Before J. V. Gupta, J.

HAR CHAND,—*Appellant*

versus

RANJIT AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 1894 *of* 1977.

April 28, 1986.

Code of Civil Procedure (V *of* 1908)—*Section* 11—*Suit between the parties raising plea of effect of adoption—Issue duly framed but abandoned as not relevant during arguments before trial Court—Appellate Court, however, making observation regarding the issue—Such observation held to be in the nature of obiter—Second suit between the same parties calling into question the adoption—Finding of the appellate Court in the first suit—Whether can operate as* res-judicata *between the parties in the second suit.*

Held, that where the plea of adoption was taken at one stage in the first suit yet it was given up subsequently. However, the said plea was not at all necessary to decide the controversy in the suit. Moreover, in the appeal in the first suit the matter was not decided on the question of adoption. The observation of the appellate Court in the first suit was, therefore, no more than obiter and as such the judgment in the earlier suit would not operate as *res-judicata* between the parties in the second suit.

(Para 3).

Regular Second Appeal from the decree of the Court of the Senior Sub-Judge with enhanced appellate powers Jind, dated the 18th day of November, 1977, *affirming that of the Sub-Judge 1st Class, Narwana, dated the 24th day of August,* 1976, *passing a decree in favour of the plaintiff and against the defendants with costs for possession of agricultural land measuring* 28 *kanals* 17 *marlas as described in heading of the plaint situated in the revenue estate of village Danuda Khurd.*

Bhoop Singh, Advocate & Sarwan Gupta, Advocate, *for the Appellant.*

V. K. Jain, Advocate, *for the Respondent.*

JUDGMENT

J. V. Gupta, J.

(1) This is defendant's Second Appeal against whom suit for possession of agricultural land has been decreed by both the courts below.

(2) Ranjit, plaintiff, filed the suit for possession of agricultural land alleging that defendant Har Chand was his real brother they both being sons of Gola, son of Mai Sukh; that Gola died about 25 years prior to the institution of the suit; that Har Chand, defendant No. 1, was adopted by Mst. Jiwani; widow of Data, after Gola's death and he was, thus, son of Mst. Jiwani; that following the death of Smt. Jiwani, her property was mutated in favour of Har Chand, being her adopted son, and he was, thus, owner-in-possession of the estate left behind by Smt. Jiwani; that in view of the adoption of Har Chand by Mst. Jiwani, he was not entitled to any property left behind by Gola, his natural father, and that the plaintiff was the exclusive owner of the property in question, being Gola's sole heir; that the suit land was owned and possessed by Gola and any entry in the revenue record mentioning Har Chand as the owner of the suit land was illegal, against facts and not binding on the plaintiff; that Har Chand had delivered possession of the suit land to defendant No. 2, i.e., Munshi, and, therefore, he has been made a party to the suit. It was also alleged that earlier Har Chand had filed a suit against the plaintiff, and in the appeal in that suit it was held that Har Chand, defendant, was not entitled to any share in the property of his natural father, and, therefore, the same would operate as *res judicata* between the parties. The suit was resisted on the ground that their father Gola died about 40 years prior to the institution of the suit; that Har Chand, defendant, was never adopted by Smt. Jiwani, as alleged; that he had acquired only occupancy rights in the land belonging to Jiwani and, thus, he became the owner thereof; that after Gola's death, his land was also mutated in favour of Har Chand, and his alleged adoption by Smt. Jiwani was under customary law, if it were to be concluded that the adoption in question did take place; that he never filed any suit in respect of the land in dispute and the former's suit has, therefore, no relevance or bearing *qua* the present suit; that the residential site of the house involved in the earlier suit had been purchased by the plaintiff from the Custodian, and that the plaintiff had no cause of action. The trial court found that Har Chand, defendant, was the adopted son of Smt. Jiwani, having been adopted as such after the death of their father Gola, and he did inherit the estate of Smt. Jiwani, and was in possession thereof. The main controversy between the parties before the courts below was under issue No. 7-A, which related to the question of *res judicata* in view of the earlier judgment dated 21st December, 1975 (Copy Ex. P1). The learned trial court found that the said judgment operated as ***res judicata,***

and, so, the suit was decreed in favour of the plaintiff. In appeal, the learned Senior Sub-Judge with enhanced Appellate Powers affirmed the said finding of the trial court, and, thus, maintained the decree dismissing the suit. Dissatisfied with the same, defendant Har Chand has filed this Second Appeal.

(3) Learned counsel for the appellant contended that the earlier judgment rendered in the suit filed by the appellant-defendant would not operate as *res judicata* because the plea taken by the plaintiff Ranjit (defendant in that suit) had been abandoned by him at the time of arguments in that suit. It was Issue No. 4 that was framed by the trial court in that suit, which reads as under :—

> "Whether the plaintiff has no right about the land in dispute on the basis of his adoption by Shmt. Jiwani ?"

