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CHHABIL DAS

v.

PAPPU

OCTOBER 31, 2006

B

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

C

*Code of Civil Procedure, 1908—Order XXII Rule 5—Suit for injunction—Death of plaintiff—Substitution of adopted son as legal heir—Order of substitution not challenged—Dismissal of the suit—In second appeal and in appeal to this court legality of adoption questioned—Held : The question of adoption attained finality, the order of substitution not having been challenged—Hence, the same cannot be reopened—Hindu Adoption and Maintenance Act, 1956—Sections 7 and 8.*

D

Mother of respondent No.1 filed a suit against appellant-defendant for permanent injunction restraining him from interfering with her possession of the suit land as a 'gair marusi tenant' which she had inherited after death of her husband. Appellant-defendant also filed a counter claim stating to be in possession of the suit land.

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During pendency of the suits, plaintiff died and respondent No.1 was substituted as her sole legal heir. It was contended that the suit could not be decreed in view of the fact that the widow (original plaintiff) had no right to adopt respondent No.1. The issue of adoption was held to be irrelevant for the suit, by the trial court.

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The suit as well as counter claim was dismissed. The appeal and second appeal were also dismissed. Hence the present appeal. In the second appeal as well as before this Court the question of legality of order of adoption was raised.

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Dismissing the appeal, the Court

**HELD:** 1.1. Once the respondent was substituted in place of the original plaintiff, the question of reopening the question of adoption by this Court does not arise. The question of substitution of the plaintiff by respondent No.1, therefore, was in issue in a proceeding under Order XXII, Rule 5 CPC. The

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application of respondent No.1 for his substitution as legal heir was allowed by trial court. The said order having not been questioned, attained finality. Such a question cannot be permitted to be raised in the second appeal or before this Court for the first time. [46-B-C] A

1.2. The appellant did not deny or dispute that the respondent herein could represent the estate of his mother. When a question arose as to who is the legal representative of a party to the suit who had expired, the same was required to be determined in terms of Order XXII, Rule 5 of the Code of Civil Procedure. However, by reason thereof, the merit of the matter does not become final. The suit was one for injunction. No issue was framed nor could be framed therein as to whether the requirements of Sections 7 and 8 of the Hindu Adoption and Maintenance Act, 1956 had been complied with or not. It is in that view of the matter, the trial judge opined that the status of the respondent as an adopted son of the original plaintiff could not be looked into in the said case. [45-F-H] B C

2. Principle of *res judicata* also applied in different stages of the same proceedings. [46-C] D

*Bhanu Kumar Jain v. Archana Kumar and Anr.*, [2005] 1 SCC 787 and *Ishwar Dutt v. Land Acquisition Collector and Anr.*, [2005] 7 SCC 190, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4611 of 2006. E

From the Judgment and Final Order dated 12.10.2004 of the High Court of Punjab and Harayan at Chandigarh in Regular Second Appeal No. 2474/2001.

R.K. Kapoor, M.K. Verma, S.S. Yadav and Anis Ahmed Khan for the Appellant. F

A.S. Nehra, Nikhil Jain Akshat Jain and Sunil Kumar Jain for the Respondents.

The Judgment of the Court was delivered by G

S.B. SINHA, J. Leave granted.

Appellant herein was a defendant in a suit filed by Respondent No.1 herein for permanent injunction restraining him from interfering with possession and cultivation of the suit land which was said to be in possession of the H

A plaintiff as a '*gair marusi tenant*'. She, allegedly, inherited the said property from her husband Sagar, who died in June, 1988. The appellant in his written statement, *inter alia*, denied and disputed the said contention and averred that the defendant was in possession of the land in question on the death of Sagar and they had planted about 200 trees on the suit land.

B The defendant also filed a counter claim. The suit as well as the counter claim filed by the appellant was dismissed. An appeal preferred by the appellant in the Court of District Judge was also dismissed. The Second Appeal preferred by him was also dismissed.

