seal, it is to some extent *obiter*. For the learned Chief Justice says that to consider the point it is necessary to travel outside the pleadings. Further, it must be remembered that it is a decision on a Statute which is no longer in force. It is difficult to say, even if it were applied here, that it fits the facts of this case. The facts of that case lay down that a corporation can sue on a contract which should have been under seal in spite of the omission of that formality where there is executed consideration. That is not exactly the case before us, and it is, therefore, not necessary to consider how far that decision can be reconciled with the decision of the House of Lords in *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa*[1] and how far the rule of English common law can prevail either in England or in India against Statutes containing restrictive provisions as to the form of corporate contracts. These are questions which will require consideration when a proper case arises.

For these reasons I agree with the order proposed.

Appeal dismissed.

R. R.

[1] (1883) 8 App. Cas 517.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1920.

September 10.

VYANKAT WALAD AWACHIT PATIL AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* ONKAR NATHU CHOWDHARI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 3 TO 5), RESPONDENTS*.

Res judicata—*First suit decreed in the Second Class Subordinate Judge's Court—Subsequent suit filed in Court of the First Class Subordinate Judge —Identical issue involved in both suits--No bar of* res judicata--*Jurisdiction—Civil Procedure Code (Act V of 1908), Order II, Rule 2—Minor plaintiff not to be prejudiced by a mistake of his guardian.*

* First Appeal No. 88 of 1919.

1920.

VYANKAT v. ONKAR NALHU.

The plaintiff's guardian filed a suit in the Second Class Subordinate Judge's Court to recover possession of property, alleging that the plaintiff was the adopted son of one Nathu. The plaintiff's adoption was upheld and suit decreed. The plaintiff subsequently filed a second suit in the First Class Subordinate Judge's Court for the recovery of another portion of family property. The defendant pleaded that the plaintiff was not the adopted son and that the suit was barred by Order II, Rule 2, Civil Procedure Code. On plaintiff's behalf it was contended that the defendants were barred by *res judicata* from disputing plaintiff's adoption.

Held, that the decree in plaintiff's favour in the previous suit could not be pleaded as *res judicata* in the subsequent suit as the judge by whom it was made had no jurisdiction to try and decide the subsequent suit in which the issue as to adoption was subsequently raised.

Held, also, that the suit was not barred under Order II, Rule 2 of the Civil Procedure Code, 1908, as the plaintiff, who was a minor when the first suit was brought, could not be prejudiced by a mistake made by his guardian, as his right to sue in his own person came into effect on his attaining majority.

Gokul Mandar v. *Pudmanund Singh*[1], referred to.

FIRST appeal against the decision of K. R. Natu, First Class Subordinate Judge at Dhulia, in Suit No. 62 of 1918.

Suit to recover possession.

The property in suit originally belonged to one Nathu who died in 1902 leaving two widows Anandi and Vari. In 1903 the plaintiff was adopted by Anandi.

At that time plaintiff was a minor. In 1910 Anandi as the guardian of the minor plaintiff filed a suit against Vari (defendant No. 2), junior widow of Nathu and other persons in possession of the property for a declaration that the plaintiff was the adopted son of Nathu and to recover possession of Survey No. 47 belonging to Nathu. This Suit No. 80 of 1910 was filed in the Second Class Subordinate Judge's Court at Yaval. The Yaval Court held that the plaintiff's adoption was not proved and dismissed the suit. The appellate Court reversed the lower Court's decree and held

[1] (1902) L. R. 29 I. A. 196 at p. 202.

that the plaintiff's adoption was proved and awarded possession. In Second Appeal the appellate Court's decree was confirmed.

In 1918 the plaintiff filed the present suit (No. 62 of 1918) in the Court of the First Class Subordinate Judge at Dhulia to recover possession of Survey No. 57 as Nathu's property, alleging that wrongful possession of the property was taken by the defendant in 1911.

The defendants contended *inter alia* that the plaintiff was not the adopted son of Nathu and that the suit was barred by Order II, Rule 2 of the Civil Procedure Code, 1908

The Subordinate Judge held that the plaintiff was the adopted son of Nathu ; that by reason of the decision in Suit No. 80 of 1910 the defendants were barred by *res judicata* from disputing plaintiff's adoption and that the suit was not barred under Order II, Rule 2 of the Civil Procedure Code, 1908. He, therefore, decreed the plaintiff's suit for possession.

The defendants Nos. 1 and 2 appealed to the High Court.

Patvardhan, with *D. G. Dalvi*, for the appellants :— The plaintiff had brought through his guardian Suit No. 80 of 1910 in the Court of the Second Class Subordinate Judge at Yaval for the recovery of Survey No. 47, pot No. 1 on the same cause of action. The present suit for the recovery of the other Survey No. 57 is therefore barred under Order II, Rule 2, of the Civil Procedure Code. The guardian of the plaintiff must be deemed to have relinquished this portion of his claim dependent upon his title as adopted son.

Secondly, we submit the decision in the former Suit No. 80 of 1910 by the Court of the Second Class Subordinate Judge in favour of the *factum* of the adoption

1920..

