

However, it was not necessary to ask for any such relief. We cannot understand the conduct of Muhammad Husain, pleader. We agree with the first Court that, being the pleader of Narain Sakha Ram, he must have known at the time he purchased of the mortgage to the present plaintiff. We are asked on behalf of the respondent to refer an issue as to the title of Narain Sakha Ram, to grant the mortgage. Narain Sakha Ram cannot dispute his own title to grant the mortgage, he is estopped. Muhammad Husain took no interest under the sale which was void. If he took any interest at all, he would have to stand in the shoes of Narain Sakha Ram. It is unnecessary to make any reference. We decree the appeal with costs in this Court and the lower appellate Court and restore and confirm the decree of the first Court.

Appeal decreed.

Before Justice Tyrrell and Mr. Justice Blair.

PHUNDO (DEFENDANT) v. JANGI NATH AND OTHERS (PLAINTIFFS)*

Civil Procedure Code, s. 13—Res judicata—Soundness in law of previous decision immaterial—Hindu law—Adoption—Baqāls.

Where a judicial decision pleaded as constituting *res judicata*, in all other respects fulfils the requirements of s. 13 of the Code of Civil Procedure, and no appeal has been preferred against it within limitation, it is immaterial whether such decision is or is not sound law. *Parthasaradi Ayyangar v. Chinnakrishna Ayyangar* (1) dissented from.

Semle that *Baqāls* do not belong to the regenerate classes, and therefore the rule of law which forbids a Hindu to adopt a boy whose mother he could not have married, does not apply to them.

The facts of this case are as follows:—

On the 13th of February 1876, one Bhika Mal, who was the step-brother of the defendant-appellant's, Musammat Phundo's, deceased husband, Dwarka Das, mortgaged certain houses to one Baij Nath, the father of the plaintiffs-respondents, alleging that he was the adopted son of the said step-brother. On the 18th of July 1882, Baij Nath brought a suit upon that mortgage against Bhika

* First Appeal No. 83 of 1891, from a decree of Babu Abinash Chandra Banerji, Judge of the Court of Small Causes (exercising the powers of a Subordinate Judge) of Agra, dated the 28th March 1891.

(1) I. L. R., 5 Mad. 204.

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Mal and Musammat Phundo, to recover the sum of Rs. 18,019 from Bhika Mal personally and from the mortgaged property. In that suit Musammat Phundo pleaded that "Bhika Mal was neither the adopted son of Dwarka Das nor did he live jointly with him." An issue was framed on this plea and the Court recorded a finding to the following effect:—"The evidence of Mutto Misr and Kanhia Lal, witness Nos. 9 and 10 for the plaintiff, tends to show that Bhika Mal, step-brother of Dwarka Das, was adopted by the latter as his son according to the rites prescribed by Hindu Law. The pleader for Musammat Phundo could not cite any texts of Hindu Law or authority to show that the adoption by a Hindu of his step-brother by a different mother is illegal. The adoption of Bhika Mal by Dwarka Das was, therefore, valid according to the Shastars," the Subordinate Judge then went on to say:—"The evidence aforesaid shows that the relatives near and distant of Dwarka Das and Bhika Mal, all took the latter to be the legally-adopted son of the former," and again:—"The weight of reliable evidence, then, establishes to moral certainty that Bhika Mal has for more than 20 years past been in possession of the estate of his step-brother, Dwarka Das, as his adopted son, without any protest or demur on the part of his widow or their relatives; that such possession of his was adverse against her, and that she has lost all right to the estate of her late husband by reason of the operation of s. 28 of the Limitation Act."

From the decree in that suit Musammat Phundo did not appeal, and it became final as against her. Baij Nath executed the decree which he obtained against the hypothecated property; and, the sale proceeds of that property proving insufficient to satisfy the decree, proceeded to attach other property of Bhika Mal's which was not hypothecated. Musammat Phundo filed an objection to this attachment, that the property was her's, inherited from her husband, and that objection was allowed and the property released.

On the 19th of May 1885, the decree-holder, Baij Nath, brought the present suit for a declaration that the property released from attachment as above-mentioned was the property of Bhika Mal,

adopted son and heir of Dwarka Das, and that it did not belong to Musammat Phundo. To this suit both Bhika Mal and Musammat Phundo were made defendants. The Subordinate Judge, holding that the suit was barred by reason of s. 244 of the Code of Civil Procedure, dismissed it *in limine*, but that decision was reversed by the High Court, and the case remanded for trial on the merits.

The Subordinate Judge before whom the case came on remand reframed the issue and on the finding that the main issue in the suit on which all the other depended, namely, that of the adoption of Bhika Mal, was *res judicata*, decreed the plaintiff's claim with costs.

The defendant, Musammat Phundo, appealed to the High Court.

Mr. *D. Banerji*, for the appellant.

Pandit *Sunder Lal*, for the respondents.

TYRRELL and BLAIR, JJ.—This was a suit brought by the respondents under s. 283 of the Code of Civil Procedure, in respect of an order made by a Court in execution-proceedings raising an attachment in favour of Musammat Phundo. The Court below decreed the plaintiff's claim, and Musammat Phundo appeals. The suit of the plaintiff succeeded upon a finding that Musammat Phundo's only plea had been concluded by the decree in a former suit between the parties, and that the question she now seeks to raise against the legal possibility of one Bhika Mal having been adopted by his half-brother Dwarka Das, falls under the disability of s. 13 of the Code of Civil Procedure. It cannot be denied that this very question was tried and decided against Musammat Phundo in the previous suit. It was then found that, inasmuch as Dwarka Das could have married the mother of Bhika Mal before she made the marriage of which Bhika Mal was the issue, there was no legal bar to the adoption. It was further found that the adoption was operative, and had been recognised with the result of the exclusion of Musammat Phundo from all title in and possession of her father Dwarka Das estate, for much more than 12 years. The Subordinate

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Judge therefore held that Musammat Phundo's mouth was closed in the present suit on the question of Bhika Mal's adoption, and overruled her claim to be the heiress of her father, Dwarka Das, in lieu of Bhika Mal, who, if her case could be proved, would be a stranger to the inheritance. Musammat Phundo has brought this appeal, and her learned counsel contends, on the strength of the ruling of the Madras High Court in *Parthasaradi Ayyangar v. Chinnakrishna Ayyangar*, (1) that the decree in the former suit is no bar to the trial in this suit of the issue of the legality of Bhika Mal's adoption. We are satisfied that the rule of s. 13 of Act No. XIV of 1862, forbids the re-opening of this question, which was a matter in issue decidèd directly in the former suit between the parties. We have no doubt, that the former decretal finding on the legal point, though ever so erroneous, would be binding on parties who did not get rid of it by appeal. But, assuming for argument's sake that the legal issue on the alleged invalidity absolute of the adoption is open to determination in this suit, we should still see no reason for coming to a different conclusion upon this point from that which was reached in the former trial. The rule relied on in favor of the appellant which is to be found in paragraph 118 of Mayne's Hindu Law, edition 1883, does not apply in our opinion to the unregenerate classes, amongst whom, according to the authorities cited in that paragraph, the adoption of Bhika Mal by Dwarka Das would not have been forbidden, Dwarka Das and Bhika Mal belonging to a family of "*Baqqáls*." The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) L. L. R., 5 Mad., 304.