

(1990) 10 AHC CK 0039

In the Allahabad High Court

Case No : First Appeal No. 57 of 1979 connected with Second Appeal No. 2191 of 1979

Manvendra Singh and others

APPELLANT

Vs

Rameshwar Dayal and others

RESPONDENT

Date of Decision : 16-10-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2, Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 2, Order 9 Rule 9
Hindu Succession Act, 1956 — Section 14
Specific Relief Act, 1963 — Section 34, 41
Transfer of Property Act, 1882 — Section 4

Citation : AIR 1991 All 291

Hon'ble Judges : N.N. Mithal, J

Bench : Single Bench

Advocate : B.N. Agrawal, for the Appellant; G.N. Verma, for the Respondent

Final Decision : Dismissed

Judgement

1. The above two appeals arise out of two suits that were filed by the same set of plaintiffs, who are respondents here. Suit No. 601 of 1969 was filed by them for possession against the predecessors-in-interest of appellants 4 to 17. The decision therein was challenged in Civil Appeal No. 25 of 1978 and now Second Appeal No. 2191 of 1979 has been filed.

2. The other suit No. 23 of 1971 was filed by the respondents for injunction to restrain the defendants from dispossessing the plaintiffs by demolition and reconstruction of the property and from interfering in their peaceful possession. Subsequently a relief of possession was also added. It may be observed here that on the death of the two original defendants their heirs were impleaded as defendants 1/1 to 1/ 8 and 2/1 to 2/ 6 and they are now appellants 4 to 17 in these appeals. The appellants 1 to 3 are the original defendants of the suit.

3. A short resume" of facts giving rise to the suits may be given here. On the

death of the original owner of the disputed property it devolved on his son Bholey Ram. When Bholey Ram died he left behind him his widow Smt. Gaura Bahu and a married daughter Tulsa who had a minor son Heera Lal. On 1-4-1910 Gaura Bahu purported to gift the property to Hira Lal claiming herself to be its rightful owner. The plaintiff allegation was that the property being ancestral in the hands of Bholey, Gaura Bahu inherited only widow's interest therein and could not bestow full rights to the donee under the gift as its full owner. In any case the gift could ensure only during her lifetime and on the death of Gaura Bahu in 1911 Tulsa became entitled to the property as immediate reversioner and she perfected those rights on the passing of the Hindu Succession Act in 1956. This property was gifted by her on 30-7-1963 to the plaintiff. Ever since the plaintiff's claim to be continuing in possession thereof as absolute owner. The plaintiff case was that heirs of Heera Lal had no right to transfer the property under sale deed dated 2-9-1966 to Ram Prasad and Virendra Kumar who have since transferred the property to appellant No. 1 on 10-3-1969. As appellant No. 1 was threatening to demolish the construction claiming to be its full owner and thus cause plaintiff dispossession therefrom, the plaintiff's rushed to the court for redress.

4. The defence in substance was that Gaura Bahu herself being its absolute owner was capable of conveying full title to Hira Lal under the gift deed which was duly accepted and even acted upon by the parties. Alternatively even if Gaura Bahu had only a limited interest in the property, the gift deed having been executed with the consent of next reversioner it was valid; that this transaction was in the nature of family settlement and, therefore, binding on the parties; that in any event since Smt. Tulsa had voluntarily surrendered her rights in favour of the donee the gift was valid and effective. The donee being the minor at the relevant time, according to the defence, the gift was accepted by his mother Smt. Tulsa and it was also acted upon. In view of this no right or interest of Smt. Tulsa survived in the property which could have been validly gifted away by her through gift deed dated 20-7-1963 to the plaintiff's. The defence taken by the heirs of Pooran and Radhey Shyam were almost on similar lines and need not be repeated. It may, however, be stated that according to plaintiff Poorna Lal had trespassed into one of the rooms of the disputed property while according to defence version he was inducted into that room as tenant by the appellant.

5. On a consideration of the entire evidence led by the parties the trial court decreed the two suits, while First Appeal No. 57 of 1979 was filed in this Court against the decision in Suit No. 23 of 1971 the decision in suit No. 601 of 1969 was challenged before the District Judge in Civil Appeal No. 75 of 1975 and that having been dismissed the appellant has now come up in Second Appeal No. 2121 of 1979 before this Court. Since the pleadings of parties in the two suits and the issues arising therein are similar in nature the two suits had been consolidated and disposed of by a common judgment. In this Court also, in my opinion, it will be convenient to take up the two appeals together for disposal.

