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Court : Rajasthan

Decided On : Sep-09-1966

Reported in : AIR1967Raj272

Judge : Kan Singh, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

Appeal No. : First Appeal No. 40 of 1957

Appellant : Laxmichand and ors.

Respondent : Ramkumar and ors.

Advocate for Def. : R.K. Rastogi and; H.C. Rastogi, Advs.

Advocate for Pet/Ap. : C.L. Agarwal,; A.C. Inani,; R.S. Kejriwal and;

Judgement :

Kan Singh, J.

1. This is a plaintiff's appeal and is directed against the judgment and decree of the learned District Judge, Alwar, whereby he dismissed the plaintiff's suit except for a simple money decree in a sum of Rs. 320 against Fatehlal only. The action was commenced by the plaintiff-appellant Kanhaiyalal on 22-2-1945 in the court of the District Judge, Alwar and by it he sought a declaration that Fatehlal (defendant

No. 2) was the adopted son of one Hiralal and he had a right to mortgage the shop in dispute with him and he sought the consequential relief of possession of that shop from the defendants. The case with which the plaintiff-appellant came to the court was briefly this :

2. The dispute relates to a shop situate in the Alwar City. It originally belonged to one Hiralal who died in the year 1920 without leaving any male issue. Hiralal was survived by his widow Smt. Dhanni. According to the plaintiff Fatehlal defendant was adopted by Smt. Dhanni sometime in the Samvat year 1982 corresponding to the year 1925. At the time of his adoption Fatehlal was said to be a minor aged about 15 years. He was the natural son of one Jugal Kishore who is said to be the real brother of Hiralal. Ramkumar defendant was another son of Jugal Kishore. The plaintiff proceeded to say that the shop was let out to him on rent by Smt. Dhanni on behalf of her adopted son Fatehlal for a period of 10 years on 29-12-1925. According to him, an indenture was executed by the plaintiff in favour of Fatehlal and he also got it executed in counter-part in his favour by Smt. Dhanni. He maintains that on the expiry of this period of 10 years he executed another rent note on 16-1-1936 in favour of Fatehlal and he continued in possession of the shop. On 4-4-1938, Fatehlal executed a mortgage deed for the shop in question in favour of the plaintiff for a consideration of Rs. 4,000 which carried an interest of 12 per cent per annum. On 27-5-1938, Smt. Dhanni filed a suit for arrears of rent and ejectment against the plaintiff saying that the plaintiff was put in possession of the shop by her and he was her tenant. Smt. Dhanni also averred in that suit that the plaintiff had executed a rent note in her favour, but she suppressed the original rent note, according to the plaintiff, in that suit. While that suit was pending, Smt. Dhanni expired and defendant Ramkumar who claimed to have been adopted by Smt. Dhanni by a registered deed came to be substituted in her place as her legal representative and the suit was continued by Ramkumar. This suit was dismissed by the trial court, but it was decreed against the plaintiff by the High Court of the ex-Alwar State on 9-12-1944. Ramkumar then transferred this decree in favour of defendant Hiralal and he also sold away the shop to him and in execution of that decree the plaintiff was evicted from the shop. The plaintiff has brought this suit for the possession of the shop on the basis of the mortgage said to have been executed by defendant Fatehlal in his favour, I ought to mention here that to start

with the plaintiff sought a relief for declaration only, but as subsequent to his filing the suit new developments had taken place consequent to the transfer of the decree and the disputed property in favour of Hiralal the plaintiff sought permission to amend his plaint and eventually amended the plaint by seeking the relief for possession of the property. The plaintiff also averred that Fatehlal being the validly adopted son of Hiralal the adoption having been made by his widow in the year 1925, the subsequent adoption of Ramkumar in the year 1937 was of no avail to the defendants. In the alternative the plaintiff prayed for a money decree for a sum of Rs. 9750 against Fatehlal.

3. The defendants contested the suit. They denied that Fatehlal had, at any time, been adopted by Smt. Dhanni as alleged. It was asserted on their behalf that Smt. Dhanni had all along been treating all the property left by her husband as her own and had adopted Ramkumar only in the year 1937 by a registered deed. They also raised the plea of res judicata on the ground that since in the earlier suit of ejectment filed by Smt. Dhanni and thereafter continued by Ramkumar on her death, the question of mortgage by Fatehlal had been raised and decided, the plaintiff was no longer entitled to maintain another suit on the basis of the mortgage deed. Some other pleas were also raised which I need not enumerate here, for reasons that will be clear from this judgment.

