restore that the executing Court. The decree-holder will be entitled to costs here and below.

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Bhandari, C. J.
Chopra, J.

Chopra, J.—I agree.

B.R.T.

APPELLATE CIVIL

Before D. K. Mahajan, J.

MANSHA RAM, *alias* MANSU,—*Appellant.*

versus

MILKHI RAM,—*Respondent.*

Regular Second Appeal No. 14 of 1955.

1959

July, 27th

Code of Civil Procedure (V of 1908)—Section 11—Consent decree—Whether and when acts as res judicata—*Hindu Law—Adoption—Giving of the boy to the adoptive mother instead of the father—Whether makes adoption invalid.*

Held, that a consent decree is as much *res judicata* as a decree obtained after contest though section 11 of the Code of Civil Procedure is not strictly applicable to consent decrees. But a consent decree can only operate as *res judicata* when the question raised in the subsequent suit was present to the minds of the parties, and was actually dealt with by the consent decree, i.e., when the consent decree actually settled the question.

Held, that to constitute a valid adoption under the Hindu law actual giving and taking of the boy is required and the placing of the boy in the lap of the adoptive mother instead of the father will not make the adpotion illegal or invalid.

Regular Second Appeal from the decree of Shri Mohinder Singh, Senior Sub-Judge, with enhanced appellate powers, Hoshiarpur, dated the 13th October, 1954, affirming that of Shri O. P. Garg, Sub-Judge, 3rd Class,

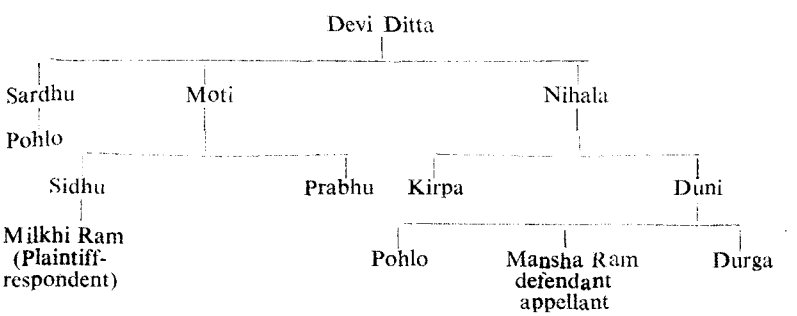
Hoshiarpur, dated the 31st May, 1954, granting the plaintiff a decree for possession of the suit property against the defendant

D. N. AGGARWAL, for Appellant.

P. C. PANDIT, for Respondent.

JUDGMENT

Mahajan, J. MAHAJAN, J.—To understand the facts of this case, it is necessary to set out the pedigree-table of the parties:—



Pohlo, son of Sardhu was the occupancy tenant of the land in dispute. On the 18th of March, 1947, a registered deed of adoption was executed by Pohlu, son of Sardhu adopting Mansha Ram, defendant wherein it was recorded that the adoption was a formal adoption and had been made according to the dictates of Hindu Law at a time when the adopted son was four years of age. This deed of adoption was challenged by Sidhu and Prabhu, sons of Moti. That suit was settled on 14th of April, 1948, by a compromise (Exhibit D. 2). It was recorded that on the death of Pohlu, Sidhu and Prabhu would get 6 *kanals* and with regard to the rest of the land the suit be dismissed. On the 19th of February, 1951, Pohlu, however, made a will of the land in dispute in favour of Milkhi Ram, son of Sidhu. Pohlu died on the 17th of June, 1951. On

his death mutation was effected of 6 *kanals* in favour of Sidhu and Prabhu, and of the remaining land in the name of Mansha, defendant on the basis of the compromise, Exhibit D. 2.