6. Before proceeding further it will be convenient to have the pedigree to show how the parties or their predecessors in interest were related to each other:

Kanhai | Bholey=Gauri Bahu @ Luhari (died in 1911) | Talsa=Chuttan (died in 1969) | _____
_____ | | Hira Lal Ganesh=Smt.Gulab Rani =Smt. Rani Dulhan (Piff No.3) | | | | _____ | | | | Rameshwar Dayal Deen Dayal | (Piff No.1) (Piff No. 2) _____
_____ |
| | | Purshottam Kishori Bai Shanti Bai SuraljBai

7. On the pleadings of the parties the trial court framed the following issues in Suit No. 23 of 1971;

1. Whether the plaintiffs are the owner of the disputed property ?
2. Whether Bholey had acquired the properties in suit ? If so, its effect?
3. Whether Mst. Gauri Bahu had inherited the suit properties from her husband Bholey and had no right to execute any gift deed on M-1910?
4. Whether the gift deed dated 1-4-1910 executed by Smt. Gauri Bahu in favour of Hira Lal with the consent of Mst. Talsa, as alleged by the defendant No. 1 ? If so, whether the gift-deed amounts to surrender as pleaded in para 25 of the written statement?
5. Whether the gift deed dated 1-4-1910 is in nature of a family arrangement? If so, its effect?
6. Whether Smt. Talsa had no right in the properties after the death of Mst. Gauri Bahu on 11-8-1911 or on the passing of Hindu Succession Act, 1956?
7. Whether the suit is barred by Sections 34 and 41 of the Specific Relief Act. ?
8. Whether the suit is barred by Or. 23 Rules 1 and 3, CPC, as pleaded in para 35 of the W.S. ?
9. Whether the suit is barred by Order 2 Rule 2 CPC as alleged in para 37 of the W.S.?
10. Whether the defendant's are bona fide purchasers for the value without notice and are entitled to the protection of Section 4 of the T.P. Act ?
11. Whether the suit is undervalued and the court-fee paid is insufficient?
12. Whether the suit is bad for non-joinder of necessary parties?
13. To what relief, if any, are the plaintiffs entitled?
14. Whether the suit on behalf of Smt. Gulab Rani, plaintiff No. 2 is not maintainable and is time barred ?
15. Whether the defendants have perfected their right by adverse possession?

16. Whether the possession of the plaintiff was merely permissive as pleaded by the defendants ?

17. Whether defendants Nos. 4 to 17 are trespassers of the disputed shop and a reliable to be evicted ?

8. In the same manner in Suit No. 601 of 1969 filed by the plaintiff in the Munsif's Court the following issues were framed which include issues Nos. 14 to 18 which were added by the appellate Court.

1. Whether plaintiffs are owners of disputed shops marked by letters "A", "B", "C" & "D" as alleged ?

2. Whether defendant No. 1 is tenant of disputed property from the time of Hira Lal, as alleged? If so, its effect ?

3. Whether the suit is bad for mis-joinder of parties ?

4. Whether the suit is undervalued and court-fee paid is insufficient?

5. To what amount of damages, if any, are the plaintiffs entitled?

6. Since when, if ever, and under what rules, if any, have the defendants been in possession of disputed shop ?

7. Whether defendant No. 1 is tenant of Manvendra Singh as alleged ? If so, its effect?

8. Whether the suit is barred by plea of res judicata ?

9. Whether the suit is bad for non-joinder of parties ?

10. Whether suit is barred by plea, of estoppel and acquiescence as alleged ?

11. Whether suit is bad for want of notice as alleged?

12. Whether land in suit lies in plot Nos. 47 and 863 according to settlement of abadi as alleged ? If so, or not its effect?

