

Mathurabai and anr. Vs. Ramkrishna Bhaskar Barve and ors.

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Court : Mumbai

Decided On : Nov-25-1959

Reported in : AIR1961Bom97; (1960)62BOMLR360; ILR1960Bom493

Judge : Kotval and ;Raju, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11 and 52 - Order 41, Rules 4 and 33; [Indian Contract Act, 1872](#) - Sections 65; Transfer of Property Act - Sections 35; Specific Relief Act - Sections 41; Limitation Act - Schedule - Article 98

Appeal No. : Letters Patent Appeal No. 115 of 1955

Appellant : Mathurabai and anr.

Respondent : Ramkrishna Bhaskar Barve and ors.

Advocate for Def. : B.R. Mandlekar, ;M.R. Mandlekar, ;D.B. Padhye, ;J.N. Chandurkar and ;N.S. Munshi, Advs.

Advocate for Pet/Ap. : D.K. Baxy, Adv.

Judgement :

Raju, J.

1. This is a Letters Patent appeal by the widow and son, who are legal representatives of the deceased Nilkanth who was original defendant No. 1, from the judgment and decree of Mr. Justice Deo in Second Appeal No. 851 of 1955. The material facts necessary for deciding this appeal are as follows:

2. A house belonging to the Deosthan of Prabhu. Dattatraya of Arvi was sold by two of the trustees of the Deosthan, namely, Nilkanth and Boliram (defendants 1 and 2) to the plaintiff Ramkrishna, for Rs. 2000/- on 12-3-1945. The plaintiff was put in possession of the house. On 23-2-1945 the two trustees purchased field No. 17/1 belonging to the plaintiff Ramkrishna, for Rs. 1800/- in 1947, Gangadhar, another trustee of the Deosthan, and one Chintaman, Pujari of the Deosthan, instituted Civil suit No. 8-A of 1947 for a declaration that the sale of the house of the Deosthan in favour of the plaintiff Ramkrishna was void, for possession of the house, and for damages. That suit was decreed, the sale deed of the house of Deosthan having been declared void and not binding on the Deosthan, In that suit the purchaser of the house contended that if the sale deed of the house of the Deosthan was found to be void, the Deosthan should be put to terms and should be ordered to pay Rs. 2000/-, but this plea was also rejected on the ground that the alienee had failed to prove that the Deosthan had received any benefit from the transaction dated 12-3-1945 and on the ground that the alienee had also failed to prove that field No. 17/1 had been purchased out of the consideration for the sale dated 12-3-1945, and the Deosthan obtained a decree for possession of the house unconditionally. Against that judgment in Civil Suit No. 8-A of 1947 there was no appeal. Two and a half years later, in 1951, Ramkrishna. the vendee of the house of the Deosthan, brought the present suit out of which this appeal arises. The Deosthan was impleaded as defendant No. 6. Plaintiffs two vendors, namely, the two trustees Nilkanth and Baliram, were impleaded as defendants 1 and 2. The following reliefs were claimed in the plaint:

(a) Defendant No. 6 shall execute a sale-deed of field No. 17/1 for a consideration of Rs. 1800/-and put the plaintiff in possession.

(b) That a decree for Rs. 1793/- made up of Rs. 624/- decreed as insane profits in the earlier suit, Rs. 328/- for repairs, Rs. 227/- for municipal taxes, Rs. 200/- for the

balance of consideration and interest on Rs. 624/- on account of mesne profits decreed in the first suit, and other amounts.

(c) In the alternative the plaintiff claimed a decree against defendants 1 and 2 for Rs. 1800/-plus Rs. 1793/- and other small items.

3. This suit by Ramkrishna, the purchaser of the house belonging to the Deosthan, was dismissed by the trial court as against the Deosthan, but the trial Court decreed the claim as against defendants 1 and 2, Nilkanth and Baliram, for Rs. 2000/- and costs. Defendant No. 6 and the two vendors, defendants 1 and 2, preferred separate appeals. The first appellate court reversed the decree against defendants 1 and 2 for Rs. 2000/- and dismissed the suit as against them but decreed the claim as against the Deosthan (defendant No. 6) for execution of a sale deed in respect of survey No. 17/1, and also decreed mesne profits.

