FULL BENCH

Before S. S. Sandhawalia, C.J., G. C. Mital and I. S. Tiwana, JJ.

MOHINDER KAUR and another,—*Appellants.*

versus

PIARA SINGH and others,—*Respondents.*

Regular Second Appeal No. 1047 *of* 1975.

April 22, 1980

Code of Civil Procedure (V of 1908)—*Section* 11—*Explanations VII and VIII, Order* 22, *Rule* 5—*Decision under* 22, *Rule* 5 *arrived at after full and proper hearing and after leading evidence—Such decision—Whether would operate as* res judicata *in subsequent suits between the same parties or their successors-in-interest—Section* 11—*Whether the only provision applicable to suits—General principles of* res judicata—*Whether can be applied to suits where section* 11 *not applicable—Explanations VII and VIII—Scope of—Stated.*

Held, that a decision under Order 22 Rule 5 of the Code of Civil Procedure 1908 is only directed to ensure an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the persons claiming to be the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. Besides this, it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead some sort of evidence in support of the claim of being a legal representative of the deceased party would not in any manner change the nature of the proceedings. It is, thus, manifest that the Civil Procedure Code proceeds upon the view of not imparting any finality as to the determination of the question of succession of the deceased party. As such, a decision under Order 22, Rule 5 of the Code would not operate as *res-judicata* between the same parties or their successors-in-interest. (Paras 4 and 5).

Held, that in matters of suits also where section 11 of the Code does not apply, the principles of *res judicata* have been applied by the Courts for the purpose of achieving finality in litigation. However, Explanation VII and VIII to Section 11 of the Code are irrelevant for determining this matter. These Explanations have been newly inserted in Section 11 by the Code of Civil Procedure (Amendment) Act, 1976. As the old section did not directly apply to the

orders in execution proceedings and the principles of *res judicata* were held applicable to them; the Explanation VII now makes this section directly applicable to such cases. Similarly, prior to the amendment brought about in this section an issue decided by a competent court of limited jurisdiction in a former suit was not *res judicata* in respect of the same issue raised in a subsequent suit unless the Court deciding the former suit was competent to entertain the subsequent suit itself; the present Explanation VIII now renders such decisions *res judicata.*

Case referred by Justice D. S. Tewatia on 1st March, 1979 to a Full Bench for decision of an important question of law involved in the case. The Full Bench consisting of the Hon'ble The Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice G. C. Mittal and Hon'ble Mr. Justice I. S. Tiwana after deciding the question returned the case to the Single Judge on 22nd April, 1980 for deciding the case on merits. The Single Judge The Hon'ble Mr. Justice D. S. Tewatia finally decided the case on 25th August, 1980.

Regular Second Appeal from the decree of the Court of Shri N. S. Bhalla, Additional District Judge, Hoshiarpur, dated the 13th day of February, 1975, affirming with costs that of Shri Hardev Singh, P.C.S., Sub-Judge, 1st Class, Garhshankar, dated the 11th October, 1971, dismissing the suit of the plaintiffs, leaving the parties to bear their own costs.

R. S. Bindra, Sr. Advocate with R. S. Cheema, Advocate, *for the appellants.*

B. S. Khoji, Advocate, *for the Respondents.*

JUDGMENT

I. S. Tiwana, J.

(1) The following question of law has been referred to this Full Bench for decision :—

> "Whether, in no case, a decision under Order 22, Rule 5, Civil Procedure Code, would operate as *res judicata* between the same parties or their successors-in-interest or their privies in subsequent proceedings even when the contested issue in the earlier proceedings had been decided by the Court on merits after affording fair and due opportunity to the contesting parties to lead evidence and of hearing ?"

A few skeletal facts necessary to unfold the basic legal contention only are noticed as under.