4. The learned District judge framed as many as 24 issues, but I need not re-count them again for the reasons that will be clear in the course of the discussion. The learned counsel for the appellant has submitted that the only issue on which the fate of the case turned was the one relating to the adoption of Fatehlal by Smt. Dhanni and it was issue No. 2: whether Fatehlal is a validly adopted son of Smt. Dhanni. Mr. Rastogi, who argued the case for respondents Nos. 1 and 3, Ramkumar and Hiralal respectively, submitted that the decision of the learned District Judge on the issue of adoption of Fatehlal by Smt. Dhanni was correct and he also reiterated the plea of res judicata. Besides he also submitted in the alternative that at any rate the decision of the High Court of Alwar on the question of the genuineness of the document Ex. P/2, counterpart of the rent-note, relied on by the plaintiff-appellant was res judicata and that question cannot be agitated once again in the present litigation. It will thus be clear that the other issues do not

merit consideration and the discussions will be confined on the points that were debated before me by learned counsel on either side.

5. Before proceeding to examine the contentions raised by the learned counsel, I may briefly summarise the findings of the learned District Judge on the questions that were debated before me.

6. The learned District Judge first went into the question whether Smt. Dhanni who is said to have adopted Fatehlal after the death of her husband had any authority to make the adoption. For considering this aspect of the matter the learned District Judge referred to the statement of P. W. 4 Ramchander, saying that his was the sole statement on the question whether Smt. Dhanni had any authority of her husband to make the adoption. The learned District Judge then considered the question about the validity of the adoption and he observed, after referring to para No. 2 of the plaint, that on the plaintiff's own showing Smt. Dhanni had made the adoption of Fatehlal to herself and as this was against the canons of Hindu Law, according to the learned District Judge, he held that adoption to be invalid on that score. Then in dealing with the question of the ceremony of adoption he observed that it was strange that the plaintiff had not produced any other witness of the locality besides P. W. 4 Ramchander. He, however, referred to certified copies of the statements of Sarfaraz Hussain (Ex. P. 23) and Niyaz Ali (Ex. P 24) recorded in the earlier litigation. What he observed about them was that when mutation proceedings were taken in respect of the agricultural lands of Smt. Dhanni at the instance of Ramkumar, Sarfaraz Hussain and Niyaz Ali, who were the Lumbardars of the village, were present and they had stated before the Tehsildar that Ramkumar had been adopted by Smt. Dhanni. It was in view of this consideration that the learned District Judge did not attach any value to the statements Ex. P/23 and Ex. P/24. The learned District Judge then passed on to consider the question whether Ramkumar had been adopted by Smt. Dhanni and after considering the evidence bearing on that question eventually reached the conclusion that the adoption of Fatehlal by Smt. Dhanni in the year 1925 was not established. In support of this conclusion the learned District Judge also adverted to the subsequent conduct of Fatehlal when from time to time he described himself as the son of Jugal Kishore. The learned District Judge also observed that on the

death of Smt. Dhanni it was Ramkumar and not Fatehlal who had performed her obsequies.

7. Issues Nos. 6 and 7 were about the plea of res judicata and they were as follows:

'Issue No. 6. Whether Mst. Dhanni was not entitled to bring the previous suit decreed by the High Court?

Issue No. 7. Whether the point raised in issue No. 6 is res judicata?'

These issues were decided by the learned District Judge by his order dated 4-11-1946. The learned District Judge observed that Hiralal the defendant was the successor in interest of Smt. Dhanni and Ramkumar and thus the present suit was between the same parties who litigated the earlier suit. Then he considered para No. 3 of the plaint and observed that the question related to the adoption of Fatehlal as her son by Smt. Dhanni and as this was a matter which might and ought to have been made a ground of defence in the previous suit according to Explanation 4 of Section 11 of the Code of Civil Procedure this matter shall be deemed to have been a matter directly and substantially in issue in the previous suit. The plaintiff was thus not held entitled to bring the present suit during the life time of Fatehlal. Thus the learned District Judge held that the question of adoption of Fatehlal was barred on the plea of res judicata. Regarding issue No. 6, the learned District Judge, however, held that in so far as the plaintiff claimed to be the mortgagee of the property he was not bound by the decision of the High Court in the previous suit between Smt. Dhanni and himself.