4. A second appeal was preferred to the High Court by the Deosthan (defendant No. 6) in which defendants 1 and 2 were made respondents. The plaintiff did not however appeal. In second appeal the learned Single Judge of the High Court allowed the appeal of the Deosthan and dismissed the suit against the Deosthan with costs throughout. But he decreed the plaintiff's claim against defendants 1 and 2. Leave was granted to the legal representatives of defendant No. 1 to file a Letters Patent appeal but as no leave had been applied for by defendant No. 2, defendant No. 2 has been joined as respondent in the Letters Patent appeal filed by the legal representatives, namely, the widow and son of Nilkanth, the original respondent No. 1.

5. The learned Single Judge of the High Court was of opinion that the first appellate Court erred in its decision that the judgment in the first Civil Suit No. 8-A of 1947 was not res judicata. He held that in that suit it was necessary for the final decision of that suit to frame issues and to decide the contentions raised by the present plaintiff in that suit and that therefore the finding in that suit that the consideration of the sale of the house did not reach the Deosthan operated as res judicata between the plaintiff and the Deosthan and also between the plaintiff and defendants 1 and 2 although plaintiff and defendants 1 and 2 were on the same side in the earlier suit. He further observed :

'....it was there held that defendant No. 6 had not received any benefit under the sale deed dated 12-3-45 and that. defendant No. 6 was not bound to make any compensation to the plaintiff as condition for obtaining a decree for possession.

In this view, it is not necessary to consider whether the plaintiff was at all entitled to any compensation under Section 65 of the Contract Act.'

Then he proceeded to consider the contention that a decree should be passed against defendants Nos. 1 and 2, for the consideration of Rs. 2000/- received by them and observed as follows.

'The finding in the earlier suit that the consideration did not reach defendant No. 6 operates as res judicata between the plaintiff and defendants Nos. 1 and 2 though they were on the same side in the earlier suit. The lower appellate Court dismissed the suit against them on the ground that they had not received any benefit under the sale deed. This finding is inconsistent with the finding in the earlier suit. Defendants 1 and 2 cannot escape the liability on the finding in the latter suit. The decree of the trial Court against them was correct.'

The learned Single Judge of the High Court therefore dismissed the suit against the Deosthan and decreed the plaintiff's claim against defendants 1 and 2.

6. The original Civil Suit No. 8-A of 1947 brought by the Deosthan for possession on the ground that the sale deed of the house of the Deosthan by two trustees was void was decreed, the sale deed having been found to be void because under the will executed by one Govindrao Therpal who had constituted the trust of the Deosthan, the trustees had no power to alienate the trust property but that they had power only to purchase property for the Deosthan. While decreeing the suit for possession filed by the Deosthan, the Court also decided whether the Deosthan should be put to terms regarding the refund of the consideration money of Rs. 2000/- paid by Ramkrishna for purchasing the house of the Deosthan. That Court held that the consideration did not reach the Deosthan and that therefore an unconditional decree should be passed in favour of the Deosthan without putting it to any terms regarding payment of money to Ramkrishna who had paid Rs. 2000/- for purchasing the house.

7. The learned Single Judge of the High Court held that this judgment in the original Civil Suit No. 8-A of 1947 against which no appeal had been preferred, operated as res judicata in the present litigation. He therefore held that the first appellate Court erred in decreeing the plaintiff's claim against the Deosthan. He however decreed the plaintiffs claim against defendants 1 and 2 for Rs. 2000/- which had been dismissed by the first appellate Court. Although the claim against defendants 1 and 2 had been dismissed by the first appellate Court and although the plaintiff did not go in appeal against that judgment. the learned Single Judge passed a decree in favour of the plaintiff who had not come in appeal.

8. In this Letters Patent appeal the following points have been argued by the learned counsel:

1. The learned Single Judge of the High Court erred in holding that the judgment in Civil Suit No. 8-A of 1947 was res judicata in the present litigation.

2. He erred in passing a decree in favour of plaintiff against defendants 1 and 2 although plaintiff had not come in second appeal before him.

3. In second appeal the decree was passed against the legal representatives of Nilkanth (defendant No. 1) although it is nobody's case that the widow and son reaped any benefit from the amount of Rs. 2000/- which had been paid by the plaintiff. Relying on Mt. Sahaundra Bai v. Shri Deo Radha Balabnji Mandir I. L. R. (1940) Nag 94 : AIR 1938 Nag 30, it is urged that the decree should not have been passed against the legal representatives of defendant: No. 1.

