only in next semester examination which is to be held in April/May as the period of 3 years will be completed by then."

(4) After hearing counsel for the parties, we find no merit in the contention raised on behalf of the University. It is not disputed that the petitioner stood disqualified from appearing in any University Examination for a period of three years, including the examinations conducted in the year 1989. This period of three years expired on December 31, 1991 and for any examination to be held in the year 1992, the University cannot refuse the petitioner to appear in the same. Merely because the semester examination was originally scheduled to be held in November/December, 1991, is no ground to continue with the disqualification even for the examination to be held after the period of disqualification has expired. It is true that if the examination had been held in November/December, 1991, the petitioner would not have been entitled to appear in the same but since the same was held in January, 1992 when the period of disqualification as decided by the Standing Committee and as communicated to the petitioner had expired, he, in our view, had a right to sit in the examination. This is not a case where the petitioner had been disqualified from appearing in any specified number-semesters of examinations to be held by the University.

(5) For the reasons recorded above, we allow the writ petition with a direction to the respondents to declare the result of the petitioner who has already taken the examination under the interim orders of this Court. There is no order as to costs.

J.S.T.

Before : A. S. Nehra, J.

KRISHAN KUMAR,—*Appellant.*

versus

SATISH KUMAR AND OTHERS,—*Respondents.*

Regular Second Appeal No. 1188 of 1988.

13th May, 1992.

Code of Civil Procedure, 1908—*S.* 11—Res judicata *between co-defendants—Only when determination of question as between*

co-defendants necessary for determination of plaintiff's claim—If such determination is not necessary for the determination of plaintiff's claim such decision would not operate as res-judicata—*For decision to operate as* res-judicata *between co-defendants there must have been actually a conflict or issue raised and such issue must have been necessary for determination of plaintiff's case.*

Held, that it is only when the determination of the question as between co-defendants is necessary for the determination of the plaintiff's claim that the decision as between co-defendants would operate as *res judicata.* If such determination as between co-defendants were not necessary for the decision of the plaintiff's case, such decision would not operate as *res judicata* for the simple reason that it is on a question which, in the language employed in S. 11, Civil Procedure Code, is though substantially, not directly in issue. It would thus be clear that whenever the contest between co-defendants is not indicated and included in the plaintiff's action itself, then it follows that, for the purpose of a decision operating as *res judicata* as between co-defendants, there must have been actually a conflict or issue raised as between them and that such conflict or issue must have been necessary for the determination of the plaintiff's case/claim.

(Para 11)

(2) *Code of Civil Procedure,* 1908—*S.* 11, *Expl. IV—All that it provides is that any matter which might and ought to have been made ground of defence in such former suit shall be deemed to have been a matter directly and substantially in issue in suit and nothing beyond.*

Held, that the instant suit cannot be said to be hit by Explanation IV to S. 11 of the Code of Civil Procedure. All that Explanation IV to S. 11 of the Code of Civil Procedure provides is that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit and nothing beyond.

(Para 10)

(3) *Specific Relief Act* (47 *of* 1963)—*Ss.* 5 & 39—*Mandatory injunction and maintainability of suit—On partition, shop fell to share of plaintiff who allowed defendant to retain shop for* 5 *years to help him in his business—Defendant to relinquish possession thereafter—Suit filed for mandatory injunction—Plea that suit filed not maintainable cannot be allowed to be raised for first time after* $9\frac{1}{2}$ *years in regular second appeal.*

Held, that the defendant-appellant was under an obligation to return the possession of the shop to the plaintiffs-respondents after 15 years of the partition. The plaintiffs respondents had given the shop to their brother Parkash Chand defendant to help him in his

business. Therefore, it does not lie in the mouth of the appellants that the present suit for mandatory injunction is not maintainable. Moreover, this plea cannot be allowed to be raised for the first time in the regular second appeal after 9½ years of the filing of the suit. The suit filed by the plaintiffs-respondents for mandatory injunction is maintainable.

(Para 8)

Regular Second Appeal from the order of the Court of Shri J. P. Gupta, Addl. Distt. Judge, Sangrur, dated 17th April, 1990 reversing that of Shri S. C. Arora, PCS, Sub Judge, IInd Class, Malerkotla dated 28th November, 1987 decreeing the suit of the plaintiff for mandatory injunction as well as for recovery of Rs. 1,800 (fully detailed in the plaint against the defendant Parkash Chand (since died) and now represented by his legal representatives Krishan Kumar and Sudesh Kumari).