8. I propose to deal with the plea of res judicata first. Mr. Rastogi submits that the twin matters, one relating to the validity of Fatehlal's adoption and the mortgage said to have been executed by him, were raised in the earlier suit and looking to all the circumstances of the case it can be said that these were directly and substantially in issue in the earlier suit and, therefore, the plaintiff was debarred from re-agitating these very matters in the present litigation. He has invited my attention to quite a large number of rulings. They are: *Isher Singh v. Sarwan Singh*, AIR 1965 SC 948, *Bhagwati Prasad v. Chandramaul*, AIR 1988 SC 735,

Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy, AIR 1924 PC 144, Biswanath Bagchi v. Jitendra Nath, ILR (1951) 1 Cal 383, Indra Sekhar v Raju Bala, AIR 1947 Cal 447, Asgar Ali v. Dinanath Kumar, AIR 1950 Cal 135, Jitendra Nath Sarcar v. Biswanath Bagchi, AIR 1952 Cal 201, Gopal Chandra Dutt v. Surendra Nath, AIR 1925 Cal 1004, Nem Kumar Agarwal v. Nem Kumar AIR 1958 All 207, Dinkar Raoji v. Anant Ganesh, AIR 1928 Bom 349, Sami Gurukul v. Thirupathi Pillai AIR 1924 Mad 193, Ajmer Singh v. Jangir Singh, AIR 1952 Pepsu 76 and Tikku v. Khimsee, ILR (1960) 10 Raj 221.

9. In Isher Singh's case, AIR 1965 SC 948, their Lordships of the Supreme Court in dealing with the principles governing the applicability of res judicata pointed out that the question whether a matter was directly and substantially in issue in the former suit has to be decided (a) on the pleadings in the former suit, (b) the issues struck therein, and (c) the decision in the suit. It will further depend upon whether a decision on such an issue will materially affect the decision of the suit. I will bear these principles in mind when I come to deal with the facts of the present matter. The other cases referred to by Mr. Rastogi, more or less, deal with the question of the applicability of the principles governing res judicata to the various facts and circumstances of those cases. Therefore, I need only refer to such cases as were between landlords and tenants to start with and the questions decided thereto were sought to be utilised in support of the plea of res judicata in subsequent suits based on title. Such cases are :

AIR 1952 Cal 201, AIR 1925 Cal 1004 and ILR (1951) 1 Cal 383.

10. In AIR 1952 Cal 201, the learned Judge considered the question as to when a question of title decided in a rent suit may operate as res judicata in a subsequent suit based on title. The first suit was brought against the tenant for rent. The tenant resisted the claim on the ground that another person was his landlord and that as he had paid rent to that person the suit could not proceed Against him. Subsequently that other person was made a pro forma defendant in that case. In his reply he claimed that he alone was entitled to the property being the reversioner of a widow and in defence of the suit he raised the plea that the transfer made by the widow being without legal necessity it was void. The Court

set out this question for determination as to whether there was any relationship of landlord and tenant between the plaintiff and the defendant and the transfer by the widow was for legal necessity. The Court came to the conclusion that there was legal necessity for the transfer by the widow and, therefore, the plaintiff was held entitled to succeed in the suit for rent. In the subsequent suit by the reversioner to avoid the sale the decision in the previous suit about the legal necessity was held to be res judicata. All that this decision shows is that even certain findings in a rent suit may become res judicata for the purposes of a title suit, but again it will depend on the question whether the fate of the case depended on the determination of such a question.

11. In Gopal Chandra Dutt's case, AIR 1925 Cal 1004, it was held that the issue which was taken up as the basis for the plea of res Judicata was necessary for the decision of the case. That case again was in respect of transfer of a property and the reversioners were parties to the suit. It was held that the widow had relinquished her interest in favour of the reversioner. It was in this context that it was held that the title to the property was put in issue and, therefore, the decision on that question of title would be res judicata in a subsequent suit.

12. In ILR (1951) 1 Cal 383, also exactly the same question was involved in the two suits. As observed by their Lordships of the Supreme Court in AIR 1965 SC 948, for coming to the correct conclusion whether a matter was directly or substantially in issue, the pleadings of the former suit, the issues and the decision in the suit have to be examined. It has also to be seen whether the decision on such a issue materially affected the decision of the suit, I, therefore, now proceed to examine the pleadings, issues and the decision in the previous suit.