4. As the first appellate Court had dismissed the suit as against defendants 1 and 2 and there was no appeal by the plaintiff, the learned Single Judge of the High Court in second appeal was not justified in passing a decree against defendants 1 and 2 in favour of the plaintiff when the plaintiff had not appealed against the dismissal of his suit as against defendants 1 and 2.

9. On behalf of the Deosthan it is contended that the learned Single Judge was right in dismissing the suit as against the Deosthan. The learned counsel supports the judgment of the learned Single Judge and his finding that the judgment in Civil

Suit No. 8-A of 1947 is res judicata.

10. The Learned counsel for the plaintiff Ramkrishna (respondent No. 1) has contended that the judgment in Civil Suit No. 8-A of 1947 is not res judicata in the present litigation because the parties in both the litigations were not in the same capacity, particularly the than. He also relies on Section 35 of the Transfer of Property Act and contends that when the house of the Deosthan was sold, a benefit was reaped by the Deosthan by the purchase of survey No. 17/1 for the Deosthan and that therefore the Deosthan cannot repudiate the sale of its house while confirming the purchase of the field for the Deosthan. It is also contended by him that in Civil Suit No. 8-A of 1947 by the Deosthan for possession of the house, the alienee of the house had a discretion to ask for a relief under Section 41 of the Specific Relief Act. The Court also had a discretion under Section 41 of the Specific Relief Act on adjudging the cancellation of the sale deed dated 12-3-1945 to require the Deosthan to make any compensation to Ramkrishna who had purchased the house on payment of Rs. 2000/-. It is therefore contended that when a discretionary relief was asked for, the finding regarding such discretionary relief could not operate as res judicata in a subsequent litigation even if it relates to the same relief against the Deosthan or against the vendors namely, the trustees for the Deosthan.

11. In our opinion, with great respect, the learned Single Judge of the High Court rightly dismissed the suit against the Deosthan but erred in finding that the Judgment in Civil Suit No. 8-A of 1947 operated as res judicata between plaintiff and defendants 1 and 2 although they were all defendants in the earlier suit and in passing a decree against them for Rs. 2000/-.

12. In order to decide whether a particular judgment is res judicata or not one must look at the pleadings in the suit, the issues in that suit and the judgment in that suit. Suit 8-A of 1947 was by the Deosthan for possession of its house upon the allegation that two of the trustees who sold the house to Ramkrishna had no authority at all to alienate the property of the Deosthan because under the will of Govindrao Therpal constituting the trust of the Deosthan, the trustees had no power to alienate the property of the Deosthan although they had authority to

purchase property for the Deosthan.

The suit was therefore for possession of the house of the Deosthan notwithstanding that a sale deed had been executed by two of the trustees in favour of Ramkrishna. In that suit the two trustees were impleaded as parties but no relief was claimed against them. The only relief claimed was as against Ramkrishna for possession of the house which was in his possession. Ramkrishna who was defendant No. 1 in that suit admitted in the written statement that the trust had been created by a registered will, that there was no specific permission or authority given by the will to the trustees to alienate the trust property, but contended that there was also no prohibition against alienation. It was also contended that at the most the sale transaction was voidable one, that if the plaintiff Deosthan wanted the transaction to be set aside, possession should be restored to the Deosthan only on condition that it should refund to defendant No. 1 (the present plaintiff) the consideration of the sale deed, namely, Rs. 2000/- and some amount spent on repairs. It was also submitted in the written statement that the Deosthan had received Rs. 2000/- from the defendant No. 1 Ramkrishna and in consideration thereof the Deosthan had put the defendant No. 1 in possession of the house in suit. It is therefore clear from this statement that while resisting the suit by the Deosthan for possession of the house, Ramkrishna had pleaded that if possession was to be awarded to the Deosthan, it should be ordered to refund a sum in excess of Rs. 2000/- because the Deosthan had reaped the benefit of the receipt of the consideration of Rs. 2000/- for the sale.