13. To what relief, if any, are the plaintiffs entitled ?

14. Whether the suit is barred by limitation?

15. Whether defendant No. 3 had become owner of the premises in suit by adverse possession ?

16. Whether the suit is barred by Order 23 Rules 1 and 3 of the C.P.C.?

17. Whether the suit is barred by Or. 2 Rule 2 C.P.C.

18. Whether the reliefs claimed are not specific ? If so, its effect?.

9. It will be noticed that issues Nos. 11 & 12 of Suit No. 23 of 1971 and Issues Nos. 4 & 9 of Suit No. 1969 are the same and none of them now survive for disposal.

The main question which remains for consideration now in the two appeals may be formulated as under :

1. Whether Hira Lal became absolute owner of the property under the gift executed by Goura Bahu on 1-4-1990?
2. Whether Hira Lal had only a life interest under the said Gift deed and on the death of Goura Bahu it reverted to the next reversioner Smt. Tulsa ?
3. Whether Tulsa became absolute owner of the property after the enforcement of Hindu Succession Act?
4. Is the suit barred by limitation since Tulsa failed to file any suit for cancellation of the gift deed dated 1-4-1910?
5. Is the suit barred by O.9, R.9, O.23, Rules I and 3 and O.2, R. 2 of the Code?
6. Whether defendants Nos. 4 and 17 were trespassers and are liable to be dispossessed from the shop?
10. According to Hindu Law any estate inherited by a widow from her husband is taken by her as a limited or restricted owner thereof in which the heirs of the husband have a reversionary interest i.e. an expectancy to inherit which may or may not mature on the death of the limited owner. The widow, therefore, has all the trappings of ownership in respect of the estate inherited by her but she cannot part with the corpus of the property except (1) for legal necessity or (2) for the benefit of the estate; or (3) with the consent, express or implied, of the next or immediate reversioner. In any of these cases she is capable of passing absolute title to the alienee as if the alienation has been made by an absolute owner thereof. Except as above, any transfer of her limited estate made by a widow shall ensure only during her lifetime and on her death the property shall revert back to the next reversioner.
11. The initial questions that emerge for consideration, therefore, are whether Gaura Bahu was an absolute or limited owner of the property? If she had only a limited estate, then, was the gift deed in favour of Heera Lal executed with the consent of the next reversioner? Did Tulsa and other family members enter into any family settlement as alleged or did she ever surrender her rights in favour of the donee?
12. To get an answer to the question as to the nature of property in the hands of Gaura Bahu there is enough documentary evidence on record. There is uncontroverted testimony of P.W. 2 that this property was originally Ahata No. 47 and Sajra of 1869-70 (Ex. 10) and Khasra of that year (Ex. 11) would amply support him in this point. The name of Kanhai, was entered against Ahata No. 47 in those documents. Apart from this, Ex. A-10 is the copy of the plaint in suit No. 361 of 1959 which was filed by Smt. Tulsa against her sons Heera Lal and Ganesh wherein it was asserted that initially Bholey was the owner of the house which later devolved on Gaura Bahu as his widow. Ex. 18 is the copy of Heera

Lal's written statement in which this fact has not been controverted at all. Besides this, when examined under O. X, R. 2, C.P.C. the appellant was unable to disclose the manner in which Gaura Bahu had acquired this property. In the face of this evidence the trial Court had rightly concluded that the property was ancestral in the hands of Bholey on whose death Gaura Bahu got the property as his widow. Thus Gaura Bahu could only acquire a widow's estate therein and she was not its absolute owner.

13. The question next is whether the gift deed dated 1-4-1910 had been executed with the consent of the next reversioner Smt. Thulsa or had she surrendered her rights in favour of the donee or this was done as a result of some kind of family arrangement between the parties.

14. Before proceeding further it would be proper to consider here the various cases relied upon by the learned counsel in support of his submissions. Appellant's case was that Gaura Bahu had gifted the property in favour of Hira Lal with the consent of the daughter Smt. Tulsia who was the next or immediate reversioner of the property. It is also submitted that Smt. Tulsia had made an implied surrender in favour of the donee who was her own son. In this respect he placed reliance on Mummareddi Nagi Reddi and Others Vs. Pitti Durairaja Naidu and Others, . In that case the widow had surrendered her life estate in favour of her daughter and son-in-law. The plaintiffs, who were the grand children of the donees, assailed the transfer made by the donee in respect of the property surrendered by the widow in their favour. The document of surrender or relinquishment was assailed before the Supreme Court on the ground that the widow had no right to do in favour of immediate reversioner and a stranger although he was her own son-in-law. Adverting to the contents of the deed their Lordships of the Supreme Court observed thus (at p. 111 of AIR)

