
(1971) 09 MAD CK 0030
In the Madras High Court
Case No : Second Appeal No. 1 of 1968

V.S. Subba Reddiar and Another	Vs	APPELLANT
Seetharaman and Others		RESPONDENT

Date of Decision : 02-09-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 105, 105(1), 11, 47
Provincial Insolvency Act, 1920 — Section 4

Citation : AIR 1972 Mad 421 : (1973) 86 LW 36

Hon'ble Judges : Gokulakrishnan, J

Bench : Single Bench

Judgement

1. The plaintiffs are the appellants.
2. The suit was for declaration that the plaintiffs are the legitimate children of the second defendant and Punnayammal and for permanent injunction restraining the defendants from interfering with the possession and enjoyment of the plaintiffs of the properties mentioned in the schedule to the plaint, which were allotted to their share in pursuance of the final decree proceedings in O.S. No. 42 of 1945, on the file of Sub Court, Tuticorin, or, in the alternative, for recovery of possession of the properties from the defendants.
3. The facts were: The plaintiffs are the children of one Punnayammal. Punnayammal is the wife of the second defendant. The third defendant, though she alleges that she is the lawfully wedded wife of the second defendant, is not the legitimate wife of the second defendant and hence the first defendant is not the legitimate son of second defendant. There was litigation in O.S. No. 42 of 1945, on the file of the trial Court, for partition. Since the plaintiffs thought that the second defendant herein was acting against their interests by associating himself with the third defendant and purchasing properties in her name, the said suit ended in favour of the plaintiffs and a final decree was passed on 17-12-1955. From 17-12-1955, the plaintiffs have been in possession of the suit properties in their own right. The second defendant herein, who was the first

defendant in O.S. No. 42 of 1945, never denied that the plaintiffs were not born to him. In the year 1956, the third defendant filed O.S. No. 168 of 1956 on the file of the Court of the District Munsif of Kovilpatti, for declaration that properties mentioned in the plaint schedule in that suit were in her possession and for an injunction restraining the present plaintiff from interfering with her enjoyment of the same. It was alleged in the said suit O.S. No. 168 of 1956, that the mother of the plaintiffs. Punnayammal, was ten years older to her husband, that her husband being the son of her first cousin was within the prohibited degree of relationship for marriage and that she was associated with one Subba Reddiar and all the plaintiff were born to him only. The plaintiffs herein alleged in the present suit that the third defendant falsely alleged in O.S. No. 168 of 1956 that the plaintiffs herein were not in possession of the suit properties in spite of the final decree in the partition suit. O.S. No. 42 of 1955. The second defendant herein remained ex parte in that case and did not file any written statement. The plaintiffs herein further alleged in the present suit that even assuming that the relationship between Punnayammal and the second defendant was within the prohibited degree for marriage, according to the Hindu Law Texts and Sastras, the marriage between Punnayammal and the second defendant could not be questioned, as there was an ancient custom in the community of Reddis permitting such marriage and even the marriage of a person to his mother's sister. The plaintiffs as defendants in O.S. No. 168 of 1956 succeeded in that suit as well as in the appeal. The plaintiffs in that suit filed S.A. No. 1445 of 1959 before this Court. This Court found that the evidence regarding custom was meagre and unsatisfactory and allowed the second appeal with a reservation that the respondents in the appeal (plaintiffs herein) would be entitled to establish the custom and legality of the marriage of their parents by a comprehensive suit and by letting in adequate evidence relating to the ancient character and reasonableness of the same in a properly instituted declaratory suit for that purpose.

4. In the present suit the plaintiffs pleaded the custom which permitted their mother's marriage with the second defendant. She is the mother's father's brother's daughter of the second defendant. According to Hindu Law, he is in the prohibited degree, but, nevertheless the custom in the Reddi community of Tirunelveli District, allowed such type of marriage. The plaintiffs further alleged that the community as a whole is not averse to such a kind of marriage being contracted. Such a custom has been recognized among the Telegus in Andhra Pradesh by judicial decisions. The Reddis migrated from Andhra and their mother-tongue is Telugu. They carried with them the custom and usage pertaining to their native country. The members of the community never felt that there was anything strange or opposed to morals and much less against any principle of eugenics. The second defendant's father Sankaralinga Reddiar of Valvangi Village had a brother by name Punnia Reddiar. The plaintiffs' mother Punnayammal is the daughter of Nagammal, one of the daughters of Punnia Reddiar, Tracing relationship through male line the second defendant is the maternal uncle's son

of Punnayammal, one degree removed. Marriage between such relations has been recognised as valid in south India. This paternal relationship of the parties should receive prime consideration than the maternal relationship. The second defendant as well as defendants 1 and 3 who claim through the second defendant are estopped by conduct and the previous proceedings from disputing the rights of the plaintiffs. On these allegations, the present suit was instituted by the plaintiffs for the aforementioned reliefs.