13. Turning to the issues framed in that suit, we find that issue No. 5 is whether the alienation by some of the trustees was for legal necessity and for the benefit of the deity. The finding was that it was neither for the benefit of the deity nor for legal necessity. Issue No. 8 was whether the trustees or the deity could be put to terms before setting aside the sale. On this issue the finding was in the negative. In its judgment the trial Court in Civil Suit No. 8-A of 1947 held that the sale was absolutely void because it had not been executed with the concurrence or approval of all the trustees or a majority of them and had been executed by defendants 2 and 3 in that suit (present defendants 1 and 2) without the requisite authority. On the question whether the plaintiff deity should be put to terms, the

learned trial Judge in that suit observed as follows in his judgment:

'I consider that the plaintiff cannot be put to terms in the present case as it has not been specifically proved that the plaintiff has derived any benefit from out of the sum of Rs. 2000/- which the defendants 2 and 3 have received as consideration of sale in favour of the defendant No. 1 (Plaintiff in present suit) Neither the plaintiff nor the trustees are liable to pay the amount spent by the defendant No. 1, before obtaining the decree for possession.'

14. Consequently, Civil Suit No. 8-A of 1947 was decreed in favour of the Deosthan by awarding possession of the house. It is clear from the written statement that Ramkrishna claimed that the deity should be put to terms by being ordered to pay Rs. 2000/-. There was no prayer that the two trustees Nilkanth and Bahrain should be put to terms. The judgment in Civil Suit No. 8-A of 1947 would therefore be res judicata on the following points:

(1) Whether the sale deed of the house dated 12-3-45 was void or not, and

(2) whether in view of the fact that the sale deed was void, the Deosthan should be put to terms or made to refund Rs. 2000/- to Ramkrishna.

It could not be res judicata on the question whether the trustees Nilkanth and Bahrain should be ordered to refund Rs. 2000/- to the vendee Ramkrishna, because that issue was not raised in the pleadings. The plaintiff Deosthan had claimed no relief as against the trustees. The controversy and the issues were between the Deosthan and the vendee Ramkrishna. The trustees were only made formal parties because the vendee Ramkrishna had taken a document from them in respect of the house belonging to the Deosthan. In that suit which was filed by the Deosthan there was no conflict of interests between Ramkrishna and the trustees who were all defendants. Moreover, none of them appealed against that judgment. Ramkrishna who alone had failed in that judgment could have appealed, and as he had not appealed, that judgment would be res judicata against him on the points referred to above. But Nilkanth and Baliram, the two trustees, had not failed in that litigation. There was no decree against them. In fact, no relief was claimed against them. It is true, that they have not gone in appeal,

but the judgment did not contain any adverse finding as against them, and even if the judgment contained an adverse finding against them, as they had succeeded in the litigation it was not necessary for them to go in appeal and the judgment could not constitute res judicata, because if a party succeeds in a suit or appeal the judgment would not operate as res judicata even if there is an adverse finding upon some other matter. It is only when the suit or appeal is decreed against a party that the party can go in appeal and challenge the decree. In *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy* ILR 48 Cal. 460 : AIR 1922 PC 241 their Lordships observed as follows:

'Their Lordships do not consider that this will found an actual plea of res judicata, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them;

As the judgment in Civil Suit No. 8-A of 1947 was not adverse to Nilkanth and Baliram, no findings in that judgment can operate as res judicata as against them. In fact, there is no adverse finding against them because the Judge observed that neither the plaintiff Deosthan nor the trustees Nilkanth and Baliram were liable to pay the amount of Rs. 2000/-. The finding on issue No. 8 is that neither the trustees nor the deity can be put to terms before setting aside the sale. The finding on this issue is therefore not adverse either to the deity or to the trustees who sold the house to Ramkrishna.

15. The learned Single Judge of the High Court, however, thought that this judgment operated as res judicata because in his opinion if a point is raised in the pleadings and the parties have joined issue thereon, a decision on it operates as res judicata between the parties even though the point was not properly raised, and he referred to the decisions in *Midnapore Zamindary Co. Ltd. v. Naresh Narayan Roy* ILK 51 Cal 631 : AIR 1924 PC 144, *Krishna Chendra v. Challa Ramanna and Prabhudayal v. Chhotelal* . In ILR 51 Cal. 631 : AIR 1924 PC 144 their Lordships of the Privy Council agreed with the following observations on the question of res judicata made by Sir John George Woodroffe and Walmsley JJ:-

