantship of the Dera, trial court found that Nirmalas are not Sikhs and the institution was not a Sikh gurdwara and Supreme Court in appeal upholding that finding — Same plaintiffs were among the signatories to the subsequent petition filed under S. 7(1) of Sikh Gurdwaras Act for declaring the institution as a Sikh gurdwara — Held, factual finding which reached finality in the earlier appeal before Supreme Court cannot be reagitated in the subsequent proceedings under the Act and the same is precluded on the principle of issue estoppel also — Sikh Gurdwaras Act, 1925 (Punjab Act 8 of 1925), S. 7(1) — Evidence Act, 1872, S. 115 — Issue estoppel**

Held :

In *Harnam Singh case*, AIR 1967 SC 1415 it was held that the Dera was maintained for an entirely distinct sect known as Nirmala Sadhus who cannot be regarded as Sikhs. It was also held that mere fact that at some stage there was a Guru Granth Sahib in the Dera cannot lead to any conclusion that the institution was meant for or belonged to the followers of Sikh religion. These findings were rendered in a suit filed under Section 92 CPC. Decisions taking the contrary view that Nirmalas are Sikhs per se lose significance. The factual findings relating to the nature and character of the institutions, specifically found on an elaborate review of the governing legal principles as well, and which have reached finality cannot be reagitated and the same is precluded on the principle of "issue estoppel" also. (Para 17)

Mahant Harnam Singh v. *Gurdial Singh*, AIR 1967 SC 1415 : 69 Punj LR 805, *relied on*

Ram Kishan v. *Bur Singh*, AIR 1934 Lah 39 : ILR 15 Lah 270; *Sohan Das* v. *Bela Singh*, AIR 1934 Lah 180 : 147 IC 632; *Sajjan Singh* v. *Ishar Singh*, AIR 1934 Lah 215 : 35 Punj LR 168; *Bisakha Singh* v. *Pt. Socha Singh*, AIR 1937 Lah 7 : 38 Punj LR 761; *Gurmukh Singh* v. *Risaldar Deva Singh*, AIR 1937 Lah 577 : 39 Punj LR 817; *Gulab Das* v. *Foja Singh*, AIR 1937 Lah 826 : 169 IC 947, *overruled*

D. **Civil Procedure Code, 1908 — Ss. 92, 11 Expln. VI — Representative suit under S. 92 filed by two persons when Sikh Gurdwaras Act, 1925 was not in operation in the area in question — Binding effect on remaining body of interested persons — Declaration made by civil court that the institution was not a Sikh gurdwara — Subsequent petition under S. 7(1) of the said Act filed by sixty persons including the two persons who had filed the earlier suit for a declaration that the institution was a Sikh gurdwara — Held, the earlier suit being a representative suit, not only the two plaintiffs whose**

names were in the suit-title but also those having common interest in the trust would be bound by the declaration made by the civil court — Hence, subsequent petition under S. 7(1) of the Act would be barred by constructive res judicata — Representative suit having been filed when the Act was not in operation in the area, declaration made by the civil court was of considerable relevance — Sikh Gurdwaras Act, 1925 (Punjab Act 8 of 1925), S. 7(1)

Held :

In the original round, when a representative suit was filed, the Act was not in operation in the area where the institution was established. Therefore, the declaration made by the civil court is of considerable relevance. (Para 18)

Kirpa Singh (Bhai) v. *Rasalldar Ajaipal Singh*, AIR 1928 Lah 627 : 113 IC 529, *approved*

The suit under Section 92 CPC is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of the public at large, may choose two or more persons amongst themselves for the purpose of filing a suit under Section 92 CPC and the suit-title in that event would show only their names as plaintiffs. The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eye of the law to be parties to the suit. A suit under Section 92 CPC is thus a representative suit and as such binds not only the parties named in the suit-title but all those who share common interest and are interested in the trust. It is for that reason that Explanation VI to Section 11 CPC constructively bars by res judicata the entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit under Section 92 CPC.

(Para 19)

R. Venugopala Naidu v. *Venkatarayulu Naidu Charities*, 1989 Supp (2) SCC 356 : AIR 1990 SC 444, *relied on*

Appeals dismissed R-M/ATZ/28999/S

Advocates who appeared in this case :

Hardev Singh, Senior Advocate (Ms Madhu Moolchandani, Advocate, with him) for the Appellant;

K.R. Nagaraja, H.S. Kathuria and Ms E.R. Sumathy, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2003) 1 SCC 619, *Shiromani Gurdwara Parbandhak Committee* v. *Bagga Singh* 388*e-f*
2. (1998) 5 SCC 157, *S.G.P. Committee* v. *M.P. Dass Chela* 388*f*
3. 1989 Supp (2) SCC 356 : AIR 1990 SC 444, *R. Venugopala Naidu* v. *Venkatarayulu Naidu Charities* 389*e-f*
4. (1984) 2 SCC 600 : AIR 1984 SC 858, *Pritam Dass Mahant* v. *Shiromani Gurdwara Prabandhak Committee* 387*e-f*
5. AIR 1967 SC 1415 : 69 Punj LR 805, *Mahant Harnam Singh* v. *Gurdial Singh* 381*a*, 381*c*, 381*e-f*, 388*g-h*
6. AIR 1937 Lah 826 : 169 IC 947, *Gulab Das* v. *Foja Singh* 383*b*
7. AIR 1937 Lah 577 : 39 Punj LR 817, *Gurmukh Singh* v. *Risaldar Deva Singh* 383*b*
8. AIR 1937 Lah 7 : 38 Punj LR 761, *Bisakha Singh* v. *Pt. Socha Singh* 383*b*
9. AIR 1936 PC 93 : 63 IA 180, *Hem Singh* v. *Basant Das* 383*a*

10. AIR 1934 Lah 215 : 35 Punj LR 168, *Sajjan Singh* v. *Ishar Singh* 383*a-b*
11. AIR 1934 Lah 180 : 147 IC 632, *Sohan Das* v. *Bela Singh* 383*a-b*
12. AIR 1934 Lah 39 : ILR 15 Lah 270, *Ram Kishan* v. *Bur Singh* 383*a-b*
13. AIR 1928 Lah 627 : 113 IC 529, *Kirpa Singh (Bhai)* v. *Rasalldar Ajaipal Singh* 389*c-d*

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J.— These appeals by special leave arise from a common judgment of a Division Bench of the Punjab and Haryana High Court. Before the High Court appeals were filed challenging the order dated 9-11-1981 passed by the Sikh Gurdwara Tribunal, Punjab, Chandigarh (in short "the Tribunal") in Petitions Nos. 119 and 121 of 1962.

2. Synoptical résumé of the factual position is as follows:

Acting on a petition under Section 7(1) of the Sikh Gurdwaras Act, 1925 (in short "the Act") made by sixty persons, who claimed to be worshippers, for declaring the institution in question (known as Gurdwara Guru Granth Sahib) situated in the revenue estate of Jhandawala, District Bhatinda to be a Sikh gurdwara, the Government of Punjab published Notification No. 1216-GP dated 23-6-1961 under Section 7(3) of the Act describing the said institution as a Sikh gurdwara. When the petition under Section 7(1) was notified, Mahant Harnam Singh, Chela Narain Singh, Nirmala Sadhu, the original respondent (who has died in the meantime and is represented by legal representatives) filed a counter-petition under Section 8 of the Act claiming that the institution in dispute was not a Sikh gurdwara but was Dera Bhai Saida Ram. Similar petition under Section 8 of the Act was also moved by fifty-eight persons of the Dera alleging that the institution in dispute was not a Sikh gurdwara. Both these petitions were forwarded by the State Government to the Tribunal for disposal. In the two petitions Shiromani Gurdwara Parbandhak Committee (hereinafter referred to as "the Committee") was arrayed as the respondent.