The present plaintiff-appellants (hereinafter referred to as the plaintiffs), along with their mother, Smt. Amar Kaur, brought a suit on July 1, 1958 for maintenance against their grandfather, Ishar Singh, with the allegation that since their father Milkhi was unheard of for the last more than thirteen years and was presumed to be dead, the defendant Ishar Singh was under a legal obligation to maintain them from the property in his hands. The said suit was decreed on August 30, 1961, by Sub-Judge, 1st Class, Garhshankar. Before an appeal could be filed against that decree. Ishar Singh, judgment-debtor, died. The present defendants, claiming themselves to be the legal representatives of Ishar Singh, deceased on the basis of a will, filed an appeal in this Court against the said decree. As a question with regard to the maintainability of the said appeal by the defendants arose, the matter was referred by this Court to the trial Court for a report on the point as to whether the defendants were the legal representatives of Ishar Singh deceased, judgment-debtor. The said Court, after recording evidence with regard to the genuineness of the will, reported in favour of the defendants. This report was accepted by this Court with the following order :—

> "In view of the report of the court below pursuant to my order, dated 19th July, 1962, Piara Singh and Sucha Singh, petitioners are directed to be impleaded as legal representatives of the deceased Ishar Singh and consequently permitted to file the appeal. The appeal has already been filed and appropriate orders have been made regarding its admission etc.
>
> 26th July, 1963. Sd/- A. N. Grover, Judge."

As a result of this order, the appeal preferred by the defendants was held to be maintainable though ultimately the same was dismissed by this Court on April 29, 1971 with certain modifications in the decree on account of death of Smt. Amar Kaur during the pendency of the appeal and the plaintiffs-grand-daughters of Ishar Singh, having joined Government service. Subsequently the plaintiffs filed the present suit against the defendants for declaration and possession of the property left by Ishar Singh, deceased on the basis of their being the sole heirs to him. A specific challenge to the will alleged to have been executed by the deceased in favour of the defendants was

also levelled. The pleadings of the parties necessitated the framing of the following issues :—

1. Whether Ishar Singh deceased, had executed a valid will in favour of Piara Singh and Sucha Singh on 28th December, 1960 ? OPD.

2. Whether the will, dated 28th December, 1960 is the result of undue influence and fraud as alleged ? OPD.

3. Whether the plaintiffs are estopped from challenging the validity of the will as alleged and the matter is *res judicata* between them ? OPD.

The above-noted question of law posed before us, pertains to issue No. 3 only.

(2) The learned Single Judge, before whom this R.S.A. came up for final hearing, felt that the inflexible and absolute rule laid down by a string of decisions of Lahore High Court and this Court that a decision under Order 22, Rule 5, Civil Procedure Code, would in no case operate as *res judicata* between the parties or their successors-in-interest in a subsequent suit required reconsideration in view of the newly added explanations 7 and 8 to section 11 of the Civil Procedure Code and the decision of their Lordships of the Supreme Court in *Union of India* v. *Nanak Singh* (1). In the said case, the learned Judges of the Supreme Court, while holding that a decision of the Court on the writ side deciding a particular issue involved therein would operate as *res judicata* regarding the said point, raised subsequently in a civil suit, observed as follows :—

> "Provisions of section 11, Civil Procedure Code are not exclusive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res*

(1) A.I.R. 1968 S.C. 1370.

judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly should be competent to decide the subsequent suit or that the former proceeding and the subsequent suit should have the same subject-matter. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principles of the finality of decisions after full contest. A.I.R. 1965 S.C. 1153 relied on."

After noticing the facts of that case, their Lordships held that the suit was so barred as the judgment in the previous case operated by express decision as *res judicata*. It is on the basis of those observations that Mr. B. S. Khoji learned counsel for the defendants, contends that the decisions of the Lahore High Court reported as *Chirag Din and others* v. *Lilawar Khan* (2), *Mohammad Khan* v. *Jan Mohammad and another* (3) and *Daulat Ram* v. *Mt. Meero and others* (4), and also of this Court in *Mangat etc.* v. *Surja* (5), laying down that a decision under Order 22, Rule 5, Civil Procedure Code, would not operate as *res judicata* in a subsequent suit where an issue with regard to the succession or heirship of a deceased party in the earlier proceedings, is raised, are no more a good law. On the other hand, Mr. R. S. Bindra, learned counsel for the plaintiffs, forcefully maintains that (i) a decision under Order 22, Rule 5, Civil Procedure Code, always relates to a collateral issue or an issue which incidentally crops up in a litigation when a party to that litigation dies and in the very nature of things such a decision is rendered only with a view to ensuring orderly conduct of the proceedings as a result of a summary enquiry and such a decision can never operate as *res judicata* in a subsequent suit where the direct question of succession or heirship to the said deceased party arises, and (ii) such a decision being not a decision in a suit, would not operate as *res judicata* in a subsequent suit in view of the provisions of section 11 of the Civil

(2) AIR 1934, Lahore 465.
(3) AIR 1939, Lahore 580.
(4) AIR 1941, Lahore 142.
(5) 1979 P.L.R. 129.