13. The plaint in that previous suit is available at page 257 of the paper book. A perusal of it shows that plaintiff Smt. Dhanni founded her claim on a rent note dated 28-12-1925 in respect of this shop. It was said to have been lost but it was on the basis of that rent-note about which she sought to produce secondary evidence that she claimed Rs. 78/- as arrears of rent and asked for the possession of the shop. It is true that in Para 4 of that plaint she endeavoured to rebut an assertion made by the present plaintiff about the shop being with him as

mortgagee, but by reading the plaint as a whole it is clear that she did not seek any relief in respect of the mortgage and confined her prayer for rent and eviction only. The reply of the present plaintiff in that suit is available at page 227 of the paper book.

He denied that he was the tenant of Smt. Dhanni and asserted that he was in possession as a mortgagee on behalf of Fatehlal. Then I may turn to the judgment of the High Court of ex-Alwar State in that case which is at page 246 of the paper book. As by this judgment the judgment of the trial Court has been reversed, it is not necessary to look to the judgment of the trial Court. The judgment of the High Court reveals that the learned Judges framed the following points for their determination:--

(1) Whether the rent-note was executed in favour of Smt. Dhanni or it was executed in favour of minor Fatehlal under the guardianship of Smt. Dhanni?

(2) Whether the document Ex. P/1 produced by the respondent and which is said to be the counter-part of the rent-note (it is Ex. P/2 in the present suit) was a genuine document or it was a forged one?

(3) How will the rent-note Ex. P/2 dated 16-1-1936 said to have been executed subsequently in favour of Fatehlal and the mortgage deed in relation to the shop said to have been executed by Fatehlal would affect the result of the present suit?

14. Having framed these questions the learned Judges considered them one by one. Regarding point No. 2, the learned Judges, on consideration of all the facts and circumstances of the case, came to the conclusion that Ex. P/2 was not a genuine document and appeared to be a forged one. While considering point No. 3, the learned Judges made it clear in the very first sentence of their discussion on this point that it was not necessary to decide anything about the rent-note dated 18-1-1936 whether it was worthy of belief or not.

15. The learned Judges further observed that though it was not necessary to deal with the mortgage in that suit, yet they would not completely overlook the same and having said this they proceeded to observe further that looking to the

established position that there was the relationship of landlord and tenant between Kanhaiyalal and Smt. Dhanni, the subsequent rent-note cannot affect that relationship in any manner. To create another relationship, according to learned Judges, it was first necessary to terminate the relationship of landlord and tenant under the first rent-note. They then observed that whatever they have said about the second rent-note applied with equal force to the mortgage deed.

16. I may notice that the observations of the learned Judges that they could not wholly overlook the mortgage-deed does create an impression that the mortgage-deed did come up for some consideration. But when I look to the ultimate decision arrived at by the learned Judges it is abundantly clear that they left the matter at that and did not make any pronouncement about the mortgage-deed one way or the other and rested their decision on the sole question whether the relationship of landlord and tenant was established between the parties. This conclusion is further strengthened by what the very learned Judges said when they disposed of an application made by the present plaintiff for grant of a certificate for appealing to the Maharaja of Alwar. That order was passed on 31-1-1945. In Para 6 of that order the learned Judges observed as follows :--

'This was a simple suit for ejectment and arrears of rent. The defendant raised the question of title also, but no issue was or could be framed on this point. The plaintiff paid court-fee for one year's rent only. After the written statement was filed, she did not get the plaint amended by basing her claim on title and paying proper court-fee. The question of title was neither decided by the trial Court, nor by the High Court; nor could it be decided by either Court. The High Court's observations about the question of title were made incidentally'.

17. These observations of the learned Judges leave no doubt in my mind whatsoever that the question of mortgage or of title for that matter did not directly come up for decisions in the suit though some observations were made by the learned Judges incidentally. Therefore, on the basis of the principles laid down by their Lordships for dealing with such matters I am not inclined to hold that the present suit based on mortgage or title was barred on the plea of res judicata.