3. Stand of Harnam Singh was that the Dera was not established in the memory of any Sikh guru or in commemoration of any incident in the life of any of the ten Sikh gurus or in the memory of any Sikh martyr, saint or historical person and had never been used for public worship by Sikhs. On the other hand, the institution was established by Bhai Saida Ram who was a Nirmala and it came to be known as Dera Bhai Saida Ram. The Dera had been in possession of Nirmala Sadhus for generations and all the mahants had been Nirmalas and by succession devolved from *guru* to *chela* subject to confirmation by Nirmala. Gurdial Singh and Ishar Singh, Lambardars of Village Jhandawala who were also signatories to a petition under Section 7(1) had earlier filed a civil suit under Section 92 of the Code of Civil Procedure, 1908 (in short "CPC") in the Court of District Judge, Bhatinda for his removal from mahantship and the same was dismissed on 31-3-1956. It was held that the institution was not a Sikh gurdwara and Sikhs had no interest in it. It was a dera of Nirmala Sadhus. In appeal, the High Court reversed the conclusions. In further appeal the conclusions of the trial court

were restored by this Court by judgment dated 24-2-1967. The said judgment is *Mahant Harnam Singh* v. *Gurdial Singh*[1].

4. In the present proceeding Mahant Harnam Singh referred to the said judgment and opposed the maintainability of the petition under Section 7(1). The judgment was one in rem and operates as res judicata was his stand. These pleas were countered by the Committee. The Tribunal framed the following issues on 18-1-1971:

(*1*) What is the effect of the judgment of this Court, copy-marked as Exhibit P-1, on the merits of the case?

(*2*) Whether the institution in dispute is a Sikh gurdwara?

(*3*) Relief.

5. Issue (1) was treated as a preliminary issue. The Tribunal vide its order dated 8-3-1977, held that the judgment of this Court in *Mahant Harnam Singh*[1] does not bar the jurisdiction of the Tribunal to decide the claim petition under Section 7 of the Act. The order of the Tribunal was challenged before the High Court and this Court without any success.

6. Issue (2) was taken up for adjudication and the same was answered in favour of the Committee. It was held that the institution was a Sikh gurdwara. The Tribunal came to hold that the institution in dispute was originally established by Sikhs and the object of worship was Guru Granth Sahib because majority of the villagers were Sikhs and Nirmalas are Sikhs. With reference to Section 16 of the Act, the Tribunal took note of the conditions which were required to be fulfilled before any institution could be declared as a Sikh gurdwara. But it did not opine as to under which clause of sub-section (2) of Section 16 the institution in question falls.

7. Aggrieved by the judgment of the Tribunal, the High Court was moved in first appeal. The High Court felt that the Tribunal had lost sight of the decision in *Harnam Singh case*[1]. In fact in that case the two plaintiffs who were signatories to the petition under Section 7(1) of the Act had obtained permission from the Advocate General for instituting a suit under Section 92 CPC against Harnam Singh. It was claimed in the plaint that there was one Guru Granth Sahib at Village Jhandawala, Tehsil and District Bhatinda which was managed by Mahant Harnam Singh as a mahatmim and he was in possession of the Dera and agricultural land belonging to Guru Granth Sahib which was a public religious place and was established by the residents of the village and it was a public trust created by the residents of the village for the service of the public to provide food from the *langar*, to allow the people to fulfil religious beliefs and for worship etc. The plaintiffs in their capacity as representatives of the owners of the land situated in the village and the residents thereof claimed that they were entitled to file a suit under Section 92 CPC. The mahant was the defendant and he took the stand that there was no such interest in the public so as to entitle them to institute the suit. This

1 AIR 1967 SC 1415 : 69 Punj LR 805

Court noticed that the trial court and the High Court gave a concurrent finding that all the mahants of the institution from Bhai Saida Ram to Mahant Harnam Singh have been Nirmalas. The trial Judge held that such Nirmala Sadhus are not Sikhs and that the institution was not a Sikh institution. The High Court disagreed with such conclusions and held that Nirmala Sadhus are a sect of the Sikhs and consequently, the Sikhs had interest in the institution as it was a Sikh gurdwara. The High Court thus found that the plaintiffs had interest as required under Section 92 CPC. They were Sikhs and the institution was a religious institution of Nirmala Sadhus who were a section of the Sikhs. The nucleus according to the High Court was by way of donation of land by the residents of the village. This Court on appeal held: (*i*) Nirmala Sadhus are not Sikhs; (*ii*) the mere fact that at some stage there was a Guru Granth Sahib in the Dera in dispute cannot lead to any conclusion that the institution was meant for or belonged to the followers of the Sikh religion. The Dera was maintained for an entirely distinct sect known as Nirmala Sadhus who cannot be regarded as Sikhs. Consequently, in their mere capacity of followers of Sikh religion in the village, the plaintiffs could not be held to have such interest as to entitle them to institute a suit under Section 92 CPC. The institution was held to be not belonging to the followers of the Sikh religion.

8. The High Court noted that Section 16 of the Act provides the manner in which a gurdwara can be held to be a Sikh gurdwara. The onus to prove whether the institution in dispute was a Sikh gurdwara is on the Committee. The Committee was required to prove the essential ingredients of either of clauses (*i*) to (*v*) of sub-section (2) of Section 16 of the Act. The Committee did not plead or prove as to which of the clauses cover the case at hand. The Tribunal was not justified in its conclusions. Merely because in some of the revenue records it was indicated that there was exemption from payment of land revenue they did not even remotely suggest that the institution in dispute was established for use of Sikhs for the purpose of public worship. Accordingly, it was held that the institution in dispute was not a Sikh gurdwara.

9. In support of the appeals, the learned counsel for the Committee submitted that in the earlier case the basic issue whether the institution was a Sikh gurdwara was not considered. Nirmalas are Sikhs as was held in several decisions and the essential ingredients necessary for coming to a conclusion that the institution is a Sikh gurdwara have been established beyond a shadow of doubt by ample oral and documentary evidence adduced by the Committee. The onus has been wrongly placed on the Committee. On the contrary, since the respondent was taking the stand that the institution was not a Sikh gurdwara, the onus was on him to establish so. According to him, by a long series of decisions rendered nearly seven decades back it was observed that Nirmalas are Sikhs. When Guru Granth Sahib was worshipped in any institution makes it a Sikh gurdwara, the onus having been wrongly placed, the judgment of the High Court gets vitiated. Merely because the manager of the institution was a Nirmala, that does not affect the institution

from being a Sikh gurdwara. The entries in the revenue records have been erroneously overlooked. The decision in *Hem Singh* v. *Basant Das*[2] on which reference was placed to ignore the entries was rendered in a different factual context and has no application. Reference was made to the following decisions: *Ram Kishan* v. *Bur Singh*[3], *Sohan Das* v. *Bela Singh*[4], *Sajjan Singh* v. *Ishar Singh*[5], *Bisakha Singh* v. *Pt. Socha Singh*[6], *Gurmukh Singh* v. *Risaldar Deva Singh*[7] and *Gulab Das* v. *Foja Singh*[8].

10. It was submitted that the question of onus in any event loses significance, when on consideration of the materials on record the Tribunal came to hold that the institution was a Sikh gurdwara.

11. Responding to the aforesaid pleas, it was submitted by the learned counsel for the respondents that there was no occasion for the matter being adjudicated by the Tribunal in the earlier round, because the Tribunal was not in existence and for the area in question it was constituted in 1963. It was dissolved in October 1966 when the matter was pending before the High Court, and was reconstituted in February 1970. The Tribunal had no jurisdiction to deal with the matter once there was an adjudication under Section 92 CPC. The implications of a representative suit have to be taken note of. The High Court has rightly placed the onus on the Committee to establish that the institution was a Sikh gurdwara. It was categorically recorded by this Court that Nirmalas are not Sikhs and the institution is not a Sikh gurdwara. That being the position, the High Court's judgment has no infirmity. Additionally, the decisions referred to by the learned counsel for the appellants as regards the nature of the institution were rendered in different factual set-up and on the facts involved in the case, it was held that the institution was a Sikh gurdwara. Factual difference in the present case makes those decisions inapplicable. Even if it has been held in some of the decisions that Nirmalas are Sikhs or the onus was on the plaintiffs under Section 7 of the Act, they are no longer good law in view of what has been stated by this Court.