Procedure Code. What Mr. Bindra submits is that in the context of suits it is only the provisions of section 11 of the Civil Procedure Code which can be looked into to find out the applicability of the doctrine of *res judicata* and in such matters it is not open to invoke the general principles of *res judicata*. For making this submission he strongly relies on two judgments of the Supreme Court, that is, *Satyadhyan Ghosal and others* v. *Smt. Deorajin Devi and others* (6) and *I. L. Janakirama Iyer and others* v. *P. M. Nilkanta Iyer and others* (7). In *Satyadhyan Ghosal's case*, it was observed as under :—

> "The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res judicata*, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceedings and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. *This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure ;* but even where section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct."
> (Emphasis supplied).

In *I. L. Janakirama Iyer's case* (supra) their Lordships observed thus :—

> "That takes us to the question of *res judicata*. The argument is that on general grounds of *res judicata* the dismissal of the suit (O.S. No. 30 of 1943) filed by defendants 1 to 6 should preclude the trial of the present suit. It has been fairly conceded that in terms section 11 of the Code cannot apply because the present suit is filed by the creditors

(6) AIR 1960 S.C. 941.
(7) AIR 1962 S.C. 633.

of defendants 1 to 6 in their representative character and is conducted as a representative suit under Order 1, Rule 8; and it cannot be said that defendants 1 to 6 who were plaintiffs in the earlier suit and the creditors who have brought the present suit are the same parties or parties who claim through each other. Where section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of section 11 and no other. In our opinion, therefore, there is no substance in the ground that the present suit is barred by *res judicata*."

The further submission of Mr. R. S. Bindra is that to hold otherwise would render section 11, Civil Procedure Code, nugatory and would introduce anomalies. He submits that if the general principles of *res judicata* are to be applied to suits independently of section 11, Civil Procedure Code also, then a decision if it fell under section 11 of the Code, would be *res judicata* in a subsequent suit and even if it did not so fall thereunder, it would equally be *res judicata*. Leaving aside the plausibility of this argument of Mr. Bindra, we feel bound by the decision of their Lordships of the Supreme Court which pointedly considers this aspect of the question in *Gulabchand Chotalal Parikh* v. *State of Gujarat* (8). It is the ratio of this judgment which has been reiterated in the latter judgment in *Nanak Singh's case* (supra) on which Mr. Khoji has relied. This is what has been said in paragraph 43 of this judgment *Gulabchand Chhotalal Parikh's case* (supra) :—

"43. The general principle of *res judicata* has been applied to suits even though the decision on the same matter in controversy had been previously given by a competent Court in proceedings which were not suits under the Code of Civil Procedure. The case law on the subject will be discussed later. It is urged that there seems to be no good principle behind applying the general principles of *res judicata* to suits in circumstances which do not bring the previous decision within the language of section 11 and that the legislature's restricting the application of the general principles of *res judicata* to the circumstances

(8) A.I.R. 1965 S.C. 1153.

mentioned in section 11 must be deemed to indicate that the general principle of *res judicata* be not applied to bar a subsequent suit if the earlier decision of the same controversy betwen the same parties had been arrived at in proceedings other than suits and in which the entire procedure provided for the decision of the dispute in a regular suit might not have been followed. It appears to us that the reason for the specific provisions of section 11 is not that the legislature intended to bar the application of the general principles of *res judicata* to suits when the previous decision is arrived at in proceedings other than suits. The legislature was providing in the Code of Civil Procedure for the trial of suits over which the civil Court was given jurisdiction under the provisions of the Code. The preamble of the Code of 1908 reads :—