18. I may now turn to consider the question whether the decision in the earlier suit about the document Ex. P/2 can be said to stand in the way of that question being reagitated in the present litigation. Mr. Agarwal had placed strong reliance on this document Ex. P/2 for proving the admission of Smt. Phanni contained therein that Fatehlal was her adopted son, as has been observed above, this document was said to be the counter-part of the rent-note that the plaintiff stated to have executed in favour of Fatehlal who was at that time a minor under the guardianship of Smt. Dhanni. Smt. Dhanni's case was that the present plaintiff Kanhaiyalal was her tenant and he had executed a rent-note in her favour, but it was lost. Now for avoiding the impact of the plea of res judicata on this question Mr. Agarwal submits that any observation or even a decision about the genuineness of Ex. P/2 was only part of the reasoning employed by the Court in the earlier case on the question of plaintiff Smt. Dhanni being the landlord of the present plaintiff who was the defendant in that case. Therefore, according to Mr. Agarwal, though the decision in the case namely, whether Smt. Dhanni was or was not the landlord of the present plaintiff would operate as res judicata, any conclusion reached by the Court about the genuineness or otherwise of Ex. P/2 will not be res judicata. Mr. Rastogi contested this stand. Both the learned counsel have invited my attention to some decisions and I now propose to notice them :

19. Mr. Agarwal placed reliance on *Jai Prakash v. Bishambhar Das*, AIR 1954 All 215 and *Profulla Chandra v. Prabartak Trust*, AIR 1954 Cal 8. Mr. Rastogi, on the other hand, cited *Jiut Ram v. Jagarnath Ram*, AIR 1956 Pat 489 and *Kedar Nath Singh v. Sheo Shanker*, AIR 1923 All 613 (2).

20. In AIR 1954 All 215, the learned Judge observed that what operates as res judicata in a case is the decision of the matter in the previous suit and not the reasoning or the basis for the decision.

21. The same view was expressed by the learned Judges in *Profulla Chandra's* case, AIR 1954 Cal 8, in which they proceeded to say that what was res Judicata was the decision and not the reason thereof and one requirement of the rule of res judicata was the identity of the issue or 'eadem questio'.

22. It was observed in AIR 1956 Pat 489, that the doctrine of res judicata applies in a subsequent action not only to case where claim is laid to the same property but also to the same matter (or issue) as was directly or substantially in dispute in the former litigation: In other words, it was the identity of the issue and not the identity of the subject matter which attracted the operation of the rule. In the light of this premise the learned Judge held that where a finding was given in a previous litigation that a certain agreement was a genuine document, it could not be permitted to be questioned in the subsequent litigation inasmuch as the parties having adduced evidence on the point and invited the Court to come to a decision on the same must be held bound by the decision arrived at in that litigation. The learned Judge further made it clear that though the genuineness or otherwise of the agreement was not put in issue, but as a finding was given about the genuineness of the same, that finding about the genuineness of the document would operate as res judicata.

23. In Kedar Nath Singh's case, AIR 1923 All 613 (2), the same principle was enunciated and it was observed that if in the previous suit the same deed that came up for consideration was declared as fictitious and nominal, the finding would operate as res judicata in a subsequent suit between the same parties.

24. In Dwijendra Narain v. Joges Chandra, AIR 1924 Cal 600, the learned Judges observed that the plea of estoppel is not confined to the Judgment but extends to all facts involved in it as necessary steps or ground work. In other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment though not as regards findings which did not form the basis of the decision or were in conflict therewith.

25. I may here make reference to some English authorities bearing on the question about the extent of the bar created on the plea of res judicata i.e. whether it will be limited to the decision actually arrived at or it will cover certain other matters in connection therewith. In Hoystead v. Commissioner of Taxation, 1926 AC 155, which is a Privy Council case Lord Shaw discussed a number of authorities and then made the following observations :--

'It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. 'But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision'.

(Underlining (here in ' ') is mine.)

Thus, according to this decision the plea of estoppel will cover not only the decision but in substance the ratio of and what is fundamental to that decision. Quite a large number of previous cases including the Hoystead's case, 1926 AC 155 have been discussed in a very recent case of House of the Lords reported as Carl-Zeiss Stiftung v. Rayner and Keeler, Ltd., 1966-2 All ER 536. Lord Reid has referred with approval to two passages from two Judgments of Lord Coleridge and I may quote those passages hereunder:--

'The question then is, whether the (former) Judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of this decision itself, though not then directly the point at issue. And we think it does conclude to that extentNow it cannot be said that the facts we are considering were merely collateral to the decision in the former case. The question then was where two unemancipated children were settled; and it was answered by showing that they were the legitimate issues of William and Esther, that is that these two were lawfully married, and the children born after and that William was settled with the now appellants. Strike either of these facts out, and there is no ground for the decision: these facts were therefore necessarily and directly matter of inquiry. The question now is, where is Esther settled: and this is answered by showing the same two facts, the marriage of Esther and William and the settlement of William, the two facts already decided. The judgments in the two cases therefore rest on the same foundation; which, having been settled in the first, cannot be, as between the same parties, unsettled in the latter.'