5. Defendants 1 and 3 filed a written statement contending that Punnayammal is not the legally married wife of the second defendant, that Punnayammal is ten years older than the second defendant, that she is within the prohibited degree of relationship and as such no marriage could have been contracted as per the Hindu Law and that Punnayammal had illicit intimacy with Subba Reddier and through him gave birth to the plaintiffs. Defendants 1 and 3 further alleged that the second defendant was during the material time immature and incapable of procreation, that Punnayammal continued to live with her children and never lived with the second defendant and that she and the second defendant were not recognized as husband and wife by anyone. The plaintiffs are not in possession of the suit properties, but only the defendants. The defendants 1 and 2 have contended that there is absolutely no custom as alleged by the plaintiffs and that the custom pleaded is opposed to the principles of Hindu Law, public policy, morality, eugenics etc. Finally, they contended that the custom pleaded by the plaintiffs is not ancient and the matter has been concluded by the judgment in S.A. No. 1445 of 1959, (Mad) and that the proceedings in O.S. No. 42 of 1955 are not binding on these defendants. According to them, the principles of *factum valet* also do not apply to the present case as the second defendant and Punnayammal did not live together.

6. The second defendant filed a written statement contending that he does not remember to have married Punnayammal who is more than twelve years older to him, that she never lived with him but with one Subba Reddier and has children through him, that the plaintiffs are not the children of the second defendant, that he had no conjugal relationship with Punnayammal, that the marriage is illegal and void as being one contracted within the prohibited degree of relationship, that the second defendant's uncle Kondu Reddier alone was in charge of O.S. No. 42 of 1945 and as such the proceedings in O.S. No. 42 of 1945 were not binding on the second defendant, that the third defendant alone is the lawfully wedded wife of the second defendant, that the first defendant is the son born of their marriage and that the plaintiffs were not in possession of the property and not entitled to any injunction or possession.

7. The first plaintiff filed a reply statement stating that he was fifty-one years of age at the time of the suit, that the second and third defendants, who were parties to O.S. No. 42 of 1945 never disputed the paternity of the plaintiffs in that suit and that there are documents to show that the second defendant executed those documents for himself and as guardian of the minor plaintiffs.

The first plaintiff has also alleged that the second defendant has admitted the relationship in the partition suit by filing a joint memo into Court in O.S. No. 42 of 1945. In a mortgage deed dated 26-2-1950 and also in the subsequent sale deed dated 26-2-1951, the second defendant has clearly admitted the rights of the plaintiffs to a four-fifths share in the family properties.

8. Subsequent to the reply statement defendants 1 and 3 filed an additional written statement stating that questions raised by issues 1 and 2 in the present suit are barred by res judicata and that the observation in the judgment in S.A. No. 1445 of 1959 will not enable the plaintiffs to reopen the case. Reception of the said additional written statement was refused by the District Munsif, Kovilpatti, in A. No. 887 of 1963. Issues 1 and 2 ran as follows:

"(1) Whether the custom alleged by the plaintiffs is true, valid, binding and has the force of law?

(2) Is the marriage between Punnayammal and second defendant legal and valid?"

Dealing with I.A. No. 887 of 1963, the District Munsif, found that there was, however, no specific issue in O.S. No. 168 of 1956 about the validity of the marriage between Sanga Reddiar and Punnayammal and regarding the validity of the marriage performed within prohibited degree. The learned District Munsif observing that even if it were otherwise the judgment in the second appeal left open that issue and hence there was no substance in the additional written statement which sought to raise only this issue. On this basis, the District Munsif refused to receive the additional written statement. This order of refusal was taken up in revision to this Court in C.R.P. No. 81 of 1964 (Mad) Venkatadri, J., by judgment dated 3-9-1964 observing that it was only in pursuance of the observations in the second appeal, O.S. No. 313 of 1962 was filed by the plaintiffs and that the District Munsif was justified in rejecting the petition to file the additional written statement, dismissed the C.R.P. The learned Judge has also observed in the C.R.P. that there is no justification for the petitioners to file an additional written statement which will give rise to unnecessary issues and make the matter more complicated.