12. In order to appreciate the rival submissions, a bird's-eye view of the pivotal provisions is necessary. They are Sections 7, 8, 9, 10, 14, 16(2) and 18(1)(*g*) and read as follows:

> "7. *Petition to have a gurdwara declared a Sikh gurdwara.*—(1) Any fifty or more Sikh worshippers of a gurdwara, each of whom is more than twenty-one years of age and was on the commencement of this Act or, in the case of the extended territories from the commencement of the amending Act, resident in the police station area in which the gurdwara is situated, may

2 AIR 1936 PC 93 : 63 IA 180
3 AIR 1934 Lah 39 : ILR 15 Lah 270
4 AIR 1934 Lah 180 : 147 IC 632
5 AIR 1934 Lah 215 : 35 Punj LR 168
6 AIR 1937 Lah 7 : 38 Punj LR 761
7 AIR 1937 Lah 577 : 39 Punj LR 817
8 AIR 1937 Lah 826 : 169 IC 947

forward to the State Government, through the appropriate Secretary to the Government so as to reach the Secretary within one year from the commencement of this Act or within such further period as the State Government may by notification fix for this purpose, a petition praying to have the gurdwara declared to be a Sikh gurdwara:

Provided that the State Government may in respect of any such gurdwara declare by notification that a petition shall be deemed to be duly forwarded whether the petitioners were or were not on the commencement of this Act or, in the case of the extended territories, on the commencement of the amending Act, as the case may be, residents in the police station area in which such gurdwara is situated, and shall thereafter deal with any petition that may be otherwise duly forwarded in respect of any such gurdwara as if the petition had been duly forwarded by petitioners who were such residents:

Provided further that no such petition shall be entertained in respect of any institution specified in Schedule I or Schedule II unless the institution is deemed to be excluded from specification in Schedule I under the provisions of Section 4.

(2) *List of property claimed for the gurdwara and of persons in possession thereof to accompany a petition under sub-section (1).*—A petition forwarded under the provisions of sub-section (1) shall state the name of the gurdwara to which it relates and of the district, tehsil and revenue estate in which it is situated, and shall be accompanied by a list, verified and signed by the petitioners, of all rights, titles or interests in immovable properties situated in Punjab inclusive of the gurdwara and in all monetary endowments yielding recurring income or profit received in Punjab, which the petitioners claim to belong within their knowledge to the gurdwara the name of the person in possession of any such right, title or interest, and if any such person is insane or a minor, the name of his legal or natural guardian, or if there is no such guardian, the name of the person with whom the insane person or minor resides or is residing, or if there is no such person, the name of the person actually or constructively in possession of such right, title or interest on behalf of the insane person or minor, and if any such right, title or interest is alleged to be in possession of the gurdwara through any person the name of such person shall be stated in the list; and the petition and the list shall be in such form and shall contain such further particulars as may be prescribed.

(3) *Publication of petition and list received under sub-sections (1) and (2).*—On receiving a petition duly signed and forwarded under the provisions of sub-section (1) the State Government shall as soon as may be, publish it along with the accompanying list, by notification, and shall cause it and the list to be published, in such manner as may be prescribed, at the headquarters of the district and of the tehsil and in the revenue estate in which the gurdwara is situated, and at the headquarters of every district and of every tehsil and in every revenue estate in which any of the immovable properties mentioned in the list is situated and shall also give such other notice thereof as may be prescribed:

Provided that such petition may be withdrawn by notice to be forwarded by the Board so as to reach the appropriate Secretary to Government, at any

time before publication, and on such withdrawal, it shall be deemed as if no petition had been forwarded under the provisions of sub-section (1).

(4) *Notice of claims to property to be sent to persons shown in the list as in possession.*—The State Government shall also, as soon as may be, send by registered post a notice of the claim to any right, title or interest included in the list to each of the persons named therein as being in possession of such right, title or interest either on his own behalf or on behalf of an insane person or minor or on behalf of the gurdwara:

Provided that no such notice need be sent if the person named as being in possession is a person who joined in forwarding the list.

(5) *Effect of publication of petition and list under sub-section (3).*—The publication of a notification under the provisions of sub-section (3) shall be conclusive proof that the provisions of sub-sections (1), (2), (3) and (4) have been duly complied with.

8. *Petition to have it declared that a place asserted to be a Sikh gurdwara is not such a gurdwara.*—When a notification has been published under the provisions of sub-section (3) of Section 7 in respect of any gurdwara, any hereditary office-holder or any twenty or more worshippers of the gurdwara, each of whom is more than twenty-one years of age and was on the commencement of this Act or, in the case of the extended territories, on the commencement of the amending Act, as the case may be, a resident of a police station area in which the gurdwara is situated may forward to the State Government, through the appropriate Secretary to Government, so as to reach the Secretary within ninety days from the date of the publication of the notification, a petition signed and verified by the petitioner, or petitioners, as the case may be, claiming that the gurdwara is not a Sikh gurdwara, and may in such petition make a further claim that any hereditary office-holder or any person who would have succeeded to such office-holder under the system of management prevailing before the first day of January, 1920 or, in the case of the extended territories, before the Ist day of November, 1956, as the case may be, may be restored to office on the grounds that such gurdwara is not a Sikh gurdwara and that such office-holder ceased to be an office-holder after that day:

Provided that the State Government may in respect of any such gurdwara declare by notification that a petition of twenty or more worshippers of such gurdwara shall be deemed to be duly forwarded whether the petitioners were or were not on the commencement of this Act or, in the case of the extended territories, on the commencement of the amending Act, as the case may be, resident in the police station area in which such gurdwara is situated, and shall thereafter deal with any petition that may be otherwise duly forwarded in respect of any such gurdwara as if the petition had been duly forwarded by petitioners who were such residents.

9. *Effect of omission to present a petition under Section 8.*—(1) If no petition has been presented in accordance with the provisions of Section 8 in respect of a gurdwara to which a notification published under the provisions of sub-section (3) of Section 7 relates, the State Government shall after the expiration of ninety days from the date of such notification, publish a notification declaring the gurdwara to be a Sikh gurdwara.

(2) *Effect of publication of a notification under sub-section (1).*—The publication of a notification under the provisions of sub-section (1) shall be conclusive proof that the gurdwara is a Sikh gurdwara, and the provisions of Part III shall apply to the gurdwara with effect from the date of the publication of the notification.

10. *Petition of claim to property included in a list published under sub-section (3) of Section 7.*—(1) Any person may forward to the State Government through the appropriate Secretary to Government, so as to reach the Secretary within ninety days from the date of the publication of a notification under the provisions of sub-section (3) of Section 7, a petition claiming a right, title or interest in any property included in the list so published.

(2) *Signing and verification of petitions under sub-section (1).*—A petition forwarded under the provisions of sub-section (1) shall be signed and verified by the person forwarding it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908), for the signing and verification of plaints, and shall specify the nature of the right, title or interest claimed and the grounds of the claim.

(3) *Notification of property not claimed under sub-section (1) and effect of such notification.*—The State Government shall, as soon as may be, after the expiry of the period for making a claim under the provisions of sub-section (1), publish notification, specifying the rights, titles or interest in any properties in respect of which no such claim has been made, and the notification shall be conclusive proof of the fact that no such claim was made in respect of any right, title or interest specified in the notification.

* * *

14. *Tribunal to dispose of petition under Sections 5, 6, 8, 10 and 11.*—(1) The State Government shall forward to a tribunal all petitions received by it under the provisions of Sections 5, 6, 8, 10 or 11, and the tribunal shall dispose of such petitions by order in accordance with the provisions of this Act.