(1855) 4 E & B 780 at p. 794.

'The now plaintiff succeeded upon the trial of a plaint in the country court which involved the same question of fact as that which was in issue in this case, viz., whether the tenancy under the defendant was a weekly or a yearly tenancy. The defendant thought the decision of the country court wrong. Upon the trial of these cause the jury thought so too; and I agreed with them: but the plaintiff, against the right, succeeded upon an estoppel.'

(1874) LR 10 CP, p. 48.

26. From the first passage it will be evident that the former Judgment concludes not only the points actually decided, but also matters which it was necessary to decide and which were actually decided as the groundwork of the decision itself though not then directly the point at issue. This recent judgment of the House of Lords shows that what is conclusive is not merely the decision in the earlier litigation, but also decision of such points as formed the groundwork of that decision and according to the judgment of the Privy Council, already referred, what is in substance the ratio and fundamental to the decision is also *res judicata*. AIR 1924 Cal 600, AIR 1956 Pat 489 and AIR 1923 All 613 (2) are in accord with the view that has prevailed in England. In the circumstances I find myself unable to share the view taken in cases cited, by Shri Agarwal and prefer that propounded in the English cases.

27. Now let me discuss what importance this document Ex. P/2 had in the earlier litigation. Smt. Dhanni came forward with the averment that the present plaintiff had executed a rent-note in her favour in the year 1925. The present plaintiff, as defendant in the case, clearly denied that averment and asserted that lie was the tenant of Fatehlal who was at that time minor and was under the guardianship of Smt. Dhanni and the plea that he raised on the basis of Ex. P/2 was that Smt. Dhanni executed this document in his favour on behalf of the minor Fatehlal as a counterpart of the rent-note executed by him. Thus, this document Ex, P/2 was not a document of any mean importance in the case. If it were taken to have been established then the case set up by Smt Dhanni would have been knocked off from the very bottom, I may in this connection further observe that Ex. P/2 being the counterpart of the rent-note on the basis of which Smt. Dhanni brought her

suit, it would have furnished the primary evidence of the rent-note itself as against Smt. Dhanni, vide Section 62 of the Evidence Act. Therefore, if this document were proved, Smt. Dhanni would have been debarred from adducing oral evidence to prove the terms of her so-called rent-note. Thus the question whether the document Ex. P/2 was not executed by Smt. Dhanni directly came up for determination at the hands of the learned Judges, and as I have already adverted to the relevant discussion in the Judgment of the ex-Alwar State High Court, the learned Judges not only set down this question for their determination, but made a considered pronouncement on the genuineness of Ex. P/2. Thus the previous suit did, in my view, directly raise the question about the genuineness of Ex. P/2 and the decision of this question will, in the circumstances, operate as a bar against the plaintiff again trotting forward this document. Not only has the ex-Alwar State High Court clearly held this document to be a forged one but for it it has adduced reasons which cannot easily be brushed aside. Apart from the plea of res judicata it has to be borne in mind that this is a pronouncement made by a Court which was the highest Court of appeal, barring of course in limited class of cases where an appeal lay to the Ruler himself, and I am not persuaded to upset that view even though it may not strictly be held binding on me. To ignore that decision one looks for cogent reasons and it was for the appellant to show that that decision was perverse and in this the appellant has not been successful.

28. I may now come to deal with Mr. Agarwal's other submissions about the proof of adoption of Fatehlal by Smt. Dhanni in the year 1925. Mr. Agarwal has placed reliance on the statements of P.W. 4 Ramchander, P.W. 5 Chhajjoram, D.W. 8 Pyarelal, D.W. 27 Fatehlal, the other defendant in the case and he has also read to me the statement of P.W. 1 Rarnkumar. Mr. Agarwal also placed reliance on Ex. P/2, the document which I have discussed at length in dealing with the plea of res judicata, Ex. C/5, and Ex. P/23, Ex. P/24 and Ex. P/25 which are the statements of Sarfaraz Hussain, Niyaz Ali and Nanu made in the earlier litigation which were utilised in the present case in accordance with the provisions of Section 33 of the Evidence Act. Mr. Agarwal submitted that the learned District Judge has not dealt with the question at issue properly and has mixed up the question of defendant Ramkumar's adoption in dealing with the question of Fatehlal's adoption by Smt. Dhanni, which was alone the subject-matter of the issue.