9. The trial Court, on an elaborate discussion of the evidence on record, found that the custom alleged by the plaintiffs was true and valid, having the force of law and binding on the parties, that the marriage between Punnayammal and the second defendant was legal and valid, that the plaintiffs were the sons of the second defendant, that the plaintiffs were estopped from raising other pleas in the present suit excepting that of the existence of the custom alleged on the principle of res judicata, that the plaintiff were not in possession of the suit properties, that the relief of possession claimed by the plaintiffs was not barred by Section 47, Civil P.C. and that the preliminary and final decrees in O.S. No. 42 of 1945 did not operate as res judicata in the present claim. The suit was decreed, therefore, by the trial court for declaration and possession as prayed for.

10. Aggrieved by the decree and judgment of trial Court, the respondents herein preferred the first appeal to the Court of the Subordinate Judge, Tuticorin, in A.S. No. 125 of 1965. The lower appellate Court reversed the judgment and decree of the trial Court and found that the suit was barred by res judicata by reason of the decision of the High Court in S.A. No. 1445 of 1959 (Mad) and that the plaintiffs are estopped from raising the pleas other than the relief relating to the question of the existence and validity of the alleged custom. The lower appellate Court has also held that the second defendant was not old enough to be able to procreate when the plaintiffs were born and as such the plaintiffs are not the sons of the second defendant and Punnayammal. On the question as to whether the proceedings in O.S. No. 42 of 1945 would operate as res judicata as far as the contentions of the defendants were concerned, the lower appellate Court answered it in the negative. The lower appellate Court has also held that the present suit so far as possession was concerned was barred by Section 47, Civil P.C. and that the question as to whether the execution of the decree of O.S. No. 42 of 1945 has become barred by limitation did not arise in this suit. Nevertheless, the lower appellate Court, on an elaborate discussion of the materials and evidence on record came to the conclusion that "marriages of persons with their mothers' sisters or with the daughters of the brothers of the mothers' fathers have taken place and the same have been customary among the members of the community concerned in the suit and also approved and recognised by the community as lawful". On these findings, the lower appellate Court held that custom pleaded as proved.

11. Aggrieved by the judgment and decree of the lower appellate Court, the plaintiffs have preferred the present second appeal.

12. Thiru D. Ramaswami Ayyangar, the learned counsel for the appellants contended that both the Courts below have concurrently found that the custom alleged has been proved that as regards the parentage of the plaintiffs, the second defendant admitted in O.S. No. 42 of 1945, the legitimacy of the plaintiffs and that according to the Medical jurisprudence even at the age of twelve a male can procreate children. The learned counsel also contended that the additional written statement in which the plea of res judicata was taken has been correctly rejected by the trial Court and by the High Court in the C.R.P. and as such the question of res judicata cannot be taken by the defendants. Finally, the learned counsel stated that the decision in S.A. No. 1445 of 1959 cannot operate as res judicata in this suit inasmuch as the said judgment makes it clear that the permanent injunction was granted "subject to" the plaintiffs proving the custom. According to Thiru D. Ramaswami Ayyangar, if once the custom is proved the suit of the plaintiffs has to be decreed notwithstanding the decision in S.A. No. 1445 of 1959. This right to get a decree has been left open by the decision in S.A. No. 1445 of 1959 given on the observation that the injunction given therein was "subject to" proving the custom pleaded by the plaintiffs.

13. Thiru Sundaram Ayyar, the learned counsel for the respondents argued that

the decision in S.A. No. 1445 of 1959 has given a finality to the disputes without leaving anything open and as such the said decision operates as *res judicata* in the present suit. According to the learned counsel, the decision in S.A. No. 1445 of 1959 does not afford a fresh cause of action. He also stated that any interlocutory order, by which a party had been denied the right to raise the question of *res judicata*, cannot give a finality and as such the question of *res judicata* can be agitated by him even in the appellate stage. Finally, Thiru Sundaram Ayyar also submitted that the custom has not been proved according to the well laid down principles enunciated in various decisions of this Court and of other High Courts.