(2) The forwarding of the petitions shall be conclusive proof that the petitions were received by the State Government within the time prescribed in Sections 5, 6, 8, 10 or 11 as the case may be, and in the case of a petition forwarded by worshippers of a gurdwara under the provisions of Section 8, shall be conclusive proof that the provisions of Section 8 with respect to such worshippers were duly complied with.

* * *

16. (2) If the tribunal finds that the gurdwara—

(*i*) was established by, or in memory of any of the ten Sikh gurus, or in commemoration of any incident in the life of any of the ten Sikh gurus and was used for public worship by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of Section 7; or

(*ii*) owing to some tradition connected with one of the ten Sikh gurus, was used for public worship predominantly by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of Section 7; or

(*iii*) was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of Section 7; or

(*iv*) was established in memory of a Sikh martyr, saint or historical person and was used for public worship by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of Section 7; or

(*v*) owing to some incident connected with the Sikh religion was used for public worship predominantly by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of Section 7;

the tribunal shall decide that it should be declared to be a Sikh gurdwara, and record an order accordingly.

* * *

18. *Presumption in favour of a notified Sikh gurdwara on proof of certain facts when a claim to property is made by an office-holder.*—In any proceedings before a tribunal, if any past or present office-holder denies that a right, title or interest recorded, in his name or in that of any person through whom the claims, in a record-of-rights, or in an annual record, prepared in accordance with the provisions of the Punjab Land Revenue Act, 1887 (17 of 1887), and claimed to belong to a notified Sikh gurdwara, does so belong, and claims such right, title or interest to belong to himself, shall, notwithstanding anything contained in Section 44 of the said Act, be a presumption that such right, title or interest belongs to the gurdwara upon proof of any of the following facts, namely—

(*a*)-(*f*) * * *

(*g*) the devolution of the succession to the right, title or interest in question from an office-holder to the successor-in-office as such on two or more consecutive occasions;"

13. In *Pritam Dass Mahant* v. *Shiromani Gurdwara Prabandhak Committee*[9] it was held as under: (SCC pp. 604-05, para 13)

"*13.* Temples are found almost in every religion but there are some differences between the Sikh temples and those of other religions. The Sikh gurdwaras have the following distinctive features:

(*1*) Sikh temples are not the place of idol worship as the Hindu temples are. There is no place for idol worship in a gurdwara. The central object of worship in a gurdwara is Sri Guru Granth Sahib, the holy book. The pattern of worship consists of two main items: reading of the holy hymns followed by their explanation by some learned man, not necessarily a particular granthi and then singing of some passages from the holy granth. The former is called katha and the second is called kirtan. A Sikh thus worships the holy words that are written in the Granth Sahib, the words or shabada about the eternal truth or God. No idol or painting of any guru can be worshipped.

9 (1984) 2 SCC 600 : AIR 1984 SC 858

(2) Sikh worship in the gurdwara is a congregational worship, whereas Hindu temples are meant for individual worship. A Sikh does the individual worship at home when he recites gurbani daily. Some scriptures meant for this purpose are Japji, Jaap, Rehras, kirtan sohila. Sangat is the collective body of Sikhs who meet every day in the gurdwara.

(3) Gurdwara is a place where a copy of Guru Granth Sahib is installed. The unique and distinguishing feature would always be the Nishan Sahib, a flagstaff with a yellow flag of Sikhism flying from it. This serves as a symbol of the Sikh presence. It enables the travellers, whether they be Sikhs or not, to know where hospitality is available. There may be complexity of rooms in a gurdwara for the building may also serve as a school, or where children are taught the rudiments of Sikhism as well as a rest centre for travellers. Often there will be a kitchen where food can be prepared though langar itself might take place in the awning. Sometimes the gurdwara will also be used as a clinic. But its pivotal point is the place of worship and the main room will be that in which the Guru Granth Sahib is installed where the community gathers for diwan. The focal point in this room will be the book itself."

14. The sine qua non for an institution to be treated as a Sikh gurdwara, as observed in the said case, is that there should be established a Guru Granth Sahib, and the worship of the same by the congregation, and a Nishan Sahib. There may be other rooms of the institution made for other purposes but the crucial test is the existence of a Guru Granth Sahib and the worship thereof by the congregation and Nishan Sahib.

15. Unless the claim falls within one or the other of the categories enumerated in sub-section (2) of Section 16, the institution cannot be declared to be a Sikh gurdwara.

16. These aspects have been highlighted in *Shiromani Gurdwara Parbandhak Committee* v. *Bagga Singh*[10].

17. In *S.G.P. Committee* v. *M.P. Dass Chela*[11] it was held that in terms of the requirement of Section 16(2), the onus to prove that the institution is a Sikh gurdwara lies on the person who asserts the same. That being the position, the Committee which asserted that the institution was a Sikh gurdwara has to prove the same. The High Court has, therefore, rightly held that the Tribunal wrongly placed the burden of proof on the respondents herein. Judgments to the contrary rendered and relied upon by the appellants are no longer good law in view of the last-noted decision. Similarly, this Court in *Harnam Singh case*[1] came to the conclusions that Nirmalas are sadhus who cannot be regarded as Sikhs and consequently, in the mere capacity of followers of Sikh religion residing in the village concerned cannot be held to have an interest as to entitle them to institute a suit under

10 (2003) 1 SCC 619
11 (1998) 5 SCC 157

Section 92 CPC. In other words, there was a categorical finding that Nirmalas are not Sikhs. It was held that the Dera was maintained for an entirely distinct sect known as Nirmala Sadhus who cannot be regarded as Sikhs. It was also held that mere fact that at some stage there was a Guru Granth Sahib in the Dera cannot lead to any conclusion that the institution was meant for or belonged to the followers of Sikh religion. These findings were rendered in a suit filed under Section 92 CPC. Decisions taking the contrary view that Nirmalas are Sikhs per se lose significance. The factual findings relating to the nature and character of the institutions, specifically found on an elaborate review of the governing legal principles as well, and which have reached finality cannot be reagitated and the same is precluded on the principle of "issue estoppel" also. As has been rightly contended by the learned counsel for the respondents, decisions rendered on the peculiar fact situation specifically found to exist therein cannot have any irreversible application.

18. A Full Bench of the Lahore High Court in *Kirpa Singh (Bhai)* v. *Rasalldar Ajaipal Singh*[12] observed that the enactment of the Act and the issue of a notification made under the provisions of the Act declaring the gurdwara to be a Sikh gurdwara do not bar the jurisdiction of the High Court to deal with an appeal against the decree of the subordinate courts passed in a suit under Section 92 CPC, in respect of the gurdwara whose appeal was pending when the Act came into force or the notification was issued. As the factual scenario indicated above amplifies, in the original round, when a representative suit was filed, the Act was not in operation in the area where the institution is established. Therefore, the declaration made by the civil court is of considerable relevance.

19. As observed by this Court in *R. Venugopala Naidu* v. *Venkatarayulu Naidu Charities*[13] a suit under Section 92 CPC is a suit of special nature for the protection of public rights in the public trust and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of the public at large, may choose two or more persons amongst themselves for the purpose of filing a suit under Section 92 CPC and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are in the suit-title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eyes of the law to be parties to the suit. A suit under Section 92 CPC is thus a representative suit and as such binds not only the parties named in the suit-title but all those who share common interest and are interested in the trust. It is for that reason that Explanation VI to Section 11 CPC constructively bars by res judicata the

12 AIR 1928 Lah 627 : 113 IC 529
13 1989 Supp (2) SCC 356 : AIR 1990 SC 444

entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit under Section 92 CPC.

20. Judged in the background of the legal parameters and the factual matrix highlighted above, the appeals are without merit and deserve dismissal which we direct. Costs made easy.

(2003) 11 Supreme Court Cases 390

(BEFORE M.B. SHAH AND ARUN KUMAR, JJ.)

DENSONS PULTRETAKNIK .. Appellant;

Versus

COMMISSIONER OF CENTRAL EXCISE .. Respondent.