There are no words of transfer used in the deed, though the widow purports to endow her son-in-law and daughter with hereditary rights of enjoyment in the property. The document is described as a release and is stamped as such. Apparently it comprises all the properties which the widow had, and in a sense the document in dispute an intention on the part of the lady to give up all connection which business affairs, prime facie these facts lend support to the story of surrender. It is not and cannot be disputed that there can be a surrender even when the next reversioner is a female heir herself, who takes a limited interest in the property, though such surrender cannot give her a larger interest that she would get as an heir under the law of inheritance. The whole difficulty in this case, however, is created by the fact that the widow purports to exercise her right of relinquishment of her husband's estate in favour of two persons one of whom is a next heir, but the other, though related to her as son-in-law, is a complete stranger so far as rights of inheritance are concerned, and there can be no doubt that she intended that her husband's estate should go to the son-in-law jointly with her own daughter."

The Supreme Court further observed (at p. 111 of AIR):

"The doctrine of surrender or relinquishment by the widow of her interest in the husband's estate which has the effect of accelerating the inheritance in favour of the next heir of her husband is now a well settled doctrine of Hindu Law which has been established by a long series of judicial decisions. Though the judicial pronouncements cannot be said to be altogether uniform or consistent, yet there can be no doubt as regards the basic principle upon which the doctrine rests, namely, that it is the self-effacement by the widow or the withdrawal of her life estate which opens the estate of the deceased husband to his next heirs at that date."

15. Quoting the Judicial Committee in AIR 1934 105 (Privy Council) the Hon"ble Judges said:

"It must be remembered that the basis of the doctrine is the effacement of the widow's estate and not the ex facie transfer by which such effacement is brought about. The result merely is that the next heir of the husband steps into the succession in the widow's place."

The Supreme Court while considering a Full Bench decision of Calcutta High Court in *Nobo Kishore v. Harinath* (1884) ILR 10 Cal 1102 expressed doubt about the correctness of the decision but did not express any concluded opinion of its own. In the light of that decision, however, the Supreme Court was of the view that *Mummareddi Nagi Reddi and Others Vs. Pitti Durairaja Naidu and Others*, :

"It would be quite consistent with established principles of law if the widow relinquishes her interest in the husband's estate and the reversioner in whom the estate vests transfers the estate either in whole or in part to another person."

If we apply the above principles to the facts of the present case it would be observed that Gaura Bahu could legally surrender her rights in her husband's property in favour of her daughter Tulsa who was the next or immediate reversioner. It was also quite possible that Smt. Tulsa may have surrendered her rights so acquired by acceleration of inheritance in her favour after Gaura Bahu had faced her interest therein in favour of her son Hira Lal. However, for this she ought to have been a party to the deed executed by Gaura Bahu or to have executed a deed herself in favour of Hira Lal. This, however, has not been done in the instant case.

16. In the above Supreme Court decision, we find a reference to a case of *Yeshvanta Bin Bala Gaekwad Vs. Antu Bin Navaji Salunke*, where the widow along with her daughter, who was the immediate heir, executed a deed of gift of the entire estate in favour of a stranger who was the husband of the pre-deceased daughter. It was held that the transaction was valid on the basis of doctrine of surrender. The Supreme Court said that the case came directly within the purview of the rule enunciated in *Nobo-kishore case* (1884 ILR 10 Cal 1002) (FB) (supra) and observed that there were two material facts which distinguished it from the case before it. In the first place the reversioner joined the widow in making the transfer in favour of a stranger and secondly, the transfer to the

stranger was of the entire estate. In such a case there would be difficulty in construing such a transaction as a valid act of surrender.