On the 7th of June, 1952, the present suit was filed by Milkhi Ram claiming the entire property of Pohlu on the basis of the will. The defence was that Pohlu could not make a will as he had adopted Mansha Ram, defendant, that no will was executed nor it could be executed as he was not of a disposing mind and, therefore, the will was not valid and that the property being ancestral no will respecting it could be made. Unfortunately, the trial Court did not call for a replication, which in the circumstances of this case, was essential. Nor any statements of the parties were recorded before the issues. This has led to a lot of confusion. On the pleadings of the parties, the following issues were framed:—

(i) Did Pohlu make a valid will in disposing mind in plaintiff's favour and bequeath the property in suit ?

(ii) Did Pohlu formally adopt the defendant as his son ?

(iii) If so, could Pohlu make that bequest ?

(iv) What is the effect of the previous litigation on plaintiff's right ?

(v) Is Prabhu a necessary party ?

(vi) Relief.

No issue was framed with regard to the contention of the defendant that no will could be made with regard to ancestral property, and therefore, the will was inoperative on his ground.

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On the 31st of May, 1954, the trial Court decreed the suit and held that the will executed by Pohlu was a valid will and that there was no adoption as alleged by the defendant Mansha Ram. Dissatisfied with this decision the defendant went up in appeal to the Senior Sub-Jugde, Hoshiarpur, who by his judgment, dated the 13th of October, 1954, upheld the finding of the trial Court and rejected the appeal. The defendant has come up to this Court in second appeal.

Mr. D. N. Aggarwal, learned counsel for the appellant, has raised the following contentions:—

(i) That the lower appellate Court had given a finding that the adoption, in fact, had taken place, but it was invalid on account of the giving of the boy in the lap of the mother and not of the father. This being not a correct position under the Hindu Law, therefore, the decision of the Court below is erroneous.

(ii) That in view of the previous decree, the question of the nature and the factum of adoption was *res judicata* between the parties and, therefore, could not be agitated in these proceedings.

(iii) That in any case the trial Court erred in not framing correct issues. The defendant had raised the plea that the occupancy rights were ancestral property and no valid will could be made respecting the same. This plea was not given up and thus this matter should have been put in issue and tried.

After hearing the learned counsel for the parties, I am of the view that the first two contentions of the learned counsel for the appellant have no force. The trial Court as well as the lower appellate Court, after examining the evidence on the record came to a definite finding that it is not proved that Pohlu adopted Mansa Ram, defendant. After having given this finding, a further finding was given, that the giving of the boy in the lap of the adoptive mother was not sufficient under Hindu Law to constitute a valid adoption; the boy should have been given in the lap of the adoptive father. The first finding is a finding of fact and cannot be interfered with in second appeal. With regard to the second finding, I have no doubt that the Courts were in error. All that is required is actual giving and taking, and the placing of the boy in the lap of the adoptive mother instead of the father will not make the adoption illegal or invalid. But as I have held that on the question whether in fact any adoption took place or not, there is a concurrent finding of two Courts below and that finding is a finding of fact, it will be of no consequence that on the validity of the adoption an erroneous view of the law was taken.

With regard to the second contention that the question regarding the factum and validity of the adoption is *res judicata* it is necessary to examine the entire contention in its true perspective. The earlier suit was filed by the sons of Moti for the usual declaration that the deed of adoption will not affect their reversionary rights as the property in suit was ancestral. Issues were framed in this suit and evidence was led when it was compromised on the 14th of April, 1948. On that date, statement of Sidhu and Prabhu, plaintiffs, Pholu, son of Sardhu, Mansha Ram, son of Duni, and Duni; son

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of Nihala, defendants 1 to 3 and their counsel was recorded. It is to the effect that the suit be decreed *qua* 6 *kanals* of the disputed land, i.e., on the death of Pohlu, plaintiff, will get six *kanals* of land with regard to the rest plaintiff's suit be dismissed. Parties to bear their own costs. On the basis of this statement the Court passed the following order:—

> "According to the statements made by the parties, a decree for possession in respect of six *kanals* out of the land in suit is granted in favour of the plaintiffs against the defendants. The plaintiffs will be entitled to get the said land after the death of Pohlu. The suit regarding the remaining land is dismissed. The parties to bear their own costs. Order announced. The file be consigned to the Record Room after it has been completed."

