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AMARENDRA KOMALAM AND ANR.

v.

USHA SINHA AND ANR.

APRIL 7, 2005

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[ASHOK BHAN AND DR. AR. LAKSHMANAN, JJ.]

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Code of Civil Procedure, 1908—Section 11—Res judicata—Respondent giving an undertaking in the Court that she would not raise the issue of forgery—High Court disposing of the matter accordingly—Respondent in fresh suit raising same issue in respect of same subject matter against the same party—Held: Such an act on the part of respondent was barred by principles of res judicata, waiver and estoppel—Doctrines—Doctrine of res judicata.

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The question which has arisen for consideration in the present appeal was whether the issue of interpolation in the agreement dated 2.9.1978 which stands settled between the same parties by the orders of the High Court and affirmed by this Court in regard to the same subject matter can be allowed to be raised in another proceedings between the very same parties in the same Court.

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Allowing the appeal, the Court

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HELD : 1. The High Court has miserably failed to appreciate that the undertaking of first respondent in a Civil Revision that she will not raise the issue of interpolation is binding on her and as such she was barred by the principles of *res judicata*, *waiver* and *estoppel* to raise the same issue again between the very same parties in relation to the same subject matter.

[336-B]

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2.1. It is well settled that once an issue of fact has been judicially determined finally between the parties by a Court of competent jurisdiction and the same issue comes directly in question in subsequent proceedings between the same parties then the persons cannot be allowed to raise the same question which already stands determined earlier by the competent Court. [337-C]

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2.2. The Agreement dated 02.09.1978 is an admitted document. Respondent No. 1 had sought to raise the issue of its forgery in earlier

proceedings, but finally undertook not to do so. This was recorded by the High Court and the Civil Revision filed by respondent No.1 was disposed of accordingly. Later respondent No.1 sought to resile from her stand and filed an application for review before the High Court, which was also dismissed. The said order was challenged in SLP, which was dismissed. In that view of the matter, the question of interpolation in the renewal clause of the said deed has been finally decided and the same issue has been raised in the present suit when in both the suits the parties are the same and the basic claim of both the parties are same, as in eviction suit, the plaintiff is claiming eviction by termination of lease and denying the renewal clause whereas in the specific performance suit, the appellants are claiming the renewal of the lease on the basis of the said renewal clause. Hence in both the suits, the main issue is substantially and materially one and the same, and both the cases are being tried simultaneously. This apart, the judgment of the High Court and of this Court is a judgment in *personam* which is binding upon both the parties. [336-H; 337-A, D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2466 of 2005.

From the Judgment and Order dated 23.9.2003 of the Patna High Court in C.R. No. 1178 of 2003.

Raju Ramachandran, Rudreshwar Singh, Shishir Pinaki and Sanjay Jain with him for the Appellents.

The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. Leave granted.

The main issue that arises for consideration in this appeal is whether an issue, already settled in a suit between the same parties in respect of certain subject matter, can be allowed to be raised again between the very same parties in regard to the same subject matter, but in a different suit.

The issue involved in the earlier proceedings was whether respondent No.1 could raise the issue that there was interpolation in the clause relating to renewal of lease deed in the agreement between the parties dated 02.09.1978. The High Court held that the said respondent could not raise that issue as she had expressly given it up. This was affirmed by this Court when the respondent challenged the order of the High Court before this Court in S.L.P.(C) No. 16513 of 2001 dated 13.09.2002. Now respondent No.1 seeks to re-agitate

A the very same issue in another suit between the same parties. According to the appellants, the said issue cannot now be raised as the said respondent is barred by the principles of *res judicata*, *waiver and estoppel*. However, the sub-Judge as also the High Court of Patna have now allowed the respondent to raise the said issue.

B To appreciate the above question, the following facts are necessary to be stated:

C Appellant No.1, Amarendra Komalam, is a lessee of a piece of land situated at Mauza Dujra, Lodhipur Market, now in the city of Patna. Appellant No.2, M/s S.K. Puri Service Station, is a petroleum dealership firm. Respondent No.1, Smt. Usha Sinha, is the land owner and respondent No.2 is M/s I.B.P. Co. Ltd., a Government of India Undertaking company, which has given the dealership of the petroleum outlet to appellant No.1.