'Whereas it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature it is hereby enacted as follows'—

The Code was dealing with procedure of the Civil Courts only and had, therefore, not to consider what would be the effect on the trial of suits in view of the provisions of other enactments or of general principles of *res judicata* or of any other kind. It has to restrict its provision about *res judicata* to the effect of decisions in a civil suit on a subsequent civil suit and therefore, enacted section 11 in the form in which we find it. It made one of the conditions for the application of a previous decision to operate as *res judicata* to be that the previous decision is made not only by a Court competent to make it but by a Court which may be competent to try the subsequent suit. This condition must have been considered necessary in view of the observations of the Privy Council in *Misir Raghobardial's case* (9), and on account of the hierarchy of Courts under the various Acts constituting Courts of civil judicature and it could have been felt that a decision by a Court which is not competent to decide the subsequent suit be not treated of a binding nature. Such an exceptional procedure seems to have been provided as a matter of precaution as the Court not competent to try the subsequent suit must necessarily be a Court of inferior jurisdiction and therefore, more liable to go wrong. Whatever the reason may be,

(9) Ind. App. 197 (PC).

the provision of section 11 will govern a previous decision in a suit barring a subsequent suit with respect to the same matter in controversy and general principle as of *res judicata* in such particular circumstances will neither be available to bar a subsequent suit nor will be needed. It is in such context that the remarks of this Court in *Janakirama Iyer's case* (10) are to be considered. In that case, the decision in a previous suit could not operate as *res judicata* in accordance with the provisions of section 11 of the Code, because the parties in the two suits could not be said to be the same parties or parties who claimed through one another. It was then said :

> 'Where section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of section 11 and no other'.

The observations are to be read in the context in which they are made, the context being that

> the question of *res judicata* was being considered in connection with the decision in a previous suit and the parties in the two suits being not the same. In fact, general principles of *res judicata* also require that the earlier decision be between the same parties. A decision not *inter parties* cannot, even on general principles of *res judicata*, operate as *res judicata* in a subsequent suit."

In view of this authoritative pronouncement we feel no scope is left to examine the second argument of Mr. Bindra noticed above. Even in the earlier judgment of the Supreme Court in *Satyadhyan Ghosal's case* (supra) relied upon by him, it has been stated in categorical terms that in matters of suits also where section 11, Civil Procedure Code does not apply, the principles of *res judicata* have been applied by the Courts for the purpose of achieving finality in litigation. Thus, we do not find any substance in this submission of Mr. Bindra. At the same time, we find the references made by Mr. Khoji

(10) 1962 Supp (1), S.C.R. 206 (at page 224) : A.I.R. 1962 S.C. 633. at page 641.

to Explanations VII and VIII to section 11, Civil Procedure Code, in support of his contention, are totally irrelevant. These Explanations have been newly inserted in the section by the Code of Civil Procedure (Amendment) Act, 1976. As the old section did not directly apply to the orders in execution proceedings and the principles of *res judicata* were held applicable to them; the Explanation VII now makes this section directly applicable to such cases. Similarly, prior to the amendment brought about in this section, an issue decided by a competent Court of limited jurisdiction in a former suit was not *res judicata* in respect of the same issue raised in a subsequent suit unless the Court deciding the former suit was competent to entertain the subsequent suit itself; the present Explanation VIII now renders such decision *res judicata*. The Explanations have nothing to do with the point in issue.

So far as the first argument of Mr. Bindra, noticed above is concerned, we find that in addition to the judgments of the Lahore High Court and of this Court, referred to in the earlier part of this judgment, he is supported by a string of judgments of other High Courts as well wherein it has repeatedly been held on varied reasons that a decision under Order 22, Rule 5, Civil Procedure Code, would not operate as *res judicata* in a subsequent suit between the same parties or persons claiming through them wherein the question of succession or heirship to the deceased party in the earlier proceedings is directly raised. Some of these reasons are as follows :—

(i) Such a decision is not on an issue arising in the suit itself, but is really a matter collateral to the suit and has to be decided before the suit itself can be proceeded with. The decision does not lead to the determination of any issue in the suit.

