APPELLATE CIVIL.

LETTERS PATENT APPEAL.

Before Khosla and Falshaw, JJ.

DURGA DASS AND OTHERS,—*Appellants.*

versus

MST. RODI, widow of LEHNUN,—*Respondent.*

1952

December, 3rd

Letters Patent Appeal No. 94 of 1951.

Code of Civil Procedure (Act V of 1908)—Section 11—Res Judicata—Directly and substantially in issue—Meaning of—Matter decided in previous suit but not necessary for its decision—Whether operates as res judicata *in a subsequent suit—Adoption under Customary Law—Nature and consequences of—Whether existence of ancestral property necessary for such adoption.*

J. died leaving behind an adopted son, D and a will in his favour. After his death J's property was mutated in favour of his brothers on the ground of their being his collaterals. D filed a suit for possession of property left by J against J's brothers claiming to be J's adopted son and a legatee under his will. J's brothers raised the plea that the property in dispute was ancestral. This plea was negatived and D's suit was decreed on the ground that he had proved his adoption. It was also held that the same result would have followed even if the property had been found to be ancestral. D died issueless and the land inherited by him from J was mutated in favour of his mother R after his death. J's brothers filed a suit for possession against R on the ground that the land was ancestral and it should revert to them as collaterals of J. R pleaded that the finding as to the nature of the land being non-ancestral acted as *res judicata*. For the plaintiffs it was pleaded that the finding as to the nature of the property was not necessary for the decision of the previous suit and this matter was not directly and substantially in issue in that suit and therefore that finding did not act as *res judicata*.

Held, that D's suit succeeded not because the land was held to be non-ancestral but because he was able to prove a valid adoption by J. The question of the ancestral nature of the land, therefore, was not directly and substantially in issue in that suit and that being so, the finding given by the trial Court in D's suit cannot be held to be *res judicata* in the present suit.

Held, that before a decision in a previous suit can be held to be *res judicata,* the conditions laid down in section 11 of the Civil Procedure Code must be satisfied.

Held further, that the notion of adoption has nothing whatever to do with the nature of the land. Adoption under Customary Law may be described as a relationship between two individuals which gives rise to certain consequences. If the relationship is recognised by law, the adoptee will inherit ancestral as well as non-ancestral property of the adoptor. If the relationship is not recognised, then the adoptee would not inherit his property. If there is a will in his favour he will inherit the non-ancestral property only. In adoption, therefore, there are two matters which must be considered, (1) the factum that certain relationship was established and (2) what was the nature of that relationship; and these matters have nothing whatever to do with whether the adoptor is possessed of ancestral property or not. An adoption may be valid even if the adoptor possessed only non-ancestral property. This means that a proprietor has the right to adopt as his son a person according to the Customary Law governing his tribe.

Held also, that the question whether there was an adoption or not and the validity of the adoption are not in any way affected by the nature of the property. The property may be affected by a valid adoption. The question of adoption must be decided upon wholly different considerations, namely, whether in a particular tribe adoption is permitted and if the consent of the collaterals was required such consent was or was not obtained and if the adopted person can only be within certain degrees of consanguinity whether he actually fulfils such requirements. These questions have no bearing upon whether the adoptor is or is not possessed of ancestral property. But it must be remembered that collaterals have the right to inherit even self-acquired property in the absence of other heirs and an adopted son's claim to non-ancestral property may fail if he cannot prove his adoption. It is the adoption which affects the ancestral property and not the ancestral property which affects adoption. Therefore it is wrong to say that the question of ancestral nature of the property is a relevant consideration in deciding the validity of the adoption.

Asrar Ahmed v. *Durgah Committee, Ajmer* (1), relied on; *Midnapore Zamindary Company, Ltd. v. Naresh Narayan Roy and others* (2), distinguished.

Letters Patent Appeal under Clause 10 of the Letters Patent of the Punjab High Court, Simla, against the judg-

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ment of Hon'ble Mr. Justice J. L. Kapur, dated the 1st August, 1951 passed in R.S.A. No. 23/E of 1947, affirming that of Shri S. S. Dulat, District Judge, Hoshiarpur, at Kanara, dated the 21st November, 1946, who affirmed that of Shri Tirath Dass, Sub-Judge, 1st Class, Kangra, dated 15th November, 1945, dismissing the suit leaving the parties to bear their own costs.

D. K. MAHAJAN, for Appellants.

K. C. NAYAR, for Respondent.

JUDGMENT.

