

BOMBAY HIGH COURT

Mahadevappa Somappa Bhusaraddi

Vs

Dharmappa Sanna Ningappa

(Broomfield and Sen, JJ.)

15.01.1942

JUDGMENT

Sen, J.

1. This was a suit by the plaintiff-appellant for a declaration that he was the validly adopted son of Somappa, the deceased husband of defendant No. 2. The part of his case with which we are now concerned is as follows. Somappa and Basavanneppa were two brothers in a joint Hindu, family. Both of them died in December, 1911, Basavanneppa dying unmarried and Somappa leaving behind him his widow Dyamavva, defendant No. 2. Defendant No. 2 adopted the plaintiff on October 3, 1927, and there was an adoption deed which was registered a few days later. In suit No. 50 of 1928 brought by defendant No. 1, who is a distant agnate of Somappa, there was a compromise decree to the effect that the adoption was null and void, the reason for such compromise being that under the law of adoption as understood then defendant No. 2 had no power to adopt without the authority of her husband or the consent of his undivided coparceners, and that no evidence was available to show that defendant No. 2 had got such authority or consent. Defendant No. 2 next adopted the plaintiff on November 8, 1935, and the present suit was brought on the strength of this adoption for a declaration that he was the validly adopted son of Somappa. As it had been agreed at the time of the adoption that the property of the family was to be enjoyed by defendant No. 2 during her lifetime no relief was sought in this suit regarding any property. Defendant No. 1 denied the plaintiff's adoption, but at the hearing he admitted the factum of the adoption. He contended, however, that the adoption was invalid, the principal ground for such contention being that the questions of defendant No. 2's right to adopt and the validity of the plaintiff's adoption were barred by res judicata in view of the decree in the previous suit No. 50 of 1928. The trial Court upheld this objection and held that but for this ground the adoption was valid in law. It held that the matter directly and substantially in issue in both the suits was the question whether defendant No. 2 had the power to adopt. As decision on this question was held barred, the plaintiff's suit failed. The learned Judge held that *Chamanlal v.*

*Bapubhai*¹ relied on by the plaintiff, was inapplicable, and he applied the principles of *Sitaram v. Laxman*, *Keshav v. Gangadhar*, and *Tarini Charon Bhattacharya v. Kedar Nath Haldar*² In the result the plaintiff's suit was dismissed with costs.

2. Mr. Coyajee on behalf of the appellant has not disputed the proposition that the decree in a former suit based on a compromise has to all intents and purposes the same effect, so far as the rule of *res judicata* is concerned, as a decree passed *per invitum* (*Bhaishankar Nanabhai v. Morarji Keshavji & Co*³.) The question that arises under Section 11 of the Civil Procedure Code is whether any matter directly and substantially in issue of suit No. 50 of 1928 between the parties litigating under the same title as in the present suit, which was heard and finally decided in that suit, is now again directly and substantially in issue in the present suit. According to the learned trial Judge such a matter is the question whether defendant No. 2 had the power to adopt. In suit No. 50 of 1923 the plaintiff was the present defendant No. 1, and defendants Nos. 1 and 2 in that suit are, respectively, the plaintiff and defendant No. 2 in the present suit. There is no doubt, therefore, that the two suits were between the same parties. One question that arises is whether these parties are litigating under the same title. In suit No. 50 of 1928 Mahadevappa, i.e. defendant No. 1, claimed to have been adopted as Somappa's son in 1927. In the present suit he claims to have been adopted as Somappa's son in 1935. It seems to me difficult to say, therefore, that he is litigating under the same title. The title that he has sought to make out in the two suits has, according to him, been derived from different transactions. *Prima facie*, therefore, his title in each suit, though of the same nature in both, is different. In *Shidlingappa Maharudrappa v. Ramappa* (1941) Second Appeal No. 892 of 1939, decided by Sen J., on January 28, 1941 (Unrep.), which I decided sitting singly, the facts were somewhat similar to those in the present suit, and I held that the parties there could not be said to be litigating under the same title in the two successive suits.