(ii) The legal representative is appointed for orderly conduct of the suit only. Such a decision could not take away, for all times to come, the rights of a rightful heir of the deceased in all matters.

(iii) The decision is the result of a summary enquiry against which no appeal has been provided for.

(iv) The concepts of legal representative and heirship of a deceased party are entirely different. In order to constitute one as a legal representative, it is unnecessary that

he should have a beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest. Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on whom beneficial interest devolved under the law whether statute or other, governing the parties, will be legal representatives.

The decisions on which Mr. Bindra has placed firm reliance and which uphold the above proposition of his, are in their chronological order, as follows:—

1. *Chirag Din and others* v. *Dilawar Khan* (supra).
2. *Antu Rai and others* v. *Ram Kinker Rai and another* (11).
3. *Zalim and others* v. *Babu Tirlochan Prasad Singh* (12).
4. *Mohammad Khan* v. *Jan Mohammad and another* (supra).
5. *Daulat Ram* v. *Mt. Meero and others* (supra).
6. *Kuwarlalsingh Indrarajsingh* v. *Smt. Kumarani Uma Devi and another* (13).
7. *Bhudeo Pandey* v. *Gupteshwar Missir & others* (14).
8. *Chacko Pyli* v. *Iype Varghese* (15).
9. *Ram Kalap* v. *Banshi Dhar and others* (16).
10. *Dukh Haran Tewary and others* v. *Dulhin Bihasa Kuer and another,* (17).
11. *Konaridoss* v. *N. Subhiah Naidu and others,* (18).
12. *Krishnakumar* v. *N. Goverdhana Naidu and another* (19).

(11) A.I.R. 1936 Allahabad 412 (DB).
(12) AIR 1937 Oudh 220 (F.D.).
(13) AIR 1940 Nagpur 424 (D.B.).
(14) AIR 1951 Patna 537 (D.B.).
(15) A.R. 1956 Travancore-Cochin 147 (F.B.).
(16) AIR 1958 Allahabad 573 (D.B.).
(17) AIR 1963 Patna 390 (D.B.).
(18) AIR 1975 Madras 124.
(19) AIR 1975 Madras 174.

13. *Suraj Mani and another* v. *Kishori Lal* (20).

(14) *Mangat and another* v. *Surja*, (21).

As against this, Mr. Khoji, counsel for the plaintiffs, conceded his inability to show us any judgment of any High Court in India except two, that is *Raj Bahadur* v. *Narayan Prasad and others* (22), *Ibrahim Ali* v. *Ashan Hussain and others* (23), which may have taken a contrary view. These above-noted two judgments referred to by Mr. Khoji have even been specifically overruled by the larger Benches of those very High Courts. Raj Bahadur's case (supra) was dissented from in Antu Rai's case (supra) and Ram Kalap's case (supra). These latter judgments, while considering the earlier judgment, that is, *Raj Bahadur's case* (supra), have said that though the facts in that case were very different from the facts in these cases, yet if it was intended to lay down in the case of Raj Bahadur (1926 Allahabad 439), that a decision in the summary enquiry under Order 22, Rule 5, Code of Civil Procedure, for ever barred anyone again claiming property as the heir of the deceased party in the suit, then we respectfully dissent from it. Similarly the other judgment relied upon by Mr Khoji, that is *Ibrahim Ali's case* (supra) was later overruled by a Full Bench of the said Court in *Zalim's case* (supra). The question of law posed before the Full Bench was 'does the determination of the question whether a certain person is or is not the legal representative of a deceased party in a proceeding under Order 22, Rule 5, Civil Procedure Code, operate as *res judicata* so as to preclude the same question from being reagitated in a separate suit? Does the ruling reported in *Jai Narain and others* v. *Ram Deo and others* (supra) lay down the correct law. While answering this question, this is what was held by the Full Bench:—

> "After a careful consideration of the case law on the subject and the trend of authorities in the various High Courts, we are clearly of the opinion that the answer to the question referred to the Full Bench should be in the negative and we hold that the determination of the question whether a certain person is or is not the legal representative of a deceased party in a proceeding under Order 22, Rule

(20) A.I.R. 1976 H.P. 74.
(21) 1979 RLR (Pb. & H.) 129.
(22) A.I.R. 1926 All. 439.
(23) A.I.R. 1933 Oudh 287.