14. The contention of Thiru D. Ramaswami Ayyangar to the effect that the respondents cannot take the plea of *res judicata* inasmuch as this Court in C.R.P. No. 81 of 1964 (Mad) had refused permission to the respondents to file an additional written statement raising the plea of *res judicata*, in this suit, was met by Thiru A. Sundaram Ayyar placing reliance upon the decision in T.S. Pichu Ayyangar Vs. Sri Perarulala Ramanuja Jeer Swamigal, Dharmakartha and Manager of Sri Alagia Nambirayar Temple, . In that decision it has been held that the order under consideration was not final, but interlocutory and was inappropriate inasmuch as the High Court dismissed the suit itself instead of directing the lower Court to dispose it of according to law. That was a case in which the trial Court overruled the defendant's preliminary objection that the Court had no jurisdiction to frame a scheme and the High Court in revision upheld the defendant's objection and dismissed the plaintiff's suit; finally the trial Court on receipt of the High Court order passed a formal decree dismissing the suit. In the above decision which arose out of later proceedings which themselves arose out of the disposal of the said suit on the basis of the High Court's observations, held that the High Court's order in the prior proceeding was not final, but interlocutory and that the order fell u/s 105(1), Civil P.C. and the appeal from the decree was competent by virtue of Section 105, Civil P.C., as the order affected the decision of the lower Court when passing the decree. Relying on the said principle, Thiru A. Sundaram Ayyar, the learned counsel for the respondents submitted that the decision in C.R.P. No. 81 of 1964 made on 3-9-1964 cannot bar the respondents from taking up the plea of *res judicata*. Though the decision cited cannot in all fours apply to the facts of the present case, it can be relied on for the purpose of construing the nature of finality of the order of the High Court in interlocutory applications. In the present case, no doubt, the fact remains that the plaintiffs objected to the reception of the additional written statement raising the plea of *res judicata* basing the contention on the decision of this Court in S.A. No. 1445 of 1959 wherein this Court granted the appellants herein leave to come forward with a comprehensive suit to prove the alleged custom. The trial Court, on objections of the plaintiffs, refused to entertain the additional written statement and on revision, this court, observing that there was no justification for the respondents to file an additional written statement which would give rise to unnecessary issues and make the matter

more complicated, confirmed the order of the trial Court. Nevertheless, the question of res judicata was agitated before the trial Court and the same was taken up before the lower appellate Court. Any order passed on an interlocutory application cannot take away the substantive right which is legally available and which can be agitated even at the second appellate stage. In the present case, the plea that is sought to be put forth by the respondents is one of res judicata. Even in the absence of any specific plea, the parties can agitate the matter in view of the decision of this court rendered on the contentions raised by the very same parties now before this Court. The said judgment in second appeal has also been marked as Ex. A-4. Considering all these aspects. I am of the view that the respondents are entitled to take the plea of res judicata.

15. The next contention taken up by Thiru A. Sundaram Ayyar is that the suit is barred u/s 47 Civil P.C. It is stated that the plaintiffs should have come by way of execution of the decree obtained in O.S. No. 42 of 1945, and not by filing the present suit, and that in view of the decree in O.S. No. 42 of 1945 the present suit is hit by S. 47, Civil P.C. It is unnecessary for me to elaborately discuss the various proceedings that took place subsequent to O.S. No. 42 of 1945 except to state that in between the filing of O.S. No. 313 of 1962 and the decree in O.S. No. 42 of 1945, the parties have agitated regarding the very same rights and obtained decision which made the decree in O.S. No. 42 of 1945 useless. The decree in O.S. No. 42 of 1945 remains no more; the decree that arose from O.S. No. 168 of 1956 granting an injunction to the respondents in S.A. No. 1445 of 1959 (Mad) is the one that remains. The said decision in S.A. No. 1445 of 1959 (Mad) has in effect become the subject-matter of interpretation for a disposal of the present suit and the appeal, now under consideration. The finding of the lower appellate Court to the effect that the present suit in so far as it relates to possession is barred by Section 47, Civil P.C. cannot be sustained. The final decree in O.S. No. 42 of 1945 was passed as late as 17-12-1955 and therefore even assuming that the contention of the defendants is true and correct, there has been no efflux of time. As stated by me supra, there have been other proceedings challenging the very basis of the decree in O.S. No. 42 of 1945, and as such the plaintiffs are not barred by Section 47, Civil P.C. from claiming the relief of possession.