Khosla, J. KHOSLA, J. The dispute in this appeal relates to the property left by Jangi who died on 18th August 1933. The facts briefly are that before his death Jangi adopted his daughter's son Duni as his son. The adoption ceremony appears to have been performed in November, 1928. In June 1933, Jangi executed a will leaving his entire property to his adopted son, Duni. After Jangi's death his property was mutated in favour of his brothers on the ground that they were his collaterals. Duni claiming to be both the adopted son of Jangi and the legatee of the will executed by him filed a suit for possession. In this suit the brothers of Jangi raised a plea that the property in dispute was ancestral. The suit was decreed in favour of Duni on the ground that he had succeeded in proving his adoption by Jangi. The defence plea that the land was ancestral was held not to have been proved, but the trial Court observed that the same result would have followed, had the land been ancestral. This decision was upheld on appeal and the result was that Duni took possession of the property and remained in possession till his death. After his death the land was mutated in favour of his mother Rodi. Then the plaintiffs brought the present suit for possession alleging that the land was ancestral and on the death of Duni who left no issue the land should revert to them as collaterals. The defence raised on behalf of Rodi was that the finding in the previous suit regarding the nature of the land acted as *res judicata*. In the previous suit it had been held that the land was not ancestral and this finding having been given in a suit

between the same parties could not now be challenged. All the Courts have held that the finding on this issue must be treated as *res judicata* and that the plaintiffs cannot now allege or seek to prove that the land is ancestral and on this finding the plaintiffs' suit was dismissed. This is the only point requiring our decision now.

It is argued by Mr. Daya Krishan Mahajan on behalf of the plaintiffs that the nature of the land was not a relevent consideration in the previous suit and that Duni was bound to succeed if he proved himself to be the adopted son of Jangi, whether the land was ancestral or not. Similarly the defendants in that suit would have succeeded if they had been able to disprove the adoption relied upon. In this view of the matter (so it was argued) the issue relating to the nature of the land was not a matter substantially and materially in issue in that suit and any decision given upon it cannot be treated as *res judicata*. On the other hand it was argued by Mr. Karam Chand Nayar on behalf of Rodi that the plea with regard to the ancestral nature of the land was raised and a decision in respect of it was invited. A decision was in fact given and that decision cannot now be questioned.

It is clear that before a decision in a previous suit can be held to be *res judicata*, the conditions laid down in section 11 of the Civil Procedure Code must be satisfied. The section reads—

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title * * * *".

It is clear that in the present suit the ancestral nature of the land is a matter directly and substantially in issue, but the question is whether it was directly and substantially in issue

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in the previous suit brought by Duni. Duni's claim at that time was in effect this—

> "I have been adopted by Jangi as a son and as his adopted son I am entitled to succeed to his property whether it is ancestral or non-ancestral. I am also the legatee under his will. This will takes effect quite apart from the factum of adoption if the property is non-ancestral, but the will may be taken as evidence of adoption and then it will entitle me to succeed to Jangi's ancestral property also.

In this view of the matter Duni's claim could have been decreed regardless of whether the property were ancestral or non-ancestral. All that Duni had to prove was that he had been lawfully adopted by Jangi. The reply of the defendants in that case was—

> "The adoption is bad and therefore Duni is not entitled to succeed to Jangi. The land in dispute is ancestral and such land must come to us if the adoption is held not to be proved."

The defendants, therefore, had to prove two things before they could succeed. They must prove in the first place that Jangi had not lawfully adopted Duni. In the second place, they had to prove that the land was ancestral. Had the land been non-ancestral, Duni could have succeeded to it on the basis of the will quite apart from the adoption. Therefore, it is, clear that as long as Duni could prove adoption, his suit had to be decreed in respect of ancestral and also non-ancestral land. It follows, therefore, that the issue with regard to the ancestral nature of the land was not a matter directly and substantially in issue in the previous suit. The learned Judge decreed the suit in favour of Duni holding (1) the adoption of Duni was good, (2) the land was non-ancestral and (3) that Duni would have succeeded

even if the land had been ancestral. In the circumstances it must be held that the decision of that Court cannot act as *res judicata*.

Mr. Karam Chand Nayar has put forward the view that a consideration of the question of adoption necessarily involves a finding that the land claimed by the adopted son is ancestral. He has drawn our attention to section 7 of Punjab Act II of 1920. Section 7 says—

> "Notwithstanding anything to the contrary contained in section 5, Punjab Laws Act, 1872, no person shall contest any alienation of non-ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom."