While deciding this issue the trial court,—*vide* copy of order Ex. PX/4, dated 21st December, 1972, observed as follows —

> "This issue was not referred by the learned counsel for the defendant as he has given up the same as being not relevant to the facts of the same."

Thus, the main controversy between the parties in the earlier suit was whether the plaintiff was the owner of the property in dispute or not. This plea taken by the plaintiff as defendant in that suit with respect to the adoption had been given up as observed earlier. However, in appeal, the learned District Judge observed :

> "In this way, the plaintiff could not have any share of the property of his natural father, and on this account also, the plaintif has no case."

It is on the basis of these observations that the Courts below found that it operated as *res judicata* between the parties. Learned counsel for the appellant contended that the said observations of the learned District Judge in appeal were *obiter* as the appeal could be disposed of without the said observations. Moreover, argued the learned counsel, in the trial court, the plaintiff (being the defendant in that suit) had given up the plea of adoption, and therefore, in these circumstances the earlier judgment could not operate as *res judicata* between the parties. It was, therefore, argued that the finding of the courts below in this behalf was wrong and illegal. I find force in this contention. No meaningful argument could be

raised on behalf of the plaintiff-respondents in support of this finding of the courts below. According to the learned counsel, even if there was a wrong judgment between the parties, the same was binding on them and it would operate as *res judicata*. He referred to *Mohanlal Goenka* v. *Benoy Kishna Mukherjee* (1) and *State of West Bengal* v. *Hemant Kumar Bhattacharjee* (2) in this behalf. There can be no quarrel with the said proposition. In the present case, however, the plea of adoption though taken at one stage by the plaintiff (defendant in that suit) but was given up subsequently. Moreover, the said plea was not at all necessary to decide the controversy in that suit. In that suit, the defendant, as plaintiff, claimed the suit property to be his exclusive property having been purchased by him from the Custodian. Thus, the question of his adoption by Mst. Jiwani was not at all relevant. It was in these circumstances that the plea was later given up. Moreover, in appeal also, the matter was not decided on the question of adoption alone. This was only an observation made by the Appellate Court being no more than *obiter*. Thus, on the facts and circumstances of the case, the earlier judgment did not operate as *res judicata* between the parties. The whole approach of the courts below in this behalf was wholly wrong, illegal and misconceived.

(4) It is not disputed that the defendant Har Chand was adopted by Mst. Jiwani after the death of defendent's father Gola. Admittedly, Har Chand, defendant, had succeeded to the property of his natural father. Once he had so succeeded to the property of his natural father he could not be divested of the same subsequently because he was adopted by Mst. Jiwani, both under the Hindu Law as well as under custom. In this behalf, reference be made to *Madhad Sahu* v. *Hatkishore Sahu* (3) A.I.R. 1975 Orissa 48 where it was held "the theory of complete severance of the child adopted from the family in which he is born has no application to cases where the properties have already become vested in person before adoption as an absolute owner, either as the sole surviving co-parcener or by inheritance or by partition in his own natural family." As regards the position under the Custom, the position was reiterated by a Division Bench of this Court in *Sohan Singh* v. *Gurtej Singh* (4), with the observations that "the only difference between an adoption under the

(1) A.I.R. 1953 S.C. 65.
(2) A.I.R. 1966 S.C. 1061.
(3) A.I.R. 1975 Orissa 48.
(4) 1971 CJL 942.

customary law and an adoption under the Hindu Law is that if the son is appointed under the customary law he does not lose all connections with the family. He retains the right of colatteral succession in his natural family, whereas in the case of an adoption under Hindu Law he is left with no connection with natural family." Thus, it is quite evident that once the appellant-defendant had succeeded to his natural father he could not be divested of the same on the ground that he was subsequently adopted by Mst. Jiwani.

(5) As a result of the above discussion, this appeal succeeds, the judgment and decree of the courts below are set aside, and the suit is dismissed with no order as to costs.

R. N. R.

Before D. S. Tewatia, J.

M. M. S. BEDI,—*Petitioner.*

versus

UNION TERRITORY OF CHANDIGARH and another,—
Respondents.

Criminal Misc. No. 2226-M of 1983.

May 9, 1986.

Code of Criminal Procedure (II of 1974)—Sections 256, 258 and 300—Accused summoned by Magistrate on basis of a complaint—Complainant absent on the date fixed—Magistrate acting under Section 256 dismissing the complaint in default and passing order of discharge of the accused—Complainant filing second complaint in respect of the same allegations—Effect of discharge in the first complaint—Stated—Second complaint—Whether liable to be quashed.

Held, that section 256 of the Code of Criminal Procedure, 1974, provides for the contingencies when the complainant is absent on the date fixed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned. It provides that if on the given date the complainant is absent the Magistrate shall acquit the accused unless for some reason the Magistrate considers it proper to adjourn the hearing of the case to some other date. A perusal of section 300 of the Code further