16. The next contention raised by Thiru D. Ramaswami Ayyangar, the learned Counsel for the appellants is with regard to the custom alleged by the plaintiffs, in the suit. According to the plaintiffs, the second defendant married Punnayammal, their mother. The said Punnayammal is the second defendant's mother's father's brother's daughter. There is no dispute that Punnayammal stands in the prohibited degree of relationship for marriage with the second defendant, according to Hindu Law. But the contention of the plaintiffs is that by custom, such marriages are allowed in their District and in their community. It is needless to repeat the wellknown principles regarding proof of custom, that it must be ancient in character, certain, reasonable and should not be opposed to public policy, morals and eugenics. It is also clear that in the southern part of

India, though the marriage with the sister's daughter is prohibited by the Hindu Law, it is recognized as a customary marriage.

17. In S.A. No. 1445 of 1959 (Mad) Ananthanarayanan, J. (as he then was) while observing that the custom alleged has not been properly established, left open the question of custom by giving right to the present plaintiffs to file a proper declaratory suit to establish the custom they had pleaded. Only subsequent to that judgment, O.S. No. 313 of 1962, out of which the present second appeal arises, was filed. Hence it can be easily taken that the courts below were aware of the decision under Ex. A-4 and have applied their mind before coming to the conclusion on the question of the custom alleged by the plaintiffs. The elaborate discussion entered into by the Courts below and the findings recorded by them, on the question of custom, clearly spell out that the marriage of the second defendant with Punnayammal was valid according to the custom of the community. No doubt, as Mr. A. Sundaram Ayyar, for the respondents, has pointed out, this Court can go into the question if the decision of custom is not based upon application of the proper principles. I do not think in the present case, any miscarriage of justice or misapplication of principles has occurred, for me to interfere with the finding of the Courts below on the question of custom alleged by the plaintiffs. In this view, I hold that the custom alleged by the plaintiffs and the validity of the marriage of the second defendant with Punnayammal, stand proved.

18. The next important point that has been argued vehemently by counsel appearing for both parties is with regard to the question of res judicata. According to Thiru D. Ramaswami Ayyangar, Ex. A-4 cannot be considered as giving a finality to the dispute between the parties, since the learned Judge of this Court has allowed S.A. No. 1445 of 1959 "subject to" the filing of a proper declaratory suit by the plaintiffs herein. Thiru A. Sundaram Ayyar, the learned counsel for the respondents, submitted that as far as the relief of injunction is concerned, the decision thereon has become final and as such the plaintiffs are barred by res judicata in view of the decision under Ex. A-4, from claiming possession of the suit properties. According to the learned counsel for the respondents, the only right the appellants can get is a mere declaration that they are the children of the second defendant out of a valid wed-lock with Punnayammal except to this extent, in other respects, the plaintiffs' claim is barred by res judicata.

19. Thiru A. Sundaram Ayyar, for the respondents, cited various decisions in support of his contention.

20. In AIR 1925 55 (Privy Council) the Privy Council has held that

"the judgment in the prior suit was a bar to the second suit and that as the case did not fall within Order 23, Rule 1, Civil P.C., the Civil Court had, after dismissing the suit, no power to reserve liberty for the plaintiffs to begin fresh proceedings."

In that case, the appellants before the Privy Council originally filed a suit questioning the gift of a widow on the ground that the plaintiffs were the presumptive heirs of the widow's husband. The defendants in that suit, pleaded inter alia that the plaintiffs were remoter in relationship to the common ancestor but one of the defendants who was the nearest reversioner and he is the only person entitled to dispute the deed of gift. While the suit was pending, the widow who made the gift died. The plaintiffs thereafter wanted to amend the plaint by adding the prayer for possession and also pleading that by custom they were the nearest reversioners. The amendment sought for was refused and the Court dismissed the suit, but in the course of its judgment the Court used the following expressions:

"The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession."