Claim :—Suit for permanent injunction and mandatory to the effect that defendant Parkash Chand may be directed to deliver back the possession of the suit property, one storied shop and double storied upper portion, bounded as East : Bazar, West : Shop of Parkash Chand North : Shop of Parkash Chand defendant, South : Walaiti Ram, situate at Malout Tehsil Ludhiana, as indicated in Plan Mark 'A' attached with the plaint.

Claim in Appeal : For reversal of the order of Lower Appellate Court.

H. L. Sibal, Sr. Advocate and S. C. Sibal, Sr. Advocate with Deepak Sibal, Advocate, *for the Appellants.*

K. S. Saini, Advocate, *for the Respondents.*

JUDGMENT

A. S. Nehra, J.

This appeal is directed against the judgment and decree dated 17th April, 1990 passed by the Additional District Judge Sangrur, by which the appeal filed by the plaintiffs-respondents was allowed and the judgment and decree dated 28th November, 1987 passed by the trial Court (dismissing the suit filed by the plaintiffs-respondents) was set aside and the suit filed by the plaintiffs-respondents was decreed.

(2) The facts of the case, as given in the plaint, are that the property, including the suit property, was jointly owned by the plaintiffs and defendants Parkash Chand and Panna Lal, but the same was partitioned orally on 23rd August, 1959; that the suit property as well as some other property fell to the share of the plaintiffs; that the partition effected was consented to by Daropadi also; that the suit property which fell to the share of the plaintiffs, however, was allowed to be retained by Parkash Chand defendant for 15 years and the latter was to relinquish possession of the suit pro-

perty (shop) thereafter in favour of the former. That, since possession of the suit property was not surrendered by defendant Parkash Chand, a suit was filed for possession as well as for recovery of Rs. 1,800 towards damages for use and occupation for the period from 1st October, 1980 to 31st October, 1983 at the rate of Rs. 50 per month.

(3) Defendant Parkash Chand denied the material averments made in the plaint. However, he pleaded that the decision in Civil Suit No. 176 of 1979 between the parties could not operate as *res judicata* in any manner *qua* the factum of oral partition dated 23rd August, 1959, adding that, even if the said decision be taken to be *res judicata,* the suit of the plaintiffs itself is hit by constructive *res judicata* in view of Explanation IV to section 11 of the Code of Civil Procedure.

(4) Defendant Panna Lal admitted the factum of oral partition, as pleaded in the plaint, but denied the other averments affecting him adversely. He also pleaded that he was arrayed improperly as no real had been claimed against him.

(5) On the pleadings of the parties, the following issues were framed :—

1. Whether the plaintiffs are entitled to the injunction, prayed for ?
2. Whether the plaintiffs are entitled to recover Rs. 1,800 on the basis of the judgment and decree dated 25th August, 1982 ?
3. Whether the suit of the plaintiffs is barred by the principles of *res judicata* ?

3-A. Whether the judgment and decree dated 25th August, 1982 in case *Panna Lal* v. *Parkash Chand*, operates as *res judicata* ? If so, its effect ?

4. Whether the suit is not properly valued for the purpose of Court-fee ?

4-A. Whether the plaintiffs have not mentioned the shop, in dispute, accordingly in the plaint ? If so, its effect ?

5. Whether the suit is not maintainable in the present form ?
6. Relief.

The trial Court decided issues Nos. 1, 2. 3 and 3-A against the plaintiffs. Issues Nos. 4, 4-A and 5 were not pressed by defendant Parkash Chand and, therefore these issues were decided against Parkash Chand defendant and the suit filed by the plaintiffs-respondents was dismissed by the trial Court on 28th November, 1987.

(6) Mr. H. L. Sibal, Senior Advocate, has argued that the civil suit filed by the plaintiffs-respondents for mandatory injunction is not maintainable and, therefore, the suit filed by the plaintiffs-respondents is liable to be dismissed on this short ground. He has further submitted that the plaintiffs-respondents should have filed a suit for possession. In support of his argument, he has relied upon section 5 of the Specific Relief Act, 1963, and sections 16 and 17 of the Code of Civil Procedure.

(7) The learned counsel for the plaintiffs-respondents, Mr. K. S. Saini, has argued that the defendant-appellant was under an obligation to deliver possession of the shop to the plaintiffs-respondents after 15 years of the partition. In support of his argument, he has relied upon section 39 of the Specific Relief Act, which reads as under :—

> "39. *Mandatory injunctions.*—When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

(8) After hearing the learned counsel for the parties, I find force in the argument raised by Mr. K. S. Saini, learned counsel for the plaintiffs-respondents, and hold that the defendant-appellant was under an obligation to return the possession of the shop to the plaintiffs-respondents after 15 years of the partition. The plaintiffs respondents had given the shop to their brother Parkash Chand defendant to help him in his business. Therefore, it does not lie in the mouth of the appellants that the present suit for mandatory injunction is not maintainable. Moreover, this plea cannot be allowed to be raised for the first time in the regular second appeal after 9½ years of the filing of the suit. The suit filed by the plaintiffs-respondents for mandatory injunction is maintainable.