Civil Appeals No. 9516 of 1995* with Nos. 7635 of 1995, 2461, 2463-65 and 2471 of 1996, decided on January 15, 2003

A. **Excise — Central Excise Tariff Act, 1985 — Headings 85.47, 7014, 3926.90 — Insulating fittings not made wholly of insulating material to which plasticisers, fillers etc. were added for the purpose of bringing down the cast — Ruling of CEGAT, that such goods were classifiable under Heading 85.47, considering the wording of the heading, upheld — Articles/Commodities — Epoxy-cast components (Para 5)**

XL Telecom (P) Ltd. v. *Union of India*, (1994) 70 ELT 530 (Bom), *approved*

B. **Excise — Central Excise Act, 1944 — S. 11-A(1) proviso — Longer period of limitation under — Held, cannot be invoked where assessee only claimed that his articles were covered by a different entry — There was no wilful misstatement or suppression of fact in such a case**

The Supreme Court has repeatedly held that for invoking an extended period of limitation under the said provision duty should not have been paid, short-levied or short-paid by a suppression of facts or in contravention of any provision or rules but there should be wilful suppression. (Para 7)

Prima facie, it is apparent that there was no justifiable reason for invoking a larger period of limitation. There is no suppression on the part of the appellant firm in mentioning the goods manufactured by it. The appellant claimed it on the ground that the goods manufactured by it were other articles of plastic. For the insulating fittings manufactured by it, the tariff entry was correctly stated. The officers concerned of the Department after verification approved the said classification list. By merely claiming it under Sub-Heading 3926.90 it cannot be said that there was any wilful misstatement or suppression of fact. Hence, there was no justifiable ground for the Tribunal for invoking the first proviso to sub-section (1) of Section 11-A of the Act. (Para 7)

Easland Combines v. *CCE*, (2003) 3 SCC 410, *relied on*

D-M/E/28029/S

Chronological list of cases cited ***on page(s)***

1. (2003) 3 SCC 410, *Easland Combines* v. *CCE* 392*d*
2. (1994) 70 ELT 530 (Bom), *XL Telecom (P) Ltd.* v. *Union of India* 391*g-h*

* **Ed.**: Appeal from (1994) 70 ELT 628 (CEGAT)

(2010) 10 Supreme Court Cases 141

(BEFORE R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.)

ALKA GUPTA .. Appellant;

Versus

NARENDER KUMAR GUPTA .. Respondent.

Civil Appeal No. 8321 of 2010†, decided on September 27, 2010

A. **Civil Procedure Code, 1908 — Or. 2 R. 2, S. 11 and Or. 6 R. 2 — Dismissal of suit as barred under Or. 2 R. 2 — Condition precedent for — Unless plea of such bar is raised by defendant and issue is framed thereon, held, court cannot dismiss suit as so barred — Raising of plea of res judicata by defendant would not meet said requirement — Distinction between pleas of res judicata/constructive res judicata and plea of bar under Or. 2 R. 2 pointed out — Practice and Procedure — Res judicata**

B. **Civil Procedure Code, 1908 — Or. 2 R. 2 — Bar of second suit under — Applicability — Held, not applicable where second suit is based on a different and distinct cause of action**

C. **Civil Procedure Code, 1908 — Or. 2 R. 2 — Bar of second suit under — Determination of applicability of — Questions relevant for — Only question relevant therefor, held, is whether relief claimed in both suits arose from same cause of action — Merits and validity of second claim cannot be considered at this stage — Conduct of plaintiff is not relevant in determining applicability of said bar**

D. **Civil Procedure Code, 1908 — Or. 2 R. 2 — Object, effect and scope of, restated**

E. **Civil Procedure Code, 1908 — S. 11 Explns. III & IV — Res judicata — Constructive res judicata — Meaning of "res judicata" and essence of res judicata/constructive res judicata, restated**

F. **Civil Procedure Code, 1908 — S. 11 Explns. III & IV — Res judicata — Constructive res judicata — Applicability of bar of — Conditions precedent for recording finding of, held, are that defendant must establish such plea and plaintiff must be given notice thereof and opportunity to meet the same — Where High Court did not specify ground of attack which plaintiff ought to have raised in first suit but instead had raised in second suit, held, bar of constructive res judicata not applicable**

The appellant and the respondent entered into a partnership as per deed dated 5-4-2000 to run an institute under the name and style of "Takshila Institute", at a place *P* in New Delhi. On 29-6-2004, the appellant entered into an "agreement to sell" (bayana agreement) an undivided half-share of the built-up property specified at another place *R* in Delhi and 50% share of Takshila Institute established in the said property including all rights, titles, etc. attached thereto or connected therewith. The said agreement added that in the said institute, the appellant was also the partner of 50%. Pursuant thereto, the appellant executed a

† Arising out of SLP (C) No. 11328 of 2010. From the Judgment and Order dated 7-9-2009 of the High Court of Delhi at New Delhi in RFA (OS) No. 60 of 2009

sale deed. Since the respondent paid only part of the sale consideration, the appellant filed Suit No. 16 of 2006 against the respondent for the balance amount. The said suit was decreed.

Subsequently, the appellant filed Suit No. 302 of 2007 in the High Court against the respondent, for rendition of accounts for the period 5-4-2000 to 31-7-2004, in regard to the partnership firm of Takshila Institute constituted under the partnership deed dated 5-4-2000. In that suit, the appellant alleged that the said partnership was at will and it was dissolved by implication on 31-7-2004, when the respondent filed a suit against the appellant for an injunction. She also sought a decree for her share of profits in the said partnership. One of the issues framed therein viz. whether the suit was barred by the principle of res judicata as the issue raised therein had been directly and substantially adjudicated between the plaintiff and the defendant in Suit No. 16 of 2006, was directed to be treated as a preliminary issue. A Single Judge dismissed the suit on the grounds that: (*i*) the appellant had abused the process of court; (*ii*) the appellant was an unscrupulous person and the suit was based on falsehoods; (*iii*) the partnership dated 5-4-2000 was illegal and unenforceable as the appellant was a government servant; and (*iv*) & (*v*) the suit was barred by Order 2 Rule 2 CPC and by principle of constructive res judicata.

A Division Bench upheld that decision on the grounds that the suit was barred by Order 2 Rule 2 CPC and that the appellant had settled all her claims with the respondent under the bayana agreement dated 29-6-2004. The present appeal was then filed by special leave.

Allowing the appeal and restoring Suit No. 302 of 2007 to the file of the High Court for being decided in accordance with law, the Supreme Court

Held :

The object of Order 2 Rule 2 CPC is twofold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 CPC is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action. (Para 12)

Unless the defendant pleads the bar under Order 2 Rule 2 CPC and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. (Para 13)

Gurbux Singh v. *Bhooralal*, AIR 1964 SC 1810, *relied on*

In the instant case, the respondent did not contend that the suit was barred by Order 2 Rule 2 CPC. No issue was framed as to whether the suit was barred by Order 2 Rule 2 CPC. But the High Court (both the Trial Bench and the Appellate Bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 CPC. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 CPC requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the

other. The dismissal of the suit by the High Court under Order 2 Rule 2 CPC, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable. (Para 14)

The pleadings in the two suits make it clear that both parties proceeded on the basis that the partnership between the appellant and the respondent under the deed dated 5-4-2000 was only in regard to the business run under the name and style of "Takshila Institute" at *P*. Therefore, the court could not, before trial, assume that the sale of the appellant's share in the immovable property at *R* and the goodwill and assets of the business carried on at *R* under the name of Takshila Institute should be taken as relinquishment or retirement or settlement of share in regard to the partnership business of Takshila Institute at *P*.
(Paras 15 and 16)

The cause of action for the first suit was non-payment of price under the agreement of sale dated 29-6-2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under the deed dated 5-4-2000. Merely because the agreement of sale related to an immovable property at *R* and the business run therein under the name of "Takshila Institute" and the second suit referred to a partnership in regard to business run at *P* also under the same name of Takshila Institute, it could not be assumed that the two suits related to the same cause of action so as to attract Order 2 Rule 2 CPC. (Para 17)

Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 CPC, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of the plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 CPC.
(Paras 18 and 30)

Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In the present case, there was no plea of constructive res judicata, nor had the appellant-plaintiff an opportunity to meet the case based on such plea. Res judicata means "a thing adjudicated", that is, an issue that is finally settled by judicial decision. The principle of constructive res judicata emerges from Explanation IV to Section 11 CPC when read with Explanation III thereof both of which explain the concept of "matter directly and substantially in issue". In view thereof, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 CPC relates to reliefs which ought to have been claimed on the same cause of action but not claimed. (Paras 20 to 24)

Greenhalgh v. *Mallard*, (1947) 2 All ER 255 (CA); *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348; *Forward Construction Co.* v. *Prabhat Mandal*, (1986) 1 SCC 100, *relied on*

In the instant case, the High Court has not stated what was the ground of attack that the appellant-plaintiff ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata. (Para 26)

G. **Civil Suit — Generally — Proper mode of conducting disposal of — Necessity to frame issues before deciding suit — Nature and object of CPC, restated — Held, civil suits have to be proceeded with in accordance with law and provisions of CPC and not on whims of court — Therefore, except cases covered by statutory exception or exemption under CPC or any other law, civil suits have to be decided after framing issues and trial permitting parties to lead evidence — Illustrative provisions of CPC enumerating circumstances in which civil suit can be dismissed without trial, and provisions for expeditious disposal, noticed**

— In the present case, trial court issuing summons in second suit between same parties, for settlement of issues, framing issues and deciding issue as to applicability of bar of res judicata on ground of issue raised therein having been directly and substantially adjudicated in first suit — Without consent of parties and without affording them opportunity to lead evidence, trial court dismissing said second suit on the basis of inferences it drew from plaintiff's conduct that plaintiff was unscrupulous who abused process of court and manipulated documents — Such decision, held, violative of Or. 15 R. 3, arbitrary and illegal — Civil Procedure Code, 1908 — Or. 5 R. 5, Or. 7 R. 11, Or. 9 Rr. 2, 3, 5 & 8, Or. 11 R. 21, Or. 14 R. 2(2), Or. 15 Rr. 1, 4 & 3, Or. 18 R. 2, Or. 23 Rr. 1 & 3 and Or. 37 Rr. 1 to 3 (Paras 18 and 27 to 36)

H. **Civil Procedure Code, 1908 — S. 35 — Levy of costs — Manner of — Reiterated, provisions of CPC should be followed — On facts levy of costs (₹50,000) disapproved (Para 35)**

H-D/46833/CV

Advocates who appeared in this case :
Aman Lekhi, Senior Advocate (Ms Meenakshi Lekhi, Sachin Jain, Madhur Jain and Sanjay Kr. Pathak, Advocates) for the Appellant;
P.C. Agarwal, Senior Advocate (Aditya K. Dubey, Varun Thakur, Ramesh Babu M.R. and Ambuj Agarwal, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348, *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra* 151*c-d*, 151*d*
2. (1986) 1 SCC 100, *Forward Construction Co.* v. *Prabhat Mandal* 151*d*
3. AIR 1964 SC 1810, *Gurbux Singh* v. *Bhooralal* 147*e-f*
4. (1947) 2 All ER 255 (CA), *Greenhalgh* v. *Mallard* 151*b-c*

The Order of the Court was delivered by

R.V. RAVEENDRAN, J.— Leave granted. Heard. For convenience the appellant and the respondent will also be referred to by their ranks in the suit, as "the plaintiff" and "the defendant" respectively.

2. The appellant and the respondent entered into a partnership as per deed dated 5-4-2000 to run an institute for preparing students for competitive

examinations, under the name and style of "Takshila Institute", at No. F-19, LSC, Bhera Enclave, Paschim Vihar, New Delhi. On 29-6-2004, the appellant entered into an "agreement to sell" (bayana agreement) under which she agreed to sell the property described as follows:

> "An undivided half-share, second floor (without roof rights) of built-up property bearing No. 8, Pocket and Block C-9, Sector 8, Rohini, Delhi 110085, built on a plot of land area measuring 158.98 sq m and 50% share of M/s Takshila Institute established in the abovesaid property which is hereby agreed to be sold includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including passages, easements facilities, privileges, etc. which are attached thereto or connected therewith."

3. Clause 13 of the said agreement clarified that the property agreed to be sold included the goodwill of the firm M/s Takshila Institute, having its office at C-9/8, Sector 8, Rohini, Delhi 85 in which the first party is also the partner of 50% and included all rights, interest, claims, title, fittings, furniture, fixtures and all equipment.

4. Under the said agreement, the total consideration agreed was ₹21,50,000 and the appellant received ₹7,50,000 as advance. The appellant claimed that in pursuance of the said agreement, she executed a sale deed in regard to the immovable property for ₹2,00,000 and that the respondent promised to pay the balance of ₹12 lakhs in regard to the other rights and interest agreed to be sold under the agreement of sale dated 29-6-2004. She filed Suit No. 16 of 2006 in the District Court, Delhi for recovery of ₹12 lakhs under the said agreement dated 29-6-2004, alleging that the respondent had paid in all ₹9.5 lakhs towards the agreed price. The said Suit No. 16 of 2006 was decreed in favour of the appellant on 25-11-2006, directing the respondent to pay ₹12 lakhs with interest at 7% per annum with effect from 30-8-2004.

5. Thereafter, the appellant filed another suit—CS (OS) No. 302 of 2007—in the Delhi High Court against the respondent, for rendition of accounts for the period 5-4-2000 to 31-7-2004, in regard to the partnership firm of Takshila Institute constituted under the deed of partnership dated 5-4-2000. In that suit, the appellant alleged that the said partnership was at will and it was dissolved by implication on 31-7-2004, when the respondent filed Suit No. 438 of 2004 against the appellant (and others) for an injunction. She also sought a decree against the respondent for her share of profits in the said partnership and for a decree for ₹25.28 lakhs or higher amount in regard to the share of the plaintiff with interest thereon.

6. The said suit was resisted by the respondent. Three preliminary grounds of objections were raised in regard to the maintainability of the suit: (*a*) that the suit was barred by res judicata; (*b*) that the suit was barred under Section 69 of the Partnership Act, 1932, as it related to an unregistered partnership; and (*c*) that the suit was liable to be dismissed for material suppression of facts and approaching the court with unclean hands. It was

alleged that parties were close relatives and the appellant being a government servant, was only a sleeping partner. It was contended that by the agreement of sale dated 29-6-2004, the partnership under deed dated 5-4-2000 was dissolved and all claims of the appellant were settled.

7. The issues in the said suit were framed on 17-1-2008 with a direction that the first issue, extracted below, be treated as a preliminary issue:

> "Whether the suit is barred by the principle of res judicata as issue raised in the suit has been directly and substantially adjudicated between the plaintiff and the defendant in Suit No. 16 of 2006 titled *Alka Gupta* v. *Narender Kumar Gupta* vide an order dated 25-11-2006 by a competent court?"

8. By order dated 13-3-2009, the Trial Bench (the learned Single Judge of the High Court) held that the suit was liable to be dismissed summarily on the following grounds:

(*i*) the appellant had abused the process of court;

(*ii*) the appellant was an unscrupulous person and the suit was based on falsehoods;

(*iii*) the partnership dated 5-4-2000 was illegal and unenforceable as the appellant was a government servant;

(*iv*) the suit was barred by Order 2 Rule 2 of the Code of Civil Procedure ("the Code", for short); and (*v*) the suit was barred by principle of constructive res judicata.

The suit was accordingly dismissed with costs of rupees fifty thousand.