5, Civil Procedure Code, does not operate as *res judicata* so as to preclude the same question from being reagitated in a separate suit and we decide that the ruling reported in 8 Lucknow 477 does not lay down the correct law on the subject."

(3) In view of the above referred to catena of authorities by Mr. Bindra and the inability of Mr. Khoji to show any judgment to the contrary, we find that the above-noted first argument of Mr. Bindra is well merital.

At least one of the reasons—that the appointment of a legal representative is only for the purposes of that suit alone-noted by us above, has met the approval of the Supreme Court in *Daya Ram and others* v. *Shyam Sundari and others* (24). In that case, while examining and interpreting the provisions of Order 22, Rule 4, Civil Procedure Code, in the context of the question involved, that is, when this provision speaks of 'legal representatives', is it the intention of the Legislature that unless each and every one of the legal representatives of the deceased defendants, where these are several, is brought on record there is no proper constitution of the suit or appeal, with the result that the suit or appeal would abate, the Court on the basis of almost universal consensus of opinion of all the High Courts in India, while holding that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record, approved the following enunciation of law in an earlier decision of the Madras High Court in *Kadir Mohideen* v. *Muthukrishna Ayyar* (25).

"In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate....If this were not the law, it would, in no few cases,

(24) A.I.R. 1965 S.C. 1049.
(25) I.L.R. 26 Madras 230.

be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of a Muhammadan party and there can be no hardship in a provision of law by which a party dying during the pendency of a suit, *is fully represented for the purpose of the suit, but only for that purpose* by a person whose name is entered on the record in place of the deceased party under sections 365, 367 and 368 of the Civil Procedure Code, though such person may be only one of several legal representatives or may not be the true legal representative.

This, in our opinion, correctly represents the law". (Emphasis provided).

This principle of law was again reiterated and approved by the Supreme Court in a later judgment, that is, *Harahar Prasad Singh and others* v. *Balmiki Prasad Singh and others* (26).

(4) We are, therefore, of the opinion that in essence a decision under Order 22, Rule 5, Civil Procedure Code, is only directed to ensure an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the persons claiming to be the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. It also does not determine any of the issues in controversy in the suit. Besides this it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead some sort of evidence in support of the claim of being a legal representative of the deceased party would not in any manner change the nature of the proceedings. In the instant case the brevity of the order (reproduced above) with which the report submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Civil Procedure Code proceeds upon the view of not imparting any finality to the determination of the question of succession or heirship of the deceased party.

(26) A.I.R. 1975 S.C. 733 at page 746.

(5) In view of the above discussion we are clearly of the opinion that the answer to the above referred to question stated in the opening part of the judgment has to be in the affirmative and we accordingly hold that in no case a decision under Order 22, Rule 5, Civil Procedure Code, would operate as *res judicata* between the same parties or their successors in interest or their privies in a subsequent proceeding even when the said parties had been provided an opportunity to contest the issue and lead the evidence thereon. With this answer to the question posed, we send back the case to the learned Single Judge for decision on merits.

S. S. Sandhawalia, C.J.—I agree.

G. C. Mittal, J.—I too agree.

H.S.B.

FULL BENCH

Before S. S. Sandhawalia, C.J., P. C. Jain and D. S. Tewatia, JJ.

BALDEV SINGH,—*Petitioner.*

versus

STATE OF PUNJAB and others,—*Respondents.*

Civil Writ Petition No. 2850 *of* 1978

September 11, 1980.

Constitution of India 1950—*Article* 16—*Presidential order providing for regularisation of the services of* ad hoc *employees—Conditions necessary for such regularisation laid down—One year's minimum service up to* 31*st March,* 1977 *a pre-requisite—Work and conduct of an* ad hoc *employee subsequent to* 31*st March,* 1977—*Whether could be taken into consideration to judge suitability for regularisation.*

Held, that it appears to be well settled on principle that as regards suitability for regularisation or confirmation the satisfaction of the employer with regard to the work and conduct of the employee is a paramount consideration. The employer cannot be robbed of this