17. As pointed out earlier, the facts of the present case are clearly distinguishable because in the deed executed by Gaura Bahu, Tulsa had not joined and, therefore, there was no surrender by her in favour of Hira Lal. By the gift deed what Hira Lal got was only the interest of Gaura Bahu, that is her limited estate in her husband's property which could last only during her lifetime and not beyond, whereafter the interest in the property would revert to the next reversioner of the last male owner of the property then in existence. Since it is admitted that Gaura Bahu died in 1911 the rights acquired by Hira Lal in the property would last only till then and thereafter the property would automatically come to be vested in Tulsa as the immediate next reversioner. Only after the death of Tulsa, Hira Lal could succeed to property as an heir.

18. The next case on which strong reliance has been placed by the appellant is to be found reported in *Chinna Swami Pilley v. Appaswami Pilley* (1919) ILR 42 Mad 25 : (AIR 1919 Mad 865). In that case the widow and her daughter both executed a deed in respect of her husband's estate in favour of the daughter's son who was the immediate next reversioner of her husband's property. The learned Judges deciding that case observed that a widow could surrender her limited interest in her husband's estate to the next reversioner so as to vest the property in the next reversioner is not settled law, provided that the whole estate is surrendered. The above case would be of no help should any support be sought from it for the instant case. In the Madras case the widow as well as daughter (the next reversioner) had jointly surrendered their rights in favour of the reversioner immediately thereafter. As a result both the widow and the next reversioner had effected themselves so as to vest their life estate and the reversionary rights to accelerate inheritance in favour of the daughter's son. In the instant case also had Smt. Tulsa joined in executing the gift deed with Gaura Bahu and had surrendered her own rights simultaneously in favour of her son Hira Lal, the principles enunciated in Madras case would have been fully applicable.

19. According to the plaintiff Hira Lal being a minor in 1910 was not competent to accept the gift. The gift would remain incomplete unless accepted according to law. The owner Gaura Bahu having died in 1911 acceptance of the gift during her life time ought to be proved. The plaintiffs case was that Tulsa had never consented to the gift deed nor she had surrendered her rights in favour of Hira Lal so as to confer title to the property on Hira Lal. In the alternative, the plaintiff's case was that the so called title under the gift would not survive after the death of Gaura Bahu.

20. The appellants, however, contend that the gift had been accepted by Smt. Tulsa on behalf of her son and her, subsequent conduct also establishes implied acceptance of the gift by her. It is undebatable that Hira Lal being a minor then was incapable of the gift. He continued to be minor until the death of Gaura Bahu

in 1911. There is no evidence to show that Smt. Tulsa had actually accepted the gift ever on behalf of or gave for. Hira Lal her express consent to accept the gift. The original gift deed has not been filed and we only have a certified copy thereof. Custody of the original deed could have raised a presumption of acceptance of gift. A perusal of the document shows that Smt. Tulsa was in no way associated with that transaction. She is neither an attesting or even an identifying witness of this deed. The fact that in the year 1959 she filed a suit disclaiming the gift deed is also a circumstance which militates against acceptance of the gift. Thus we find no evidence on the record about the express acceptance of the gift by or on behalf of Hira Lal of Tulsa's consent in this behalf.

21. Learned counsel for the appellant, however, urged that the conduct of parties subsequent to the execution of the gift deed is strongly suggestive of implied acceptance of the gift by her and also of her consent. It is urged that even in the absence of any documentary or oral evidence regarding mutation of Hira Lal's name in the Municipal records, the existence of his name in subsequent years would indicate that Hira Lal was treated as owner of the property. From this it is sought to be made out that the ownership of Hira Lal had been accepted by Tulsa also over a long period of time leading to an irresistible inference that she had impliedly consented to the gift deed and the same had been accepted.

22. It is difficult to accept that Smt. Tulsa had even impliedly consented to the gift. Had it been a fact there is no reason why this important fact does not find any mention in the gift deed itself although it clearly recites that Gaura Bahu had one daughter, Tulsa. If she was aware, as indeed she must have been, that Tulsa was the immediate successor to the property there is no good reason why her consent was not put down in writing in the gift deed. Surprisingly there is also no mention of acceptance of the gift by or on behalf of the donee in the deed although it recites that the donee has been put in possession of the property. It is apparent from the gift deed that Hira Lal was under the care of Gaura Bahu with whom he also resided. In the face of the above contents in the deed it is really difficult to accept that Smt. Tulsa had ever accepted the gift or even an attempt was made to obtain her consent for the gift. I am in agreement to the findings of the trial Court that the gift deed had neither been accepted by or on behalf of Hira Lal nor Smt. Tulsa had ever given her express or implied consent in regard to the gift deed.