D Pursuant to the negotiations between the parties for taking the land in question on lease for opening of the petroleum outlet, an application was filed by the appellant to M/s I.B.P. Co. Ltd. for approval of the site of the land in question for motor spirit outlet. A letter was issued by M/s I.B.P. Co. Ltd. to appellant No.1 specifying in detail the requirement of a renewal clause in the Lease Deed Agreement. Vide Memo No. 4788, the office of the District Magistrate, Patna issued no objection certificate for installation of HSD filling station on the aforesaid land in question in favour of appellant E No.1. Lease deed for a period of 15 years was executed by respondent No.1 in favour of appellant No.1 with respect to aforesaid property on 01.06.1978 and the same was registered on 12.08.1978 and given effect to between the parties from 01.06.1978. A Clarification Agreement was appended to the main registered lease deed on 12.08.1978. A written agreement for being F appended as Clarification Agreement to the main registered lease deed dated 12.08.1978 was executed on 02.09.1978 mainly incorporating two clauses firstly, the renewal of lease deed and the second clause was that private passage to respondent No.1's bounded land behind the land in question. The stamp paper for the written agreement dated 02.09.1978 was purchased by G respondent No.1 who got it typed and signed after fully understanding the same, as admitted by her in her deposition. Thus respondent No.1 executed fresh agreement dated 02.09.1978 inserting the following words in the original deed in compliance to the I.B.P company's demand:

H "Whereas as per the IBP guidelines renewal option is must so the following words at the end of paragraph 5 of the deed No. 5115 dated

12.8.1978 is added.”

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“Provided if it is required to be renewed by Lessee then possession shall not be given.”

After expiry of the lease, the appellant, as per the terms of the renewal agreement dated 02.09.1978, gave a notice through registered post to respondent No.1 on 28.05.1993 for execution of a fresh lease deed renewing it for a further period of 15 years. Respondent No.1 instead of renewing the lease filed Title Suit No. 382 of 1993 seeking the following reliefs:

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- (a) That on adjudication the decree of eviction be passed in favour of the plaintiff as against the defendant (appellant No.1 herein) and plaintiff be put in possession by process of law at the cost of the defendants over schedule I premises.
- (b) That by grant of interim injunction defendant No.1 be restrained to run the petrol pump, namely, M/s S.K. Puri Service Station and defendant No.3 be restrained to supply fuelling of the said pump pending the suit in breach of the contract.
- (c) Cost of the suit be awarded to the plaintiff.
- (d) Any other relief or reliefs to which the plaintiff be found entitled be awarded to the plaintiff.”

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The defendant-respondent purposely suppressed the existence of written agreement dated 02.09.1978 in the original plaint of Title Suit No. 382 of 1993. Appellant No.1 (the defendant in Title Suit No. 382 of 1993) filed written statement and in paragraph 7 of the written statement averred as follows:

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“That when the deed was sent to the company for approval they pointed out that there should be renewal clause in the deed as per guidelines of the Company (Marketing Manual). Respondent No.1 in compliance to the company demand, thereafter executed a fresh agreement and gave option of renewal in these words:-

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“Whereas as per IBP guidelines, renewal option is must. So the following words at the end of para 5 of the deed No. 5315 dated 12.08.1978 is added “provided if it is required to be renewed by the lessee then the possession shall not be given.”

It is thus apparent from the pleadings that at the earliest point of time,

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A the plaintiff-appellant pleaded about the renewal clause as the renewal clause is incorporated in the agreement dated 02.09.1978.

When the lease was not renewed, then on the basis of the renewal clause incorporated in the agreement dated 02.09.1978, the appellants filed Title Suit No. 15 of 1996 for a suit of specific performance in which respondent
B No.1, Smt. Usha Sinha, was made the defendant. The following reliefs were sought by appellant No.1 :

C (a) Decree of specific performance of agreement for lease dated 2.9.1978 executed by the defendant No.1 and the plaintiff in respect of land described in Schedule 1 of the plaint be passed in favour of the plaintiff and against the defendant and defendant
D No.1 be directed to execute the registered lease deed in respect of the land in suit for a further period of 15 years on the terms and conditions as mentioned in para 3 of this plaint, within a reasonable time fixed by the Court failing which the said lease deed be executed and registered by the Court on behalf of the defendant No.1 aforesaid.

(b) The defendant No.1 be enjoined from taking any step for vacation of the plaintiff from the premises in suit fully detailed in schedule 1 below till the disposal of the suit.

E (c) Cost of the suit be awarded to the plaintiff and against the defendant.

(d) Any other relief or reliefs for which the plaintiff may be found entitled be passed in favour of the plaintiff and against the defendant.”