29. It is true the learned District Judge has misdirected himself to some extent in dealing with this question. It is clear from the judgment that though the learned Judge proceeded to consider the validity of Fatehlal's adoption, he ended his discussion by observing: 'I, therefore, hold that Ramkumar was validly adopted by Smt. Dhanni. The result is that issue No. 2 is decided as against the plaintiff and issue No. 10 in favour of Ramkumar defendant No. 1.' Whether Ramkumar was or was not adopted by Smt. Dhanni can have no rational connection with Fatehlal's adoption. It may be that in spite of Fatehlal's adoption Smt. Dhanni proceeded to make a second adoption but that will not by itself be sufficient to make or unmake the previous adoption if it were really made by Smt. Dhanni. Therefore, the sole question on which the learned District Judge should have focussed his attention was about Fatehlal's adoption and he was not right in bringing in Ramkumar's adoption in dealing with this question.

30. Now the learned District Judge has held that as according to the averments in the plaint itself Smt. Dhanni has made the adoption of Fatehlal to herself, the same was invalid as a Hindu widow was not competent to make an adoption to herself and it was necessary for her to adopt the son to her husband, if she at all wanted to make the adoption. Now a perusal of paragraph 2 of the plaint shows that the plaintiff stated (that Fatehlal was the adopted son of Smt. Dhanni and the ceremony of adoption was completed according to Dharma Shastra and the custom of the community to which the parties belonged. It was, therefore, averred that defendant No. 2 was the rightful heir of Smt. Dhanni and her husband Hiralal and consequently Fatehlal was entitled to let out the shop on rent and to mortgage it. This clearly implies that Fatehlal was alleged to be the heir of both Smt. Dhanni and her husband on account of the adoption which, according to the plaintiff, was made according to the Dharma Shastra and the custom of the community. From this alone I am unable to hold that it was admitted by the plaintiff that Fatehlal was adopted by Smt. Dhanni to herself alone and not to her husband. The learned District Judge was thus clearly in error in thinking that the alleged adoption of Fatehlal was invalid on the ground that it was made by Smt. Dhanni to herself.

31. As regards the evidence of P.W. 4 Ramchander the learned District Judge observed that apart from him no other witness of the locality had been examined. As regards the previous statement of Sarfaraz Hussain and Niyaz Ali, the learned District Judge has observed that as in the mutation proceedings these very persons had stated before the Tahsildar Shri Rajeshwar Dayal (D.W. 16) that Smt. Dhanni had adopted Ramkumar who were her heirs, their evidence regarding the adoption of Fatehlal was not worthy of belief. The statement of Sarfaraz Hussain Ex. P/23 is dated 22-4-1947 and that of Niyaz Ali (Ex. P/24) is also of the same date. It is not understandable as to how in the year 1947 they proceeded to state that Fatehlal was the adopted son and heir of Smt. Dhanni and her husband when in the year 1944 before the Tehsildar (D.W. 16) they had undoubtedly stated that Ramkumar was the heir of Smt. Dhanni being her adopted son. If they were really present at the time of Fatehlal's adoption as they professed to be in their statements Ex. P/23 and Ex. P/24, there is no reason why they should not have then in 1944, clearly apprised the Tehsildar of the position that it was Fatehlal who was the heir of Smt. Dhanni and her husband and not Ramkumar.

32. Thus, I am not inclined to take a view different from what the learned District Judge has taken regarding the trustworthiness of these statements. Moreover, in the earlier suit the only question that was directly involved was whether Smt. Dhanni was the landlord of the plaintiff and, therefore, these persons may not have been fully cross-examined about the adoption of Fatehlal, as that question was not directly involved in that litigation, though I may observe that incidentally that question did come up for consideration at one stage or the other of the proceedings. Therefore, I am not inclined to attach much value to these statements. The learned District Judge has not referred to the statement of Nanu Ex. P/25 on the record, but whatever has been said regarding the statements Ex. P/23 and P/24 equally applies to this statement of Nanu Ex. P/25.

33. Then I may consider the statement of D. W. 27 Fatehlal. He has come in his evidence. He has, no doubt, stated that he was adopted by Smt. Dhanni, that the ceremony of giving and taking was gone through and that batashas' and coconuts were distributed. He has, however, admitted that subsequent to that he has described himself as the son of Jugal Kishore and has also transferred some of

the property belonging to his natural father Jugal Kishore giving out himself as his son. His conduct at different times has been inconsistent and thus not above board. No reliance can, therefore, be placed on his testimony regarding his adoption.