'It was contended before us that whatever the appellants might have done in this respect, the issue in fact was not a necessary or proper one to be tried in that suit,

and that it is open to us to say so. But we must see first whether the Court adjudged otherwise, that is, whether this Court having the question before its mind decided that the issue did arise. If so, that decision would be as much *res judicata* as the final determination of the issue on the merits. If we are of opinion that the Court did so decide, we are not concerned to see whether it did so rightly or not, and indeed cannot do so. Now, this is not a case, as not infrequently happens, where incidentally some point is decided which is not necessary, which was not of first-rate importance or specially brought to the notice of the Court. The plaintiff had excluded the question by the statement of his pleader. The First Court had therefore expressly stated that it could not decide it. The defendant, the present appellant, has expressly urged that the Judge was wrong in not deciding this question even though his action was based on the plaintiff's adviser's statement and he asked this Court expressly to decide it. As the Court did so, it seems to us that we ought to assume not that it did something which was unnecessary, but that in so far as it decided the point raised, it must also have decided that the defendant's objection that the point should be tried was a good one and that the issue was one which did arise in the suit.'

It was also observed:

'But if so. what was the necessity of discussing the question in the judgment? We ought not, we think, to assume that the Judges discussed a question which was irrelevant to the case, and then granted no relief in respect of it; but rather that as they had discussed and negatived the alleged tenancy right in the judgment they intended to. and did, give a decree which should received effect to these findings. It so, the learned Judges' decree in effect gave to the respondents before us a right to the lands in that suit free of the alleged tenancy right claimed. We are of opinion, therefore, that the issue as to the appellants right is *res judicata*.'

It is therefore clear that if any of the parties raises an issue and the Court agrees that that issue did arise and was necessary for determining the question at issue and decides it. its decision on that issue would be *res res judicata* even if the suit might or should have been properly determined without deciding that issue. In it was held that where a point is not properly raised by the plaintiff, but both parties

have without protest chosen to join issue upon that point, the decision on the point would operate as res judicata between the parties. In it was observed:

'Where a point is raised in the pleadings and the parties have without protest joined issue thereon a decision on it operates as res judicata between the parties even though the point was not properly raised and the finding on the point was not necessary and the previous suit could have been decided independently of the decision upon that issue.'

But in our opinion the facts of the instant case do not warrant the application of those principles. As already pointed out in Civil Suit No. 8-A of 1947, the plaintiff did not raise any question as to whether the consideration money of Rs. 2000/- had been utilised by defendants 1 and 2 who were defendants 2 and 3 in that litigation. Nor was this question raised in the written statement. In the written statement what was contended was merely that the Deosthan, which was the plaintiff, had reaped the benefit of the amount of consideration and it was therefore contended that the plaintiff Deosthan should not get possession of the house unless it was ordered to refund Rs. 2000/-, the amount of consideration for the sale deed, on the assumption that the sale deed was void. There was therefore no contention in the pleadings that the vendors of that sale deed should be ordered to refund Rs. 2000/-. This question also was not necessary to be decided. While framing the issue 8, however, the trial Judge added the names of the defendants and framed the issue as 'Whether the trustees or the deity can be put to terms before setting aside the sale'. But In the discussion on the issue there is no reference to the question whether the trustees had reaped the benefit of Rs. 2000/- the consideration paid by the vendee. This is not therefore a case where the parties had joined issue on the question of the liability of defendants 1 and 2 to refund the consideration money to another defendant. The cases cited therefore do not apply to the facts of the instant case.

16. Further, in fact, there is no adverse finding to operate as res judicata. The finding is in fact in favour of defendants 1 and 2. The finding is that they are not liable to refund Rs. 2000/- to Ram-krishna. For both reasons, namely, that in fact the parties did not join issue and also because there is no adverse finding in that

judgment against the present defendants 1 and 2, that judgment does not operate as res judicata on the question of the liability of defendants 1 and 2 to pay Rs. 2000/- to Ramkrishna. But that judgment does operate as res judicata on the question whether defendant No. 6, the Deosthan, was liable to pay Rs. 2000/- to Ram-krishna. The finding on this question was against Ramkrishna and would operate as res judicata in this case. The question therefore should not have been tried in the present litigation and should not have influenced the decision of the trial Court or of the first appellate Court. The learned Single Judge of the High Court, with great respect, therefore rightly dismissed the suit as against the Deosthan.