The principal relief claimed in the suit was that the adoption was a paper transaction. An issue to the effect was framed and there is no decision on the issue nor the parties have made any statement relating to it one way or the other. They treated the suit as one relating to a specific piece of land not as one relating to the status of the adopted son. It was agreed that on the death of Pohlu land would be divided in the ratio of 6 *kanals* to the plaintiffs and the remaining 14 *kanals* and 1 *marla* to the defendant. It is on this basis that the suit was dismissed *qua* the remaining land. In these circumstances, it cannot be said that there is a previous decision on the factum or validity of adoption which can operate as *res judicata* in the present controversy so far as the question of adoption is concerned. It is no doubt true that a consent decree is as much *res judicata* as a decree

obtained after contest [see *Shankar Sitaram Sontakke and another* v. *Balkrishna Sitaram Sontakke and others* (1) and *Raja Sri Sailendra Narayan Bhanja Deo* v. *The State of Orissa* (2),] though section 11 of the Code of Civil Procedure is not strictly applicable to consent decrees. But a consent decree can only operate as *res judicata* when the question raised in the subsequent suit was present to the minds of the parties, and was actually dealt with by the consent decree, i.e., when the consent decree actually settled the question. In this connection, reference may be made to *Jagdish Misser and another* v. *Rameshwar Singh* (3), *Mahalinga Sundara Thevan* v. *Krishna Thevan and others* (4), *(Chennuri) Appalanarasiah Chetty Garu* v. *Makka Chittavadu* (5), and *Dhurwas M. Venkatachalapathi Iyer, Lakshmana Iyer, Sons* v. *City Cinema Co., Ltd.; through Managing Director, J. C. Rajagopala Iyer* (6):

With regard to the third contention, I am of the view that it has considerable force. In the trial Court the defendant's plea was that the land in suit is ancestral and, therefore, Pohlu could not make a valid will. The trial Court did not ascertain the plaintiff's stand on this question of fact. This could have been done by calling for a replication or by recording statements of the parties before issues. In case this was not done, it was his duty to have framed proper issues. It cannot be disputed that the duty to frame proper issues is of the Court. It seems that this matter was present to the minds of the parties. What I find from the record is that evidence was led on the nature

(1) 1955 S.C.R. 99
(2) 1956 S.C.R. 72
(3) A.I.R. 1920 Pat. 212
(4) A.I.R. 1916 Mad. 411
(5) A.I.R. 1934 Mad. 454
(6) A.I.R. 1938 Mad. 225

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of the property. In the lower appellate Court, grounds Nos. 2 and 5 were raised against the non-framing of the proper issues and as to the determination of this matter. In this Court ground No. 3 has been raised on this point. Mr Pandit's argument on the other hand is that as no issue was claimed by the defendant specifically and the Court had not refused to frame it, it should be presumed that this point was given up by the defendant. I find no statement on the record whereby this plea was given up, and considering the conduct of the case, I am not prepared to assume that the plea was in fact given up. In these circumstances, I feel that on this part of the case, there has not been a proper trial. The entire trouble has arisen on account of the Court's failure to perform its duty. I would accordingly frame the following issues and send back the case to the trial Court for a report after allowing the parties opportunity to lead whatever evidence they are advised on the same:—

(1) Whether the property in dispute is ancestral *qua* Pohlu and the parties to the suit ?

(2) If it is held that the property is ancestral, whether any valid will could be made with regard to this property ?

The trial Court will submit its report to this Court within three months from the receipt of the records in that Court.

The office is directed to transmit the records to the trial Court immediately. The parties are directed to appear in the trial Court on the 24th of August, 1959, when a date will be given to the parties for evidence.

The costs will abide the event.

B. R. T.