23. Learned counsel then submitted that the document was executed by way of family arrangement. There is hardly any evidence to support this contention. At the relevant time there was no dispute as to title or any claimant to it which needed settlement by way of family arrangement. There is nothing on record to show as to why a family arrangement should have been made. The plea of family arrangement was never raised by Hira Lal even in his written statement filed in suit No. 331 of 1959. I have, therefore, no hesitation in rejecting this contention.

24. The question still remains whether the gift deed could still prevail even after the death of Gaura Bahu? Admittedly, she had died about a year after the gift

deed had been executed. In the ordinary course the property would revert to her next reversioner i.e. Smt. Tulsa who will then be entitled to enjoy her rights therein during her lifetime as a limited owner. Only on her death the rights would have devolved on the heirs of Bholey, the last male owner. However, in the present case Hindu Succession Act intervened while Tulsa was still alive and the limited rights possessed by her became absolute. In view of the above, the legal position appears to be that on the death of Gaura Bahu Tulsa became limited owner of the property as the next reversioner but subsequently she became absolute owner thereof in view of S. 14 of the Hindu Succession Act.

25. It is contended for the appellant that there is nothing like automatic reversion of the rights and Smt. Tulsa ought to have claimed these rights by seeking cancellation of the gift deed within limitation prescribed. The contention is not sound. If a gift is accepted (by?) the donee without obtaining consent of the next reversioner in actual possession of the gifted property no suit for cancellation of the gift deed may be necessary. The gift would ensure for the lifetime of the donor whereafter it will become void or at least ineffective. During life time of Gaura Bahu it would be valid but from the moment of her death the rights of next reversioner would revive and vest her with rights as next reversioner because the limited interest on the donee will cease to exist. Since donee's rights have ceased by operation of law there could be no occasion for Tulsa to file any suit for cancellation of the gift deed more particularly when she was already in possession of the property along with the donee. In these circumstances the rights of Smt. Tulsa could not become barred by time merely because she had not sought cancellation of the gift or delivery of possession.

26. This disposes of points 1 to 4 formulated earlier for decision of the appeal.

27. The next question that requires consideration is regarding the effect of O.9, R. 9, O. 23, Rules 1 and 3 and O.2, R. 2 of the CPC on the rights of the plaintiff. However, before taking up these points for consideration it will be necessary to have a few facts on which entire argument is based.

28. In respect of the property several suits have been filed earlier, first of these suits was Suit No. (sic) of 1959 which Smt. Tulsa had filed against her sons seeking restoration of possession to her after she had been forcibly ousted from it on 8-3-1959. Copy of the plaint is Ext. A-10 and the two written statements filed by her sons Ganesh and Hira Lal, are A-11 and A-18 on the record. In Ex. A-11 Ganesh more or less supported his mother's claim while vide Ex. 18 Hira Lal contested the suit and disputed Tulsa's right in the property. However, the relevant allegation as to her forcible dispossession was not met with a specific denial. This suit was dismissed, in default. The case taken up by Smt. Tulsa was that she had been restored possession and, therefore, cause of action did not survive thereafter.

29. The next suit was Suit No. 139 of 1964 which was filed by the heirs of Ganesh, younger son of Smt. Tulsa against the heirs of his other brother Hira Lal

for possession over a specific portion of the house. According to the Commissioner's report Ex. A-13 he found both the parties in possession of specific portions. The plaintiff in that case claimed title of the entire house and also a right to obtain possession against the heirs of Hira Lal. While the suit was pending transferee from the defendant applied for being impleaded and resisted the plaintiffs application for withdrawing the suit. In the aforesaid application it was alleged that the heirs of Hira Lal have handed over possession to the plaintiff and have vacated the house. In these circumstances the Court granted permission to withdraw the suit on 13-7-1967 but permission to file a fresh suit was not given. This will be apparent from Ex. A-12 which is copy of the decree of that suit.