9. In the preamble to the said order, the trial court observed that on 12-1-2009, when arguments were on the preliminary issue, it was clarified that arguments were being heard not only on the said preliminary issue, but also the question as to why independent of Section 11 and Order 2 Rule 2 of the Code, the suit should not be dismissed summarily on the ground of relitigation and abuse of process of court. It is further stated that on 16-1-2009, the statement of the plaintiff (the appellant herein) was recorded and arguments on various aspects were heard on 16-1-2009 and 21-1-2009.

10. Feeling aggrieved, the appellant filed an appeal. An Appellate Bench of the High Court, by the impugned judgment dated 7-9-2009, dismissed the appeal. The Appellate Bench affirmed the decision of the Trial Bench. It however held that as it was agreeing with the learned Single Judge that the suit was barred by Order 2 Rule 2 of the Code and that the appellant had settled all her claims with the respondent under the bayana agreement dated 29-6-2004, it was not necessary to decide upon the question as to whether the partnership deed dated 5-4-2000 could be enforced in a court or not. The said order is challenged in this appeal by special leave.

11. For the reasons following, we are of the view that the orders of the learned Single Judge and the Division Bench which ignore several basic principles of the Code of Civil Procedure cannot be sustained.

I. A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon

12. We may extract Order 2 Rules 1 and 2 of the Code for ready reference:

> "1. *Frame of suit.*—Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.
>
> 2. *Suit to include the whole claim.*—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
>
> (2) *Relinquishment of part of claim.*—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) *Omission to sue for one of several reliefs.*—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

The object of Order 2 Rule 2 of the Code is twofold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

13. This Court in *Gurbux Singh* v. *Bhooralal*[1] held: (AIR p. 1812, para 6)

> "6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (*1*) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (*2*) that in respect of that cause of action the plaintiff was entitled to more than one relief; (*3*) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar."

Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier

1 AIR 1964 SC 1810

suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action.

14. In the instant case, the respondent did not contend that the suit was barred by Order 2 Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2 Rule 2 of the Code. But the High Court (both the Trial Bench and the Appellate Bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under Order 2 Rule 2 of the Code was not attracted

15. The first suit was for recovery of balance price under an agreement of sale. The agreement dated 29-6-2004 was not an agreement relating to dissolution of the firm constituted under the deed of partnership dated 5-4-2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it related to sale of the undivided half-share in the second floor at Rohini, 50% (property bearing No. 8, Pocket and Block C-9, Sector 8, Rohini, Delhi 110085) and 50% share of the business that was being run *in that premises*, that is, premises at Rohini. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of Takshila Institute constituted under the deed of partnership dated 5-4-2000, carrying on business at Bhera Enclave, Paschim Vihar, Delhi 110087 and for payment of the amounts due on dissolution of the said firm.

16. The pleadings in the two suits make it clear that both parties proceeded on the basis that the partnership between the appellant and the respondent under the deed dated 5-4-2000 was only in regard to the business run under the name and style of "Takshila Institute" at Bhera Enclave, Paschim Vihar, Delhi 110087. The appellant proceeded on the basis that the property at Rohini and the business carried therein under the name of Takshila Institute, was not a part of the partnership business under deed dated 5-4-2000. Even the respondent in his written statement in the first suit asserted that the partnership dated 5-4-2000 between the appellant and the respondent did not extend to Takshila Institute at Rohini or other places. In fact the appellant clearly contended that the respondent was carrying on business under the same name of Takshila Institute at Janakpuri, Ashok Vihar and Kalu Sarai in Delhi and also at Dehradun and Palampur, but they were not partnership businesses. The respondent in his written statement asserted that he alone was carrying on business at those places under the name of

Takshila Institute. Therefore, the court could not, before trial, assume that the sale of the appellant's share in the immovable property at Rohini and the goodwill and assets of the business carried on at Rohini under the name of Takshila Institute should be taken as relinquishment or retirement or settlement of share in regard to the partnership business of Paschim Vihar Takshila Institute.

17. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29-6-2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under the deed dated 5-4-2000. The two causes of action are distinct and different. Order 2 Rule 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of "Takshila Institute" and the second suit referred to a partnership in regard to business run at Paschim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action.

18. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of the plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code.

III. The second suit was not barred by constructive res judicata

19. The learned Trial Bench passed the order on 13-3-2009 on the preliminary issue (Issue 1) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order: "Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable." This was not interfered by the Appellate Bench. Both proceeded on the basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons.

20. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant-plaintiff an opportunity to meet the case based on such plea.

21. Res judicata means "a thing adjudicated", that is, an issue that is finally settled by judicial decision. The Code deals with res judicata in Section 11, relevant portion of which is extracted below (excluding Explanations I to VIII):

> "11. *Res judicata.*—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."

22. Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:

(*i*) The matter must be directly and substantially in issue in the former suit and in the later suit.

(*ii*) The prior suit should be between the same parties or persons claiming under them.

(*iii*) Parties should have litigated under the same title in the earlier suit.

(*iv*) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

(*v*) The court trying the former suit must have been competent to try the particular issue in question.

23. To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression "former suit" refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that:

> "*Explanation IV.*—Any matter which might and ought to have been made a 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."

The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue".

24. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or defence,

shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed.

25. The principle underlying Explanation IV to Section 11 becomes clear from *Greenhalgh* v. *Mallard*[2] thus: (All ER p. 257)

> "... it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*." (emphasis supplied)

26. In *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*[3], a Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to *Forward Construction Co.* v. *Prabhat Mandal*[4] thus: (*Direct Recruit Class II case*[3], SCC p. 741, para 35)

> "*35.* ... an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

In the instant case, the High Court has not stated what was the ground of attack that the appellant-plaintiff ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata.

IV. A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff

27. The Code of Civil Procedure is nothing but an exhaustive compilation-cum-enumeration of the principles of natural justice with reference to a proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no

2 (1947) 2 All ER 255 (CA)
3 (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348
4 (1986) 1 SCC 100

short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.

28. The Code enumerates the circumstances in which a civil suit can be dismissed without trial. We may refer to them (not exhaustive):

(*a*) Dismissal as a consequence of rejection of plaint under Order 7 Rule 11 of the Code in the following grounds:

(*i*) where it does not disclose a cause of action;

(*ii*) where the relief in the plaint is undervalued and the plaintiff fails to correct the valuation within the time fixed;

(*iii*) where the court fee paid is insufficient and the plaintiff fails to make good the deficit within the time fixed by court;

(*iv*) where the suit appears from the statement in the plaint to be barred by law;

(*v*) where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Order 7 Rule 9 of the Code.

(*b*) Dismissal under Order 9 Rule 2 or Rule 3 or Rule 5 or Rule 8 for non-service of summary or non-appearance or failure to apply for fresh summons.

(*c*) Dismissal under Order 11 Rule 21 for non-compliance with an order to answer interrogatories, or for discovery or inspection of documents.

(*d*) Dismissal under Order 14 Rule 2(2) where issues both of law and fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only and it tries such issue relating to jurisdiction of the court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the decision on such preliminary issue warrants the same.

(*e*) Dismissal under Order 15 Rule 1 of the Code when at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact.

(*f*) Dismissal under Order 15 Rule 4 of the Code for failure to produce evidence.

(*g*) Dismissal under Order 23 Rules 1 and 3 of the Code when a suit is withdrawn or settled out of court.

29. The following provisions provide for expeditious disposal in a summary manner:

(*i*) Order 5 Rule 5 of the Code requires the court to determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit (and the summons shall have to contain a direction accordingly). In suits to be heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

(*ii*) Order 15 Rule 3 of the Code provides:

> "3. *Parties at issue.*—Where the parties are at issue on some question of law or of fact, and issues have been framed by the court as hereinbefore provided, if the court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:"

(But where the summons has been issued for the settlement of issues only, such a summary course could be adopted only where the parties or their pleaders are present and none of them objects to such a course.)

(*iii*) Order 37 Rule 1 read with Rules 2 and 3 of the Code relating to summary suits.