The plaintiffs did not file any appeal, but came forward with a subsequent suit claiming possession of one half of the property founding their title on family custom. The trial Court dismissed the suit. The Judicial Commissioner who heard the appeal therefrom observed that some complication was introduced by the language of the Judge who tried the first case and by his expressing himself as if he had power to give leave to bring a fresh suit. On these observations, the Judicial Commissioner dismissed the appeal. On further appeal to the Privy Council, the Privy Council, after considering the facts, dismissed the appeal observing that the case was barred by res judicata as per Sec. 11. Civil P.C. It has to be noted that in that case the plea of custom which only would have given the right to the plaintiffs therein to get at the property, though taken, was not allowed by the Court, since the same was introduced by way of an amendment at introduced by way of an amendment at a later stage. Explanation IV to S. 11. Civil P.C. states 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. By reason of this explanation, it is clear that the question of custom had also been decided and as such the plaintiffs in that suit were clearly barred by the rule of res judicata from again filing a suit based on the custom. In the Privy Council case, the trial Court dismissed the suit in the prior occasion without mentioning that the said decision was subject to any other comprehensive suit. It is also significant to note that in that decision, the trial Court, on the previous occasion, had only observed: "The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession". On a consideration of the said observations and also Explanation IV to Section 11, Civil P.C. the Privy Council held that the second suit was barred by res judicata.

21. Thiru D. Ramaswami Ayyangar distinguished the above decision by the statement that in the present case the custom had been pleaded and agitated, that the very same custom, originally pleaded, was left open under Ex. A-4 judgment and that the High Court while granting the injunction observed:

"It is open to the contesting respondents (present plaintiffs) to establish the alleged custom and the legality of the marriage by comprehensive and adequate evidence relating to its ancient character, its certainty and its reasonableness, in a proper declaratory suit instituted for that purpose. Subject to this, the appeal is allowed by granting the permanent injunction in favour of the appellants....."

According to the learned counsel from the above said observations it is clear that the High Court has left open everything for a comprehensive suit without finally deciding the case before it, and that is why the judgment of the High Court says "subject to" this, and such a clause is not found in the Privy Council case. Apart from this, Thiru D. Ramaswami Ayyangar further states that for the case decided by the Privy Council, Explanation IV to Section 11, Civil P.C. applied squarely, but in the present, it is not so.

22. Thiru A. Sundaram Ayyar, the learned Counsel for the respondents, submitted that the reservation made was only to remove the stigma attached to the plaintiffs, and not for the purpose of re-considering the "injunction" granted.

23. In Palani Goundan (dead) and Others Vs. Suppia Goundan and Others, , the plaintiffs claiming to be presumptive reversioners to the estate of one R filed the suit for declaration that a mortgage executed by R's widow was not binding on them. R's widow and the mortgagee who were made parties to the suit denied the plaintiffs' alleged relationship to R and the reversionary right claimed by them. An issue was framed on that question. After a witness was examined, the plaintiff wanted to withdraw the suit with liberty to file fresh suit. Permission to withdraw with liberty to file fresh suit was refused. The plaintiffs declined to withdraw the suit without such permission. The Court disposed of the suit on the merits of the ground that the plaintiffs had not proved that they were the reversionary heirs as alleged by them. The decree dismissing the suit was confirmed in appeal. While disposing of the suit, the trial Court observed:

"After all, this suit is only for a declaration and there is no hardship for the plaintiffs if no permission to bring a fresh suit for declaration is granted, for they could after the widow's death bring a suit for possession, contesting also the present alienations".

Basing on these observations the plaintiff came forward with a subsequent suit for possession on the basis that he was the reversioner. In such circumstances this Court held in the above decision that the question of reversionary right of the plaintiff had become barred by res judicata by reason of the decision in the prior suit. From this, Thiru A. Sundaram Ayyar, for the respondents, would state that the present suit is barred by res judicata. Thiru D. Ramaswami Ayyangar pointed out that the facts of the said case have absolutely no bearing to those in the present case and further there is absolutely no judgment as in Ex. A-4 containing the clause "subject to" in the case covered by the said decision.

24. In Krishnaswami v. Manikka, 1936 Ind Cas 13 a Judge of this Court observed:

"The statement in the judgment that the plaintiff may bring a separate suit will not create in the plaintiff any right to bring a fresh suit which he does not already enjoy".