(9) The learned counsel for the appellants has further argued that the present suit filed by the plaintiffs-respondents is hit by the principles of *res judicata* in view of Explanation IV to section 11 of the Code

of Civil Procedure, because the plaintiffs did not raise the plea of possession/damages for the use and occupation in Civil Suit No. 176 of 1979, which plea was available to the plaintiffs because the period of 15 years from the date of oral partition had expired.

(10) After giving due thought to the respective contentions advanced in this context, I have the least hesitation to hold that the instant suit cannot be said to be hit by Explanation IV to section 11 of the Code of Civil Procedure. All the Explanation IV to section 11 of the Code of Civil Procedure provides is that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit and nothing beyond. The earlier suit, as the record shows, was instituted by Panna Lal against Parkash Chand defendant Ram Sarup and Jagan Nath, present plaintiffs, and others and that too simply for possession by way of partition but the suit was dismissed holding that oral partition had taken place in the year 1959, meaning thereby that it was not obligatory on the part of the present plaintiffs to raise the plea of possession/damages for use and occupation from their co-defendant Parkash Chand in that suit. Like wise, it also cannot be said that the Court in the earlier suit was, in fact, bound to grant the relief of possession/damages for use and occupation in favour of one defendant against his co-defendant. Still further, it cannot be said if the plea of possession/damages for use and occupation forming the subject matter of the instant suit in any manner is either a ground of defence or attack by one defendant against the co-defendant in a suit for partition at the instance of a person who is neither a defendant nor co-defendant but merely a plaintiff.

(11) It is only when the determination of the question as between co-defendants is necessary for the determination of the plaintiff's claim that the decision as between co-defendants would operate as *res judicata*. If such determination as between co-defendants were not necessary for the decision of the plaintiff's case, such decision would not operate as *res judicata* for the simple reason that is is on a question which, in the language employed in section 11, Civil Procedure Code, is, though substantially, not directly in issue. It would thus be clear that whenever the contest between co-defendants is not indicated and included in the plaintiff's action itself, then it follows that, for the purpose of a decision operating as *res judicata* as between co-defendants, there must have been actually a conflict or issue raised as between them and that such conflict or issue must have been necessary for the determination of the plaintiff's case or claim,

Therefore, the present suit is not barred by the principles of *res judicata*. There is no merit in the appeal and the same is dismissed with costs which are assessed at Rs. 5,000.

J.S.T.

Before : G. R. Majithia, J. and A. S. Nehra, J.

INDRAJ,—*Petitioner.*

versus

SHAMLAT DEH PATTI JATTAN, VILLAGE DADO RANGHRAN, TEHSIL AND DISTRICT HISSAR THROUGH ITS SARPANCH AND OTHERS,—*Respondents.*

Civil Revision 1861 *of* 89

6th August, 1992

Land Acquisition Act (E *of* 1894)—*Section* 30—*Apportionment of compensation—Disputes regarding—Reference under S.* 30—*Court can add a person as a party who has not asked for reference—Such person must be entitled to apportionment of Compensation—Jurisdiction of Court to effectively and completely adjudicate upon and settle all questions involved is unfettered.*

(Para 8, 10 & 12)

Niranjan Singh and others v. *Amar Singh and others*, 1984 *PLJ* 200 = *A.I.R.* 1984 *Pb. & Hy.* 250 *overruled.*

Held, that the Collector under section 30 of the Act is not enjoined to make a reference; he may relegate the person raising the dispute to agitate the same in a suit and pay the compensation in the manner declared by the award. If a person can be relegated to the remedy of a suit, there can be no bar for impleading him as a party in the reference for complete adjudication of the dispute relating to apportionment. Any other view would not advance the cause of justice.

Held, that a person who has not appeared in acquisition proceedings before the Collector can raise a dispute with regard to apportionment of compensation or relating to the person to whom it is payable and apply to the Collector for a reference under section 30 for determination of his right to compensation which may have existed before the award or which may have devolved upon him since the award and there is no limitation for making such an application. meaning thereby that the Collector can make more than one reference relating to apportionment to the Court. If the Collector can make more than