Mr. Nayar argues that the question of adoption is so intimately tied up with the ancestral nature of property that the two are entirely inseparable and the notion of an adopted child cannot be entertained without assuming that the land which he claims is ancestral. From this premise Mr. Nayar sought to argue that Duni could not have maintained his suit for possession of the land left by Jangi without asserting that the land was ancestral or at any rate without basing his claim upon such an assumption. The argument of learned counsel is, however, without any force. The notion of adoption has nothing whatever to do with the nature of the land. Adoption under Customary law may be described as a relationship between two individuals which gives rise to certain consequences. If the relationship is recognized by law, the adoptee will inherit ancestral as well as non-ancestral property of the adoptor. If the relationship is not recognized, then the adoptee would not inherit his property. If there is a will in his favour he will inherit the non-ancestral property only. In adoption therefore there are two matters which must be considered (1) the factum that certain relationship was established, and (2) what was the nature of that

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relationship, and these matters have nothing whatever to do with whether the adoptor is possessed of ancestral property or not. An adoption may be valid even if the adoptor possesses only non-ancestral property. This means that a proprietor has the right to adopt as his son a person according to the Customary Law governing his tribe. For instance, Jangi was authorised to adopt his daughter's son and he could do so whether he was possessed of ancestral property, non-ancestral property or no property at all and therefore the fact that Duni claimed to be Jangi's adopted son is a matter which may be considered by itself irrespective of the nature of Jangi's property. If the adoption is proved, Duni must be held entitled to inherit ancestral as well as self-acquired property of Jangi, but if the adoption is not proved then Duni cannot lay claim to any property left by Jangi. He would then have to rely upon the will and this will could only give him a right to the self-acquired property of Jangi. Kapur, J., has observed in his judgment—

> "Two questions arise whenever an adoption is made under custom, (1) whether in fact there was an adoption and (2) whether the adoption was valid in accordance with custom. The first question is not hit by the nature of the property, but in order to decide the question whether the adoption is valid or not, the question of the ancestral nature of the property is a relevant consideration."

Kapur, J., then cited section 7 of Punjab Act II of 1920. With great respect I must hold that the learned Judge was mistaken in the view he took. The question whether there was an adoption or not and the validity of the adoption are not in any way affected by the nature of the property. The property may be affected by a valid adoption. The question of adoption must be decided upon wholly different considerations, namely whether in a particular tribe adoption is permitted and if the

consent of the collaterals was required such consent was or was not obtained and if the adopted person can only be within certain degrees of consanguinity whether he actually fulfils such requirements. These questions have no bearing upon whether the adoptor is or is not possessed of ancestral property. But it must be remembered that collaterals have the right to inherit even self-acquired property in the absence of other heirs and an adopted son's claim to non-ancestral property may fail if he cannot prove his adoption. It is the adoption which affects the ancestral property and not the ancestral property which affects adoption. Therefore, it is wrong to say that the question of ancestral nature of the property is a relevant consideration in deciding the validity of the adoption.

In *Asrar Ahmad* v. *Durgah Committee, Ajmer* (1), a suit was brought against the Mutawalli of the Durgah for his dismissal from office on account of incompetency, dishonesty, neglect of duty, etc. The plea raised in defence was that the Mutawalli had a hereditary right to remain in office. This point was decided in the Mutawalli's favour, but the Mutawalli was removed on the ground that he was incompetent and dishonest. It was held that in a subsequent suit the finding with regard to the hereditary right of the Mutawalli was not *res judicata* because in the previous suit the issue raised by the plaintiff was as to the competency of the defendant to remain in office, "an issue to which it was irrelevant whether he had a hereditary right." Mr. Nayar relied upon *Midnapore Zamindary Company, Ltd.* v. *Naresh Narayan Roy and others* (2). In that case an issue was held material by the appellate Court although the trial Court had not dealt with it. The facts of that case were, however, somewhat peculiar. A certain issue raised in the trial Court was not dealt with in the judgment of the trial Court. In appeal the appellant directly insisted on the point being tried and adjudicated upon. In the circumstances it was held that the decision must be treated as

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res judicata because the appellant had insisted on obtaining a decision upon it and a decision was in fact given. The present case is clearly distinguishable from the *Midnapore Zamindary Company, Ltd.* case.

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In the present case it is clear that Duni's suit succeeded not because the land was held to be non-ancestral but because he was able to prove a valid adoption by Jangi. The question of the ancestral nature of the land, therefore, was not directly and substantially in issue in that suit and that being so the finding given by the trial Court in Duni's suit cannot be held to be *res judicata*. I may mention here that the defendants in that case were unable to prove their assertion because they were unable to get revenue excerpts which showed that the land in possession of Jangi was ancestral. Be that as it may, the present appeal must succeed for the reasons given above. I would, therefore, allow this appeal and remand the case to the trial Court for decision on merits. The appellants will recover costs of appeal in this Court.

Parties have been directed to appear before the trial Court on 5th January 1953.

Falshaw, J.

FALSHAW, J., I agree.