17. The next question for determination is whether the learned Single Judge of the High Court was justified in passing a decree afferents defendants 1 and 2 when the suit against them was dismissed by the first appellate Court and there was no appeal by the plaintiff. The learned Single Judge thought that the finding in the first suit that the consideration did not reach the Deosthan (defendant No. 6) operated as res judicata between the present plaintiff and defendants 1 and 2 though they were on the same side in the earlier suit. In that suit by the Deosthan there was no conflict of interests between the trustees and Ramkrishna who were all defendants as no relief was claimed against the trustees. There was in fact, a finding that the consideration did not reach the Deosthan. That would not amount to a finding that the consideration had reached some other persons, namely, defendants 1 and 2. In tact, as already pointed out, there is a finding that neither the Deosthan nor the two vendors were liable to refund the amount of Rs. 2000/-. With great respect the learned Single Tudee therefore, in our opinion, erred in observing that the finding of the first appellate Court that defendants 1 and 2 had not received any benefit under the sale deed is inconsistent with the finding in the earlier suit which operates as res judicata. The learned Single Judge observed that defendants 1 and 2 could not escape the liability and that the decree of the trial Court against them was therefore correct. The learned Single Judge restored the decree of the trial Court. If the judgment in the earlier suit operates as res judicata, the finding therein was that defendants 1 and 2 are not liable to refund Rs. 2000/- to Ramkrishna, Ramkrishna did not go in appeal against that judgment. With great respect, therefore, we are of opinion that the learned Single Judge should not

have reversed the dismissal by the first appellate Court of the suit against defendants 1 and 2 merely on the ground that the question of res judicata had been misjudged by the first appellate Court and on the ground that in fact the judgment in suit No, 8-A of 1947 operated as res judicata.

18. As regards the contention that the learned Single Judge should not have passed a decree in favour of the plaintiff against defendants 1 and 2 because the appeal before him was filed by defendant No. 6, the Deosthan, and not by the plaintiff, reliance is placed on Order 41, Rule 33, Civil Procedure Code. The learned Single Judge could therefore have passed a decree in favour of a respondent although he had not filed an appeal or cross-objections.

19. AS regards the contention that no decree should have been passed by the learned Single Judge against the legal representatives, namely, the widow and son of defendant No. 1, reliance is placed on ILR (1940) Nag 94: AIR 1938 Nag 30 for the contention that even if a decree could have been passed against defendant No. 1, no decree could have been passed against his legal representatives unless it is shown that the legal representatives had derived some benefit from the transaction. In our opinion, this Nagpur case relates to a question of breach of trust and it has no application to a case where the consideration received for a sale deed should be ordered to be refunded under Section 65 of the Contract Act if the sale deed is discovered to be void or becomes void. In the Nagpur case the suit had been filed for making good out of the joint estate of the deceased trustee, the loss occasioned by breach of trust by him. The suit was filed against the daughter of the deceased trustee in respect of the breach of trust said to have been committed by her father. She herself was not the trustee and she did not commit any wrong act. The defaulted money was also not in her possession. It was therefore held that the suit against her was one under Article 98 of the First Schedule to the Limitation Act to make good out of the joint estate of the (trustee the loss occasioned by breach of trust. This decision is therefore no authority for the proposition that the legal representatives of a person who had entered into a contract cannot be sued for compensation under Section 65 of the Contract Act. If a suit is filed against the legal representatives of a deceased person for what the deceased person had done, the decree can provide that the money should be paid

out of the property of the deceased in the hands of the legal representatives. Vide Section 52 of the Civil Procedure Code. In the present case defendant No. 1 was alive when the suit was filed and his legal representatives were joined as parties only in second appeal. There is therefore no merit in the objection that no decree could be passed against the legal representatives of defendant No. 1.

20. Mr, Mandlekar, learned counsel for the alienee, the plaintiff, has contended that the parties to Civil Suit No. 8-A of 1947 had not the same capacity as the parties to the present litigation and that the capacity of the Deosthan in both the suits is different. His contention is that in the earlier suit the Deosthan had filed the suit in the capacity of owner of the house, while in the second suit the Deosthan is joined as a person intermeddling and receiving Rs. 2000/-. In our opinion, this contention has no merit for two reasons (i) because the Deosthan cannot intermeddle, it being not a human being; it can only act through trustees; (ii) in both the suits the Deosthan was treated as the owner of the property i.e. the house in question. As owner, a person who sells the property receives its consideration, but it cannot be said that his capacity as owner is different from his capacity in receiving consideration money.