In that case, though the plaintiff had an opportunity to put forward alternative plea, he brought the suit after the dismissal of the previous suit in view of the observations in the judgment in the prior suit. Curgenven, J., referring to Explanation IV to Section 11, Civil P.C. held that the subsequent suit was barred by *res judicata*. Thiru D. Ramaswami Ayyangar distinguished this decision stating that in the present case the plea of custom was already taken and "subject to" proof thereof in a subsequent proceeding injunction was granted by the learned Judge.

25. In *Sinna Subba Goundan v. Rangai Goundan*, (1945) 2 MLJ 394 a Hindu father was declared insolvent and the purchaser of certain of his properties from the Official Receiver who was obstructed by the sons of the insolvent applied to the Court for delivery of possession after removal of obstruction. The Court ordered the same after deciding that the properties constituted the self acquisition of the father and that the sons had no rights and that even if they had such rights they should be established by a separate suit. One of the sons having filed the suit, the Court held that the prior decision by the trial Court that the properties were self-acquired, which was confirmed in appeal and revision, was binding upon the sons and they cannot reagitate the matter, that that the decision cannot be attributed to any other jurisdiction than the one conferred on the Insolvency Court by Section 4 of the Provincial Insolvency Act, that a decision under that section is final and conclusive and that a mere direction of the Court that another proceeding might be taken for having a point more adequately considered and decided is of no avail when considering a plea of *res judicata*. Relying upon this decision, Thiru A. Sundaram Ayyar, learned counsel for the respondents, reiterated that Ex. A-4 judgment cannot leave the question of custom open and in spite of the observations contained in Ex. A-4, the present suit is barred by *res judicata* on the ground that under Ex. A-4 injunction has been granted in favour of the respondents. Thiru D. Ramaswami Ayyangar, for the appellants, reiterated that in the abovesaid decision a finality was given with regard to the question as to whether the property was the self-acquired property of the father of the plaintiff or not. The learned counsel also submitted that in the previous suit, covered by the abovesaid decision, the clause "subject to", was not there; but as far as the present case is concerned Ex. A-4 has not given finality but has left open the question of custom.

26. The next decision cited by Thiru A. Sundaram Ayyar is the one in *Malaya Kumar Mazumdar Vs. Fakir Mohammad Sarkar and Others*, wherein it has been held that where in a previous suit the defendant's right to relief which he seeks in the subsequent suit as plaintiff was one which might and ought to have been raised and had in fact been raised by him but the Court erroneously remitted him to another suit, the subsequent suit would still be barred by *res judicata*

notwithstanding that liberty had been expressly reserved to him to institute separate suit and that in such a case, the matter would be deemed to be impliedly decided in the previous suit and the subsequent suit filed in pursuance of the direction of the Court would be barred by the rule of constructive res judicata. In the said decision, the right of the defendant, whether he had the darpatni-interest or not, was finally decided and the plaintiff was given the relief he claimed on the basis that the defendant's darpatni-interest had been annulled. The observation of the Court that the defendant can agitate his darpatni right in a regular suit was held to be barred under the rule of res judicata in the subsequent suit. According to Thiru D. Ramaswami Ayyangar, for the appellants, such is not the present case, where Ex. A-4 has not finally decided the matter.

27. Ganesh Jha Vs. Baidyanath Jha and Others, lays down more or less the same principles as enunciated in the above Calcutta decision.

28. Thiru A. Sundaram Ayyar also brought to my notice the following statement at page 509 in "Black on Judgments", second edition, as to finality of a judgment:--

"It is well settled that the doctrine of res judicata applies only to final judgments, not to interlocutory judgments or orders which the court which rendered them has power to vacate or modify at any time".

On the basis of this, the learned counsel submitted that Ex. A-4 is a final judgment" and would operate as res judicata in the present case.

29. At this stage, it is necessary to consider Ex. A-4, the Judgment of Anantanarayanan, J. (as he then was) in S.A. No. 1445 of 1959. In the Privy Council case, above cited, the Judicial Commissioner observed that some complication was introduced by the language of the Judge who tried the first case and by his expressing himself as if he had power to give liberty to bring a fresh suit. As I have already observed, it is clear from the Privy Council case that originally a final decision was arrived at and the amendment petition alleging custom was also rejected. The observation in that case by the trial Court is completely different from the one given in Ex. A-4 herein. That is why the Judicial Commissioner and the Privy Council rejected the plea of the plaintiff in that case and held that suit was barred by res judicata.