34. I may then refer to the statement of P.W. 1 Ramchander. From his statement the learned counsel for the appellant only wanted to show that Smt. Dhanni had the authority of her husband to make an adoption. Well, this may be so, because the indisputable fact is that she has adopted Ramkumar and it is mentioned in the adoption deed of Ramkumar which is registered document, that she had the authority of adoption subsequent to the death of her husband. But this is not the question that is receiving the immediate attention at the moment. The question is about the making of adoption itself by Smt. Dhanni in 1925, as alleged by the plaintiff and for that the sole testimony is that of P.W. 4 Ramchander. He had stated that he knew Smt. Dhanni and her husband Hiralal. According to him, Hiralal had a son, but unfortunately he predeceased Hiralal by about 10 days. Hiralal, according to him, had, in his presence, authorised Smt. Dhanni to make the adoption of a boy and Ramkumar defendant had not been born by that time. Thereafter according to him, Smt. Dhanni adopted Fatehlal and the ceremony of giving and taking was also done. He has also stated that Fatehlal became the owner of Hiralal's property and he remained in its possession. This witness could not be cross-examined by the defendants as it appears from the note appended to that statement that none of the two counsel for defendants were present although the learned District Judge waited for them and the defendants themselves did not want to cross-examine the witness in the absence of their counsel. I have, therefore, anxiously considered this statement with a view to seeing whether it should be accepted. Since it is the sole statement. I took into consideration the other features presented in the case. To start with, I may notice that in the plaint it has not been specified as to when Fatehlal was adopted by Smt. Dhanni. The assertion was left beautifully vague so that the plaintiff would have a very wide range in which he could operate regarding this claim of Fatehlal's adoption by Smt. Dhanni. Smt. Dhanni was herself examined in the earlier case and she categorically denied to have made this adoption. Then Smt. Dhaini had all along been dealing with the property of her husband as owner as is evident from (sic) a

large number of rent-notes placed on record of the present case. All in all, therefore, I find myself unable to place implicit reliance in the testimony of this witness for holding that Fatehlal was validly adopted by Smt. Dhanni.

35. P.W. 5 Chhajuram's evidence is about Ex. P/2, and about it I have already held that the previous finding has to be taken to be binding on the plaintiff. D.W. 8 Pyarelal's evidence as also Ex. C/5 are about Smt. Dhanni being authorised by her husband to make the adoption. Thus, there are no good reasons for disturbing the findings of the District Judge on this question. This brings me to the other aspect of the appellant's claim. In his plaint he asked for a decree for a sum of Rs. 4,000 as principal and Rs. 5,750 as interest, total Rs. 9,750 against Fatehlal. In the alternative Fatehlal in his statement as D.W. 27 has clearly admitted that he had executed the mortgage deed in question and the principal was made up a previous account for the amount of Rs. 3,680 and his taking Rs. 320 in cash on that occasion. He also stated that Rs. 3,680 were due from his father Hiralal. The learned District Judge by his Judgment awarded a decree of Rs. 320 only in favour of the plaintiff-appellant as against Fatehlal defendant. In dealing with the relevant issue, which was issue No. 19, he observed as follows:---

'The plaintiff has not at all proved the consideration of the remaining sum of Rs. 3,680 except by production of two entries Ex. P/10 and Ex. P/11 executed by defendant No. 2 relating to the old debts for which no evidence has been produced.'

The reasoning of the learned District Judge speaks for itself. He has misapprehended the position about the manner of proving consideration. When the execution of the document was admitted the burden heavily lay on the defendant to prove the non-receipt of consideration. Apart from this defendant Fatehlal in his statement as D.W. 27 has clearly admitted that this mortgage deed was executed for the past consideration to the extent of Rs. 3,600 and odd and the remaining amount had been taken by him in cash. Thus, this finding of the learned District Judge is wholly perverse and has to be reversed.

36. Therefore, I accept this appeal in part and while I dismiss it against all other respondents, I accept it against defendant-respondent Fatehlal and award the

appellant adecree for a sum of Rs. 9,750 against him withcosts in place of a decree of Rs. 320. So faras respondents Nos. 1 and 3 are concerned,they shall get their costs of both the Courtsfrom the plaintiff-appellant. The principalamount awarded in the decree, namelyRs. 4,000 shall carry a simple interest of Rs. 6per cent per annum from the date of thefiling of the amended plaint, namely24-9-1952.

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