3. As regards the defendant's power to adopt, can it be said that the same question, as arises in this case arose, was heard and was decided in suit No. 59 of 1928? In *Parsotam Gir v. Narbada Gir*⁴ a dictum of Willes J. in *Langmead v. Mabb*⁵ is thus quoted (page 183):--The conditions for the exclusion of jurisdiction on the ground of *res judicata* are that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided.

4. In *Tasini Charm Bhattacharya v. Kedar Nath Haldar*⁶ Rankin C.J. remarked (page 736):--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 section 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 recontesting that which has been finally decided.

5. In the plaint in suit No. 50 of 1928 it was stated that defendant No. 2 being the widow of an undivided coparcener had no right over the property and had no power to make any adoption. In paragraph 2 of the decree, on this point it was stated that "under no circumstances had the defendant any right under the law to make an adoption." The wording of both these passages no doubt appears at first sight to refer to defendant No. 2's general power to adopt, including her power to make an adoption in future. But it appears to us improbable that the plaintiff asked the Court to consider the question of defendant No. 2's power to adopt throughout her lifetime. The prayer clause in the plaint shows that he wanted a declaration that defendant No. 2 had no right to adopt defendant No. 1 and that the adoption of the latter was void. The decree also, after saying, "Under no circumstances had the defendant any right under the law to make an adoption", stated, "Therefore the adoption of defendant is illegal and void." No Court could presume that the law relating to adoption would remain unaltered for all time or would be expected to make an unqualified pronouncement as to a party's legal capacity to act in a specific manner on a future date.

6. In *Vishnu v. Ramling*⁷ the plaintiff, a khot, sued to recover thal (rent-in-kind) from the defendants for the years 1898-99 including the rent for the betel-nut trees growing on the land. The question arose whether the claim in respect of the betel-nuts was res judicata owing to a decision in a prior suit between the same parties, the plaintiff having claimed in it inter alia the rent for the betel-nuts for the year 1897-98. In that suit the plaintiff had alleged that the defendants were liable to pay thal to the plaintiff "according to practice" without alleging what the rate was according to practice or that according to practice the defendants were liable to pay thal with respect to betel-nuts. Chandavarkar J. held that as the defendants' liability in respect of betel-nuts not only for the year 1897-98 but for all years "according to practice" had not been alleged, and therefore had not directly and substantially been in issue in the previous suit, the claim in the second suit was not barred by res judicata. In our present case also, it does not appear to us that the defendant's right to adopt for all years was alleged or decided in the earlier suit.

7. There are certain authorities to the effect that an earlier decision on an issue of law, though the

cause of action in a subsequent suit is different, is *res judicata*, e.g. *Tarini Charan Bhattacharya v. Kedar Nath Halder, Sitaram v. Laxman, and Keshav v. Gangadhar*. We have, however, been referred to two English cases, *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*⁸ and *Hoystead v. Commissioner of Taxation*⁹ Mr. Coyajee has relied on the first and Mr. Thakor on the second of these two cases. In *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*, the question for determination was as to the correct method of ascertaining the annual value of the mine of the appellants for rating purposes for the years 1919, 1920 and 1921, and the question turned upon the construction of a section of the Local Government Act, 1919, of New South Wales. The company had been assessed for the previous years, 1917 to 1919, on a particular construction of the section, and that construction had been upheld by the High Court of Australia. The same method of assessment was adopted for the years 1919 to 1921 and was upheld by the Supreme Court. The assessee company appealed to the Privy Council. It was contended that the question as to the method of valuation was *res judicata*. But their Lordships said (page 100):-- There is, however, no substance in this contention. 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 could 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 *eadem questio*, and therefore the principle of *res judicata* cannot apply.

8. This case shows that according to the English law an erroneous decision on the interpretation of a statute does not operate as *res judicata*; and there appears to be no reason to think that Section 11 of the Code of Civil Procedure lays down a different principle of law.