21. In our opinion, Section 35 of the Transfer of Property Act has no application to the facts of this case because this is not a case where in the same transaction property is transferred and also a benefit is conferred in which case only Section 35 applies.

22. As regards the contention that the relief for the refund of Rs. 2000/- claimed in the earlier suit was a discretionary relief under Section 41 of the Specific Relief Act it is urged that there tore the principle of res judicata cannot apply to issues arising from discretionary reliefs claimed. It is unnecessary to consider whether a discretionary relief will fall under Explanation IV to See. 11, Civil Procedure Code, which provides that 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. But if a relief is claimed in fact, whether discretionary or not, and an issue raised on it the principle of res judicata would apply as the relief, though discretionary, having been claimed, it is

a matter directly and substantially in issue. If a particular issue has not been raised, the principle of res judicata would still apply to it if that issue ought to have been made a ground of defence or attack. But this principle would not apply if the raising of that issue was discretionary and not obligatory. The question of relief under Section 41 of the Specific Relief Act was of course discretionary in the earlier suit, but where it was discretionary or obligatory it was in fact raised by the defendant in the earlier suit and became a matter directly and substantially on issue and therefore the principle of res judicata would apply provided the other requirements of Section 11, Civil Procedure Code, are satisfied.

23. With great respect, therefore, we are of opinion that the learned Single Judge of the High Court erred in decreeing the claim for Rs. 2000/- against defendants 1 and 2. It is however contended by Mr. Mandlekar, learned counsel for the plaintiff alienee, that as leave to file the Letters Patent appeal had been granted only to defendant No. 1 and not to defendant No. 2, the decree passed against defendant No. 2 should not be set aside even if the Court decides to set aside the decree against defendant No. 1. But both defendants 1 and 2 were in the same position and the alienation was made by both of them jointly, and in view of the provisions of Order 41, Rule 4, and Order 41, Rule 33, Civil Procedure Code, we do not think that this is a case where while setting aside the decree passed against defendant No. 1, we should maintain the decree against defendant No. 2. We therefore allow the appeal and set aside the decree passed against defendants 1 and 2.

24. As regards costs, in view of the circumstances stated at the beginning of this judgment, we order that costs in the Second Appeal as well as the costs in the Letters Patent Appeal should be borne as incurred.

25. Cross-objections have also been filed by the plaintiff, contending that the decree should have been passed against the Deosthan (defendant No. 6) in respect of the field and also in the alternative for the payment of Rs. 2000/-. As regards the payment of Rs. 2000/-, this was clearly decided in Civil Suit No. 8-A of 1947, and the finding in that suit that the Deosthan cannot be put to terms and cannot be made to pay Rs. 2000/- is res judicata on the present plaintiff who had not appealed against that judgment. As regards the question of the field, it was

also pleaded in the written statement in the earlier suit that in case a decree for possession of the house was passed in favour of the Deosthan, the field purchased for the Deosthan and Rs. 700/- which had been spent over and above the price of the land should be directed to be given by the Deosthan to Ramkrishna (plaintiff) who was defendant No. 1 in the earlier suit. This issue is included in issue No. 8 in suit No. 8-A of 1947, namely 'whether the trustees or the deity can be put to terms before setting aside the sale'. On this issue the question whether one such term should be to require the deity to transfer the field was included and this issue was decided in the negative. The reason given was that it has not been proved that the field purchased in the name of the Deosthan had been mutated in its name or the lease money spent for its benefit and that it has not been proved that the Deosthan had derived any benefit from the sum of Rs. 2000/-. In other words the judge did not find it proved that the field had been purchased for the Deosthan out of Rs. 2000/-. Even if there was no separate issue regarding the field, under Explanation V to Section 11, Civil Procedure Code, any relief claimed in the plaint which is not expressly granted by the decree shall for the purposes of Section 11 be deemed to have been refused. The same principle would apply to a relief claimed in the written statement. In any case no law or authority has been cited in support of the contention that when a contract is discovered to be void or becomes void, property purchased from the consideration of the contract money should be restored or transferred. If Section 65 of the Contract Act applies the benefit received from the contract must be restored or compensation made for it. But this principle cannot be extended to properties purchased from the consideration of a void contract. We therefore reject the cross-objections also, but in view of the circumstances all parties should bear their own costs.

26. Appeal allowed. Cross objections dismissed.