30. But where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced without a trial.

31. In this case, the learned Single Judge has adjudicated and decided questions of fact and rendered a judgment, without evidence tested by cross-examination. We extract below some of the reasonings, findings, assumptions and conclusions of the learned Single Judge leading to the dismissal of the suit when hearing a preliminary issue relating to res judicata, thereby demonstrating assumption of a jurisdiction not vested in it and also acting in the exercise of its jurisdiction illegally and with material irregularity:

> "What emerges from the aforesaid is that the plaintiff at the time of inception of the partnership and till date is a government teacher and under the terms of her employment was not entitled to enter into the partnership and was not entitled to earn any profits therefrom. Not only under the terms of her employment, *the plaintiff before the Service Tax Authorities also represented that she had only academic interest. It can only mean that she had no profit interest in the partnership.* Though the plaintiff has denied that she has filed the clearance certificate aforesaid with the government school in which she is employed but the purpose of the plaintiff obtaining the said clearance certificate from the defendant can only be to use the same in the event of any complaint of breach of terms of employment being made against her.
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> The *question which arises for adjudication* is whether a litigant can be permitted to take a stand in the court, diametrically opposite to the stand of that litigant elsewhere. Can there be different stands before the

Government as employer and before the Taxation Authorities and before the court? Should the courts permit such stand to be taken in the course of judicial proceedings and should the courts come to the rescue of such a litigant in recovering dues which that litigant elsewhere has represented are not due to her?

The aforesaid circumstances leave no manner of doubt that the plaintiff in contravention of the terms of her employment was carrying on business as a partner with the defendant. The question is of enforcement of such a partnership and/or the terms thereof by the court.

* * *

In the present case the condition in the terms of the employment of the plaintiff as a government teacher, admittedly prohibits her from carrying on any business activity or other vocation for profits. Such condition has been imposed to ensure that the teachers of the government school devote their full energy and time to developing the young minds, rather than treating the government service as a mere source of income and utilising their time and skill in earning/making money elsewhere. The plaintiff by entering into the agreement of partnership with the defendant had clearly violated her terms of employment and this Court cannot come to her assistance to enable her to earn profits which she otherwise is not entitled.

The plaintiff has admitted to having not shown any profits whatsoever in her income tax return. It is inconceivable that the plaintiff who has claimed to be in partnership since the year 1999 or 2000 would not have earned any profits from the partnership and/or if would not have earned would have sat quietly for four years. The plaintiff cannot be permitted to take different stands before different fora. The condition/ term of employment prohibiting the plaintiff from entering into partnership is found to be in public interest and the action of the plaintiff of breaching/violating the same is found to be immoral and opposed to public policy. The breach is not found to be trivial or venial. Further, the conduct of the plaintiff thereafter also, as noted above is found to be of subterfuge and the plaintiff has been found to be misstating facts. *The plaintiff is found to be an unscrupulous person and her case is found to be based on falsehood. This Court refuses to come to the aid of the plaintiff and her case is liable to be dismissed summarily.*

That even on the facts of this case, I have no doubt that the plaintiff has abused the process of the court. The plaintiff in the bayana agreement aforesaid had clearly agreed to the sum of ₹21.50 lakhs towards her share in the partnership firm inclusive of the value of the Rohini property where the partnership business was being carried on. As far as the Paschim Vihar property is concerned, the issue with respect whereto was raised, the same also finds mention in the said bayana agreement and the receipt. *The conduct of the plaintiff also shows that all accounts had been settled and no accounts remained to be taken and for which purpose the*

suit had been filed. Had the accounts not been settled, the question of the plaintiff instructing the bank to delete her name from the account in the name of the firm and of receiving the original bayana agreement and of obtaining the clearance certificate aforesaid would not have arisen. The case set up by the plaintiff is contrary to all the admitted documents.

* * *

I find the present case to be clear beyond all reasonable doubts. The bayana agreement and receipt admittedly executed by the plaintiff and the averments of the plaintiff in the plaint in earlier suit instituted by the plaintiff, permit of no controversy. The consideration mentioned therein was in settlement of all claims of the plaintiff with respect to her share in partnership. The contemporaneous conduct of the plaintiff, of statement on 13-8-2004 in Suit No. 438 of 2004 instituted by the defendant; of taking clearance certificate dated 13-8-2004 from the defendant, of having her name as signatory deleted from the bank account of firm are also in consonance with said documents. *The facts of this case do not require any opportunity for leading evidence to be given to the plaintiff. This Court cannot put a case contrary to such documents and conduct to be put to trial.* The explanations now given during arguments do not form the basis of suit and pleadings." (emphasis supplied)

32. The observation of the learned Single Judge that "the facts of this case do not require any opportunity for leading evidence to be given to the plaintiff" violates Order 15 Rule 3 of the Code. Where summons have been issued for settlement of issues and where issues have been settled, unless the parties agree, the court cannot deny the right of parties to lead evidence. To render a final decision by denying such opportunity would be high-handed, arbitrary and illegal. Even the Division Bench committed the same error.

33. We extract below para 14 of the impugned order which shows that the decision was based on assumption without basis and in the absence of evidence freely referring to and relying upon unexhibited documents:

"This is not the case of the appellant-plaintiff that the firm was maintaining separate accounts, one for the business being run by it in Rohini and the other for the business being run in Paschim Vihar. Ordinarily, when there is a settlement between the partners of the firm whereby they agree to part ways, the settlement effected between them would cover accounts of the entire business being run by them in partnership and it would not be confined only to one part of the business. This is more so when the document executed between the parties at the time of parting ways and settling the disputes does not reserve any right in favour of the outgoing partner, to receive any further payment from the partner who retains the business of the erstwhile firm.

In none of the documents executed between the parties, there is an averment that the accounts of business being run in Paschim Vihar had not been settled or that the appellant-plaintiff would not, in addition to the sum referred in the document, also be entitled to share of the profit

earned by the firm from its business in Paschim Vihar. Vide endorsement made on the receipt dated 29-6-2004, the husband of the appellant recorded that Paschim Vihar institute deed would be settled in the name of Dr. Rashmi Gupta for the consideration of ₹15 lakhs. *This is yet another proof of the fact that the matter relating to Paschim Vihar institute had also been finally settled between the parties.*

During the course of arguments before us, it was contended by the learned counsel for the appellant that the endorsement was made by the husband of the appellant without authority from her. Since we noticed a gentleman giving instructions to the learned counsel for the appellant, during the course of the hearing before us, we asked her as to who the gentleman was and we were told that he was none other than the husband of the appellant. *This leaves no doubt in our mind that the husband of the appellant was acting on authority from her when he made endorsements on the bayana agreement and receipt dated 29-6-2004.* The shifting stands taken before him have been noted in detail, by the learned Single Judge." (emphasis supplied)

34. The High Court recorded factual findings on inferences from the plaintiff's (appellant) conduct and branded her as an unscrupulous person who abuses the process of court and as a person who utters falsehoods and manipulates documents without there being a trial and without there being an opportunity to the plaintiff to explain her conduct. To say the least, such a procedure is opposed to all principles of natural justice embodied in the Code of Civil Procedure. At all events, the alleged weakness of the case of the plaintiff or unscrupulousness of the plaintiff are not grounds for dismissal without trial.

35. We also fail to understand how costs of ₹50,000 could be levied. This Court has repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of the Code of Civil Procedure in levying costs.

36. This order should not be construed as a finding on the conduct of the appellant one way or the other. We have examined the matter only for the limited purpose of finding out whether the High Court had proceeded in accordance with law and the provisions of the Code of Civil Procedure. If on evidence, the conduct of the plaintiff or the defendant is found to be unscrupulous or unbecoming, it is open to the court at that stage to decide upon the consequences that should be visited upon her or him.

37. We therefore allow this appeal, set aside the order of the Division Bench of the High Court dated 7-9-2009 affirming the order dated 13-3-2009 of the learned Single Judge and restore the suit to the file of the High Court with a direction to decide the same in accordance with law, after giving due opportunity to the parties to lead evidence.

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