30. The 3rd suit was Suit No. 601 of 1969. It was filed by the heirs of Ganesh, Tulsa's younger son, in whose favour Smt. Tulsa had gifted the property by gift deed dated 30th July, 1963. The suit had been filed for possession against one Pooran Mal and his heirs for possession over a shop forming part of the disputed house which had been allegedly occupied by force by the defendant in 1959. Ex. A-15 is the written statement filed by the defendant in which it was alleged that he was a tenant to whom the shop had been let out by Hira Lal as its owner. Plea of res judicata was also raised on the ground that some other Suit No. 1339 of 1964 had been dismissed. No document such as plaint, written statement, issues or judgment of Suit No. 1339 of 1964 have been placed on record and, therefore, no plea of res judicata due to dismissal of that suit can legitimately be raised.

31. In the light of the above facts, now it has to be first examined whether O.9, R. 9 will bar this suit. We have seen above that Suit No. 331 of 1969 has been dismissed in default. But it was for the reason that Smt. Tulsa has again been allowed to occupy the house. This fact is clear from the Commissioner's report Ex. A-13, given in Suit No. 139 of 1964. At the time when the Commissioner visited the spot the heirs of Ganesh, younger son of Tulsa were found in possession. Thus there was no occasion for Tulsa's heirs or transferees from her to file any suit based on the earlier cause of action i.e. her dispossession on 8-3-1959. Merely because she had asserted her title as an heir of the last male owner of the property and challenged the validity of the gift deed in favour of Hira Lal it cannot be said that her right to challenge the gift deed had been lost for ever. Her right to file suit questioning the same subsequently survived.

32. So far as dismissal of Suit No. 1339 of 1964 is concerned since neither a copy of the plaint nor of the judgment are on record, it is difficult to say who the parties were and what was the cause of action for the suit and the relief claimed therein. Dismissal of that suit, therefore, can be of no help to the respondent to sustain the bar of res judicata.

33. Coming now to the bar of O.23, Rules 1 and 3 of the Code it has not been shown as to how the plea is sustainable. It is not the case of the respondent that the plaintiff ever abandoned any part of the claim made in the suit or that they had withdrawn the suit in respect of any part thereof. Rules 1 and 3 of O.23 will

therefore, not be attracted at all.

34. As for the plea regarding O.2, R. 2 of the Code it is not specified as to which relief could and ought to have been claimed by the plaintiff in the earlier suit which has now been claimed in the instant suit. The relief claimed in the present suit is for permanent injunction restraining them from demolishing it or in any way interfering in plaintiffs peaceful possession thereof and, in the alternative, for possession over the shop, which is subject-matter of pending Suit No. 601 of 1969. The relief sought is thus based on a cause of action which is alleged to have arisen on 25th October, 1974 when the defendant threatened to forcibly dispossess the plaintiff with a view to demolish the house and reconstruct the same. This was entirely a new cause of action.

35. The only question that now remains is regarding possession over the shop as claimed in Suit No. 601 of 1969. For this, it would be pertinent to examine whether defendants 4 to 17 were lawfully let in by Hira Lal as tenant or they were merely trespassers. The whole defence depends on the title of Hira Lal. It has already been found earlier that the gift deed in favour of Hira Lal was only for a limited period and the same came to an end on the death of Gaura Bahu whereafter Tulsa became owner of that property. The defendants Nos. 4 to 17 do not plea that they had been let in to the shop either by Tulsa or by her successor in interest. Their right flows from Hira Lal who is alleged to have let out the shop. They have not specified as to when this tenancy came into existence. Defendants Nos. 4 to 17 do not set up any right in the alternative for possession. The title of Hira Lal has already been rejected. The plaintiff's consistent stand has been that there exists no relationship of landlord and tenant between them. That being so, it is manifest that plaintiff's claim for possession against them is sound and valid. The Second Appeal No. 2191 of 1979 filed by defendants Nos. 4 to 17 has thus no merit and is concluded by concurrent findings of the two Courts below. No illegality in the judgment of the said Courts has been pointed out. The second appeal, therefore, merits dismissal.

36. In the result First Appeal No. 57 of 1959 and also Second Appeal No. 2191 of 1979 arising out of Suit No. 601 of 1969 both fail and are hereby dismissed. In the special circumstances of the case the parties are directed to bear their own costs in this Court.

37. Appeal dismissed.