VYANKAT v. ONKAR NATHU.

cannot be *res judicata* in the present suit. The value of the subject-matter of the present suit is admittedly above Rs. 5,000 and this suit is therefore triable by a First Class Subordinate Judge, whereas in the former suit, the claim was within the jurisdiction of the Second Class Subordinate Judge. Under section 11, Civil Procedure Code, it is necessary that the first Court should be competent not only to try the first suit but also " competent to try such subsequent suit or such suit in which the issue has been subsequently raised ": see *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*[1]; *Rajah Run Bahadoor Singh* v. *Mussumut Lachoo Koer*[2] and *Gokul Mandar* v. *Pudmanund Singh*[3]. The rule is that the two Courts must have concurrent jurisdiction both as to the pecuniary limits as well as the subject-matter, otherwise " the lowest Court in India might determine finally and without appeal to the High Court, the title to the greatest estate in the Indian Empire " see *Rajah Run Bahadur's*[2] case.

If the decision as to the factum of the adoption is not *res judicata*, we submit that the appeal should be remanded to the lower Court for evidence on behalf of the defendants on that question. The Rojnama will show that the witnesses for the defendants were summoned and ready in the Court on the day of hearing but the defendants were misled into cancelling their evidence on an expression of opinion from the Court that the former decision in favour of the adoption was *res judicata* in the present suit.

Gokhale, with *V. D. Limaye*, for the respondents, not called upon.

[1](1882) L. R. 9 I. A. 197, 203.

[2] (1884) L. R. 12 I. A. 23 at p. 38.

[3] (1902) L. R. 29 I. A. 196 at p. 202.

MACLEOD, C. J. :—The plaintiff sued to recover as owner possession of the suit property. He claimed as the adopted son of one Nathu who died in 1902 leaving two widows, Anandi and Vari. Anandi purported to adopt the plaintiff in 1903. At that time he was a minor, not coming of age until 1914. In 1910, Anandi as his guardian filed a suit against the present 2nd defendant, the junior widow, and other persons in possession of some of Nathu's property to recover possession. In that suit the plaintiff's adoption was disputed. But it was held by the Second Class Subordinate Judge, in whose Court the suit was instituted, that the plaintiff was the adopted son of Nathu and that judgment was affirmed on appeal. The suit came up in second appeal to the High Court and the appeal was dismissed. The plaintiff has now filed this suit to recover possession of another portion of family property, and in the first place it was argued that the suit was barred under Order II, Rule 2, as the subject-matter of this suit ought to have been included in the previous suit. That argument would not apply to a case like this where the previous proceedings were taken in the name of the minor by his next friend. The minor could not possibly be prejudiced by a mistake made by those representing him during his minority as his rights to sue in his own person only come into effect when he attains majority. He will, therefore, be entitled to disregard any proceedings which had been taken during his minority if his interests had not been properly safeguarded. I cannot see how he could possibly be injured and prevented from now suing for the suit property owing to the fact that his adoptive mother did not sue for it in 1910 during his minority.

Then the next question is whether the plaintiff is the adopted son of Nathu. That was the first issue in the lower Court. It was also combined with the sixth

1920.

VYANKAT v. ONKAR NATHU.

issue whether the defendants were barred by *res judicata* from disputing the plaintiff's adoption. The first was a question of fact and the second was a question of law. Evidence was called for the plaintiff. The first witness was the genitive father of the plaintiff. He said : "The plaintiff was my son. He is given in adoption to my father-in-law Nathu. Nathu died in 1902 and plaintiff was adopted in 1903. I live at present in Nathu's house. Nathu had two wives, the elder was Anandi and the second is defendant No. 2. Anandi is alive. Anandi adopted the plaintiff. There is an adoption deed for that." The witness was cross-examined and there is nothing in the cross-examination which weakens the evidence he gave in examination-in-chief with regard to the factum of adoption. In fact hardly any attempt was made in cross-examination to destroy the effect of the witness' evidence. It was open to the defendants to call evidence to show that as a matter of fact the plaintiff never had been adopted by Anandi. They did not do so. We are now told that their witnesses were there, but owing to an expression of opinion on the part of the Judge that the matter was *res judicata* they considered that it would be useless to call evidence. It is quite possible that there were other reasons as well which decided the defendants' pleader with regard to the advisability of calling evidence to dispute the plaintiff's adoption.

On the question of *res judicata* it does appear that the learned Judge's finding was wrong, because the previous suit was filed in the Second Class Subordinate Judge's Court, and that Court was not competent to try the present suit as the value of the subject-matter of this suit is over Rs. 5,000, and it is now beyond dispute on the decided cases, the latest of which is *Gokul Mandar* v. *Pudmanund Singh*[a], that a decree in a

[a] (1902) L. R. 29 I. A. 196 at p. 202.

previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit in which the issue is subsequently raised. It has been very strongly urged upon us, therefore, that we should remand the case to enable the defendants to lead evidence against the plaintiff's adoption. The defendant No. 2 in her written statement merely says that the plaintiff has no right to bring the suit and he is not Nathu's adopted son. Now I think in the first place that the evidence which I have already referred to, of the plaintiff's genitive father is quite sufficient to enable us to come to the conclusion that the plaintiff was the adopted son and I should not be inclined to think that there was any hardship in the defendant's case, because he had the opportunity of calling evidence and he did not do so. But I also think that apart from that we are entitled to consider whether there would be the slightest chance of success on the defendants' own showing if a remand be granted. The judgment in the previous case is on the record and is evidence on the question of adoption, and it appears from that judgment that the 2nd defendant herself had admitted in the plaint filed before the conciliator that the plaintiff had been adopted by Anandi. It appears to me the defence made in her written statement as to the factum of adoption was merely made for the purpose of obstruction, and nothing else. There is no reason, therefore, I think, why we should interfere with the decision of the learned Subordinate Judge.

The appeal must be dismissed with costs.

SHAH, J. :—I agree.

Decree confirmed.

J. G. R.