9. In *Hoystead v. Commissioner of Taxation*¹⁰ there had been an assessment on the annual income of an estate in Australia, divisible under a will between the testator's daughters, for the financial year 1918-19 under the Land Tax Assessment Act of Australia; and the trustees who were administering that estate claimed under a section of that Act a deduction of 5,000 in respect of the shares of each daughter. The case having been stated for the opinion of the Full Court of the High Court upon the questions (1) whether the shares of the joint owners were the original shares within the meaning of that section, and (2) how many deductions of 5,000 should be made, the answers returned by the Full Court were: (1) the shares of the six children surviving at the date of the assessment and (2) six; and judgment was entered accordingly. In the next year, 1919-20, the Commissioner of Taxation allowed only one deduction of 5,000, contending that the beneficiaries were not joint owners within the meaning of that Act. It was held that although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given, and the Commissioner was estopped from proceeding upon a different view; and their Lordships remarked that though the original admission might have been

erroneous, that admission could not be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact. Then their Lordships stated (page 165):--Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.

10. It will be seen, therefore, that the decision in this case was not based on the principle of res judicata, but really upon an admission made by the Commissioner relating to a fact which remained fundamentally the same in the successive litigations, and that there had been no change in law and the interpretation of the law. We think that the case which really applies is Broken Hill Proprietary Co. v. Broken Hill Municipal Council, and that case shows that where the cause of action is different, an earlier decision on the interpretation of the law will not operate as res judicata.

11. Mr. Thakor has relied on the words in the decree in the suit of 1928, "The plaintiff should take possession of the suit properties on the death of the defendant No. 2," and has contended that these words show that the defendant's right was decided for all time, because such a direction could not have been given if there was any possibility of defendant No. 2 making a fresh adoption and thereby creating fresh rights in the adopted son. It seems to us that this is a very slender foundation for the conclusion that the right of defendant No. 2 to adopt was decided for all time. In view of the law then prevailing, such a direction would ordinarily be expected to be made in consequence of the decision that defendant No. 2 had no right to adopt at the time of the suit. The passage is not a material part of the decree, and, in our opinion, is insufficient to show that the decision was as to defendant No. 2's future right of adoption. Mr. Thakor has also asked us to apply the test, whether defendant No. 2 could, after the decision in suit No. 50 of 1928, have made a fresh adoption on the very next day. It seems to us that it would be difficult to say that defendant No. 2 was actually precluded from making such an adoption. In view of the law then prevailing, no doubt it would have been thought futile for her to make a fresh adoption immediately after the decree. We think that the question as to defendant No. 2's power to adopt which arose in suit No. 50 of 1928 and was decided therein, was limited to the occasion on which the adoption was alleged to have been made, or at least to the period up to the date of that suit, so that it can be said that the decision in that suit was that defendant No. 2 had no right to adopt in 1927 or at any time up to the date of that suit. In the present suit what the Court has to consider is whether defendant No. 2 had the power to adopt in 1935. These appear to us to be two different questions and we must hold that there is no such identity of issues in the two suits as is required under Section 11 of the Civil Procedure Code. Accordingly, we hold that the learned trial Judge

was wrong in finding that the questions of defendant No. 2's right to adopt and the validity of the plaintiff's right to adoption were barred by res judicata in view of the decree of 1928.

12. Mr. Thakor has argued that if we come to that conclusion, the only declaration which can be given to the plaintiff would be a declaration in the form of the decree in *Radhabai v. Rajaram* (1937) 40 Bom. L.R. 559. That was a case in which the plaintiff had sued for a declaration that her adoption of defendant No. 2 was invalid and could not prevent the plaintiff from succeeding to the property. The widow in that case was a widow of a gotraja sapinda of the last male holder who had succeeded under the rule established by *Lulloobhoy Bappoobhoy v. Cassibai*¹¹ and it was held that such a widow could not by adoption alter, after her death, the devolution of the property to which she was entitled as such widow. The declaration given in that case was that the adoption was valid but did not affect the devolution of the property inherited by defendant No. 1 as the widow of a gotraja sapinda as against the plaintiff. In the present case it is no doubt true that defendant No. 2 was a widow of a gotraja sapinda of Basavanneppa, the last holder, but we are not called upon to make any declaration as regards property in this case. The plaintiff has deliberately sought no relief regarding the property and has given a reason why he has excluded questions relating to property from this suit. He is, therefore, not entitled to any declaration relating to his rights as to property.