F Respondent No.1 filed written statement and denied the existence of agreement dated 02.09.1978 in following words:

G “The said alleged deed, if any, is forged manufactured and antedated and this defendant never executed such alleged deed nor there was any such negotiation.”

H It is relevant to state here that vide order dated 03.09.1998 passed in Title Suit No. 382 of 1993, the sub-Judge-VI, Patna ordered that both the suits bearing Title Suit No. 382 of 1993 and 15 of 1996 will be tried simultaneously as agreed by the parties though it will be decided by separate judgments. This was done only because the conflicting judgments may not be

delivered in the matter. As such both the suits are pending in one and the same Court. A

The son of respondent No.1 was examined as a witness in the Title Suit No. 382 of 1993 as PW-1. While being cross-examined, he was shown the signature on the written agreement dated 02.09.1978 through pin hole method, when he identified the signature of the plaintiff, his mother-respondent No.1 herein. Then the document was disclosed to be the bilateral agreement dated 02.09.1978 which contained the signature of respondent No.1 herein. The son of respondent No.1 has admitted in paragraph 15 of his deposition as follows: B

“The signature on the document of 3 pages is of my mother which I identify/acknowledge (the witness gives this statement when only signature portion of the agreement dated 2.9.1978 shown to him through pin hole method).” C

When respondent No.1's son admitted the signature on the written agreement dated 02.09.1978 of his mother, Smt. Usha Sinha, respondent No.1 herein, then took a U-turn in her stand and instead of denying the total existence of the written agreement dated 02.09.1978, started accepting the existence of the agreement dated 02.09.1978 but pleaded interpolation in the renewal clause. Subsequently in the course of cross-examination, respondent No.1 herself in paragraph Nos. 19 and 26 admitted that while signing the bilateral lease agreement dated 02.09.1978 she had read the agreement and thereafter she had signed. She had also admitted that stamp paper on which the bilateral lease agreement was signed was purchased by her. When respondent No.1 admitted the existence of the agreement dated 02.09.1978 after identification of her signature by her son in cross-examination on 01.12.1998, she filed a petition on 04.12.1998 objecting the admissibility of the written agreement dated 02.09.1978 by changing her stand and stating that only the renewal clause was interpolated. Appellant No.1 filed the rejoinder and contended that the witness of respondent No.1 cannot be examined without deciding the petition dated 04.12.1998 by which interpolation has been alleged in the renewal clause of agreement dated 02.09.1978. The Court below did not allow the prayer of appellant No.1. However, as respondent No.1 was not ready to press the petition dated 04.12.1998, the sub-Judge allowed the petition of the appellants dated 01.12.1998 by which the prayer for appointment of Advocate Commissioner to find out whether the present passage existing in the west as per the written agreement dated 02.09.1978 or in the east as per D
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A the registered lease deed dated 12.08.1978. The appellants filed rejoinder to the petition dated 04.12.1998 of respondent No.1 and submitted that there is no interpolation nor it change the nature of the suit. Respondent No.1 filed a petition stating that question of interpolation in the renewal clause of the agreement dated 02.09.1978 alleged through the petition dated 04.12.1978 would not be pressed at present. The appellants filed rejoinder on 09.12.1998 to the petition dated 07.12.1998 to the effect that without deciding the question of interpolation finally, the evidence cannot be adduced. Hence they prayed that the petition dated 04.12.1998 of the defendant-respondent may be disposed of first and then the evidence should proceed. The sub-Judge vide order dated 09.12.1998 directed the appellants to cross-examine the witness otherwise they would be discharged, since respondent No.1 was not pressing the petition dated 04.12.1998 at present and when the petition would be pressed by respondent No.1, the appellants would get the chance of rebuttal.

D The appellants filed Civil Revision No.18 of 1999 before the High Court of Patna against the order dated 09.12.1998 of the sub-Judge contending therein that if the contention of respondent No.1 raised vide petition dated 04.12.1998 that there is interpolation in the renewal clause is not decided finally, then after closing of the evidence if such petition is pressed and allowed then the whole evidence has to be recorded de novo. As such the contention of the appellants was that the issue in respect of the interpolation of the agreement be decided first before proceeding with the evidence. E Respondent No.1 appeared in Civil Revision No. 18 of 1999 and submitted that the pleading of interpolation would never be raised at later stage also and the objection to that effect shall be considered as withdrawn. In such view of the matter and in view of the aforesaid undertaking, the High Court vide order dated 15.02.1999 disposed of the Civil Revision No. 18 of 1999 as F infructuous recording the statement of the counsel of respondent No.1 which reads as under:

G “A petition was filed by the plaintiff alleging some interpolation in respect of bilateral unregistered document which was introduced in the evidences. Objection was filed. Then there was prayer from the side of the petitioners to dispose of that matter prior before proceeding further in recording evidences. The plaintiff then filed Ann.4 stating that she was not pressing her earlier petition “at that stage”. The learned Court below accepted that petition and ordered for proceeding further in the suit. Hence this revision petition.