30. When a former suit between the same parties in the same court and for the same relief, resulted in a decree of dismissal but the judgment left it open to the plaintiff to bring a fresh suit and left open untouched and undecided all matters affecting the rights of the parties, the decree does not constitute res judicata in the subsequent suit, as such matters cannot be said to have been "heard and finally decided" within the meaning of Section 11, Civil P.C. 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 is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and return 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 proceeding 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, Civil P.C.

31. In S.A. No. 1445 of 1959, (Mad), Anantanarayanan, J. (as he then was) granted the injunction "subject to" the appellants herein filing a proper declaratory suit for the purpose of proving the legality of the marriage between the second defendant and Punnayammal. According to "Black on Judgments" abovecited, it is well settled that the doctrine of *res judicata* applies only to final judgments and not to interlocutory judgments. Proof of custom has to depend on the well-defined principles such as of its ancient character, certainty, reasonableness and also not opposed to public morals and eugenics. Hence, when the court in a given case leaves open the proof of custom to be decided in a proper declaratory suit, it definitely intends only temporary relief without there being any "finality" in its judgment. As far as the present case is concerned, once the custom is proved, so as to make the marriage of the second defendant with Punnayammal, a valid one, the plaintiffs will automatically get the decree they prayed for. The clause "subject to" in Ex. A-4 clearly indicates that there was no finality in the judgment thereunder and as such the injunction granted thereunder was only subject to the decision on the question of custom. This case cannot be equated to a case in which the party has failed to adduce necessary evidence in proof of his case. Proof of custom stands on a peculiar footing and unless and until the same is decided in a particular case, as in the present case, any other relief which is incidental thereto, will depend upon the decision upon the existence of such a custom. This has been made very clear in Ex. A-4 by the use of the words "subject to". In AIR 1925 55 (Privy Council) the facts are completely different. There the party had not taken the plea of custom. Further, the Court had refused to allow the amendment, pleading the custom as to the nearness of relationship to the deceased person there. But in the present case, the specific case of the plaintiffs was based upon custom and that too, on the strength of the observations made in Ex. A-4 judgment, which clearly gives the right to the appellants to file the present suit for the purpose of establishing the validity of the marriage of Punnayammal with the second defendant. It will be meaningless if we interpret the judgment under Ex. A-4 to mean that the appellants have no right in the property since the judgment thereunder is final and any right left open thereunder is only academical, just meant for washing away the stigma attached to the birth of the plaintiffs. The basis and the purport of the judgment under Ex. A-4 are not only to establish the legitimacy of the birth of the plaintiffs but also to get a right in the property. Only in this background, Anantanarayanan, J. (as he then was) has delivered the Judgment under Ex. A-4 with the clause "subject to" the appellants filing the present suit to establish the custom. Hence, once the custom is established, automatically, the

plaintiffs must get the relief. Section 11, Civil P.C. or Explanation IV to S. 11 will never come in the way or be a bar to the present suit, inasmuch as I am of the view that the judgment under Ex. A-4 is clear to the effect that the decision arrived at thereunder is not a "final" one, but "subject to" the decision in the present suit.

32. As rightly pointed out by Thiru D. Ramaswami Ayyangar, in the cases covered by the decisions relied on by Thiru A. Sundaram Ayyar, there is absolutely nothing in the Judgments in those suits to show that the decrees passed were "subject to" any condition, as is contained in Ex. A-4, and this makes all the difference and as such there is no finality in the judgment under Ex. A-4 to bar the present suit under S. 11, Civil P.C. If we accept the contention of Sri A. Sundaram Iyer; the spirit of the judgment under Ex. A-4 will not be there and in substance the plaintiffs will be deprived of their valuable right to get relief in this suit. Both on equity and on proper interpretation of the judgment under Ex. A-4, substantial justice can be rendered only when Ex. A-4 is construed as judgment which has not given "finality" to the dispute between the parties, but it has left open the question of custom to be decided in the present suit.

33. I am completely in agreement with the interpretation given by Sri D. Ramaswami Aiyangar, the learned counsel for the appellant, to Ex. A-4, judgment, and I confirm the findings of the trial court.

34. In these circumstances, the second appeal is allowed, the decree and judgment of the first appellate court are vacated and those of the trial court are restored. Considering the relationship between the parties, there will be no order as to costs. No leave.

35. Appeal allowed.