13. The appeal, therefore, must be allowed, the decree of the lower Court set aside, and the plaintiff will be entitled to a declaration that his adoption in 1935 is a lawful and valid adoption. But we express no opinion as to any right he may have in the property by virtue of his adoption. The plaintiff to get his costs throughout from respondent No. 1.

Broomfield, J.

1. I agree that the plaintiff's claim for a declaration of the validity of his adoption in 1935 is not barred by res judicata by reason of his adopted mother's right to adopt having been negated in the suit of 1928. In that suit defendant No. 2's right to adopt was no doubt in controversy and was decided. But that was only with reference to the particular adoption which had already taken place. The Court did not, and, in our opinion, could not decide such a question for all time. The law might change. For practical purposes it has changed. The law as it affects the people is the law as it is administered by the Courts, and the decision of the Privy Council in *Bhimabai v. Gurunathgouda* (1932) 35 Bom. L.R. 200 p.c. changed the manner in which the law of adoption has been interpreted and administered in this Province. No injunction restraining defendant No. 2 in perpetuity was granted in the former suit, and it is difficult to see how any such injunction could have been granted. As provided in Section 54 of the Specific Relief Act, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant. Defendant No. 2 was not under any obligation to the plaintiff in the suit of 1928 to

refrain from making a lawful adoption, nor had he any right to ask the Court to prevent her from doing so. It does not appear to me that the Court ever applied its mind to the question whether defendant No. 2 could be or should be restrained perpetually. But if it had applied its mind to that question and if it had been asked to make an injunction of that kind, it could only have done so *rebus sic stantibus*, subject to the law remaining the same.

2. We have been referred to two decisions of the House of Lords reported in the same volume, *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* [1926] A.C. 94(SUPRA) and *Hoystead v. Commissioner of Taxation* [1926] A.C. 155(SUPRA). Mr. Coyajee for the appellant relies on the former and Mr. Thakor for the respondents on the latter. The latter, however, seems to be rather a case of estoppel or approbating and reprobating than of *res judicata*. Moreover the observations on which Mr. Thakor relies (which have been quoted by my learned brother) seem to imply that the facts were the same at the material times and the party was held to be estopped by a previous admission from changing the basis of his claim based on those facts. The other case seems to me to be much more in point.

3. A question very similar to the present came before my learned brother in *Shidlingappa Maharudrappa v. Ramappa*¹² decided by Sen J., on January 28, 1941 (Unrep.). He overruled the plea of *res judicata* there on the ground that the adopted son, who in that case brought both suits, was not litigating under the same title. With respect, I think, there is much to be said for this view. It is true that "litigating under the same title" has generally been interpreted to mean "in the same capacity." The plaintiff here is litigating in the same capacity in this suit as in the suit of 1928, namely, in the capacity of an adopted son. All the same, I doubt very much whether he can be said to be litigating under the same title. One of the matters to be considered must, I think, be whether the claim put forward in the second suit could have been put forward in the first, and obviously plaintiff could not have set up his adoption in 1935 in the suit of 1928.

4. Mr. Thakor relies on the fact that the decree in the former suit directed that the then plaintiff, now defendant No. 1, was to take possession of the property on the death of defendant No. 2. He argues that that implies that no future adoption could be made and that the former decree would not be affected if the present adoption is now upheld. But it is well settled that the validity of an adoption is not dependent on any question of vesting or divesting of property. The plaintiff here asked for a bare declaration of the validity of his adoption, and, in our opinion, he is entitled to it. We are not called upon to consider any question of right to property.

Cases Referred

1(1897) I.L.R. 22 Bom. 669

2(1928) I.L.R. 56 Cal. 723, F.B

3(1911) I.L.R. 36 Bom. 283, S.C. 13 Bom. L.R. 950

4(1899) L.R. 26 I.A. 175, s.c. 1 Bom. L.R. 700
5(1865) 18 C.B.N.S., 255, 270
6(1928) I.L.R. 56 Cal. 723, F.B.
7(1901) I. L. R. 26 Bom. 25, s.c. 3 Bom. L.R. 450
8[1926] A.C. 94
9[1926] A.C. 155
10[1926] A.C. 155
11(1880) L.R. 7 I.A. 212
12(1941) S.A. No. 892 of 1939