C The question raised before the High Court as also before us, relates to legality and/ or validity of the order of adoption of Pappu by Jarwali. It was pointed out that the adoption allegedly took place on 28.11.1983 whereas Sagar died in the year 1988, in the plaint, the Plaintiff-Respondent categorically stated that Sagar died issueless and a registered Adoption Deed regarding the purported adoption on 28.11.1983 was executed on 28.10.1990, which demonstrates that the purported adoption was not valid in law.

D Submission of Mr. R.K. Kapoor, learned Counsel appearing on behalf of the appellant was that having regard to the fact that the widow had no right to adopt Pappu, the suit could not have been decreed.

E It is not in dispute that Jarwali died on 17th December, 1994. Pappu filed an application representing her estate as a legal representative. By an order dated 4.8.1995, the said application was allowed, stating :

F "2. On the other hand, the above application has been contested by the defendant-respondent having filed reply vide which it is admitted that plaintiff Smt. Jarawali has expired, but no document regarding her date of death has been brought on record; that it is denied that applicant Pappu is the only legal representative of said deceased Smt. Jarawali, so he is not entitled to be impleaded as plaintiff in the suit and lastly, it is prayed that the application in hand may kindly be dismissed with costs.

G 3. I have heard the arguments advanced by learned counsel for the parties and carefully gone through the record available on the file after giving my thoughtful and anxious consideration.

H 4. A bare perusal of the file reveals that no counter affidavit has been

filed by the defendant-respondent. Moreover, photostat copies of the registered adoption deed dated 3.12.1990 vide which applicant Pappu was adopted by Smt. Jarawali widow and her death certificate have been brought on record. Having a glance over these documents, *I have no hesitation to say that Smt. Jarawali has expired on 17.12.1994 at Mohalla Nalapur, Narnaul and Pappu applicant is her only legal representative.* So, he is entitled to be impleaded as a plaintiff. With these observations, I apparently do find a merit in the application in hand and the same stands allowed.”

[Emphasis supplied]

The said order having not been questioned, indisputably, attained finality.

The question of substitution of Jarwali by Pappu, therefore, was in issue in a proceeding under Order XXII Rule 5 of the Code of Civil Procedure, 1908. Order XXII Rule 5 reads thus :

“5. *Determination of question as to legal representative.* When a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.”

The appellant, therefore, did not deny or dispute that the respondent herein could represent the estate of Jarwali. When a question arose as to who is the legal representative of a party to the suit who had expired, the same was required to be determined in terms of Order XXII, Rule 5 of the Code of Civil Procedure.

However, by reason thereof, the merit of the matter does not become final. The suit was one for injunction. No issue was framed nor could be framed therein as to whether the requirements of Sections 7 and 8 of the Hindu Adoption and Maintenance Act, 1956 had been complied with or not. It is in that view of the matter, the learned Trial Judge opined that the status of the respondent as an adopted son of Smt. Jarwali could not be looked into

A the said case.

Submission of Mr. Kapoor that adoption of the respondent is *per se* illegal, in our opinion, has rightly been held by the learned Trial Judge to be irrelevant for the purpose of determination of the issues in suit.

B If the respondent could represent the estate of original plaintiff and despite the fact that the appellant had an opportunity to raise the said issue at the stage of determination of the question as envisaged under Order XXII, Rule 5 of the Code of Civil Procedure, the same having not been done, such a question cannot be permitted to be raised in the second appeal or before us for the first time.

C It is now well-known that the principle of *res judicata* also applies in different stages of the same proceedings. {See *Bhanu Kumar Jain v. Archana Kumar & Anr.*, [2005] 1 SCC 787 and *Ishwar Dutt v. Land Acquisition Collector & Anr.*, [2005] 7 SCC 190.}

D Once, thus, the respondent was substituted in place of Jarwali, in our opinion, the question of reopening the said question by us does not arise.

For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly. No costs.

E K.K.T.

Appeal dismissed.