H Learned counsel for the O.P. submits that she is not at all inclined to

press her earlier petition regarding interpolation. But the words 'at this stage' in the later petition raised confusion in the mind of the petitioner. Now it has been clearly stated before this Court that the plea of interpolation would never be raised at later stage also and the petition to that effect shall be considered as withdrawn." A

In view of the above position, this revision petition has become infructuous." B

Against the order dated 15.02.1999 passed in Civil Revision No. 18 of 1999, respondent No.1 filed Civil Review No. 88 of 1999 on the ground that the undertaking recorded in order dated 15.02.1999 were never taken. Civil Review No.88 of 1999 was dismissed by the High Court on 19.07.2001 observing as under: C

"Heard learned counsel for the petitioner.

This review petition has been filed against the order dated 15.2.1999 passed by this Court in Civil Revision No. 18/99. In presence of both the parties admission has been made from the side of the petitioner and the order was passed. Now, the petitioner wants to deviate from the admission made before this Court which cannot be a ground for review. D

Accordingly, this Civil review application has got no force and the same is rejected." E

Against the order dated 19.07.2001 passed in Civil Review No. 88 of 1999, respondent No.1 filed Special Leave Petition (Civil) No. 16513 of 2001 before this Court and took the ground of the agreement dated 02.09.1978 being a forged document. Apart from other contentions, she also contended that action should be taken under Section 340 Cr.P.C. against the appellant, though the pleading of Section 340 Cr.P.C. was never raised either in the trial Court or before the High Court and the same was raised for the first time in the special leave petition. F

The appellants herein who were the respondents in the said special leave petition filed their counter affidavit before this Court stating in detail that the agreement dated 02.09.1978 is an admitted document in the trial Court and that the initial order dated 15.02.1999 passed in Civil Revision No. 18 of 1999 was never challenged and it attained finality and no appeal lies against the review order. This Court, after hearing both the parties, dismissed G H

A the special leave petition on 13.09.2002. It is thus evident that the question of interpolation stood settled by the aforementioned decisions and it was concluded that respondent No.1 could not raise the said issue at any stage.

B When the plaintiff's evidence started in Title Suit No. 15 of 1996, counsel for respondent No.1 started putting question to the plaintiff witness with regard to the forgery and interpolation of agreement dated 02.09.1978. An objection was raised by the plaintiff-appellant vide objection petition dated 24.01.2003 that as per her own undertaking before the High Court in Title Suit No. 382 of 1993, respondent No.1 could not raise the question of interpolation with regard to the renewal clause in agreement dated 02.09.1978.

C It was contended that respondent No.1 has waived the issue of interpolation. Hence, she is barred from raising the same under the principle of estoppel. When witness Nausad was being examined, then the Court vide order dated 04.02.2003 decided that this issue with regard to giving liberty to respondent No.1 on questioning the witness with regard to the interpolation of renewal clause in agreement dated 02.09.1978 will be considered at the time of final adjudication of the case and it will not amount to create the right of respondent No.1 to raise such issue subsequently and thereby the objection filed by the appellant was rejected vide order dated 04.02.2003. In view of the observation given in order dated 04.02.2003, the objection was again raised when appellant No.1 was being cross-examined and again respondent No.1 asked the question relating to the interpolation in renewal clause in the agreement dated 02.09.1978, then again the objection was filed that respondent No.1 cannot raise the issue of interpolation in the agreement dated 02.09.1978 in view of her undertaking given in Civil Revision No. 18 of 1999 before the High Court and which was affirmed by this Court. A rejoinder was filed by respondent No.1 herein on 10.06.2003 on the ground that the objection was rejected by the trial Court on 04.02.2003 and suits are not analogous moreover since the beginning respondent No.1 is saying that the alleged deed is forged and fabricated. The sub-Judge allowed respondent No.1 to raise the question relating to interpolation in the agreement dated 02.09.1978 from the witnesses. The appellants filed Civil Revision No. 1178 of 2003 against the order of sub-Judge X, Patna dated 17.06.2003 in Title Suit No. 15 of 1996 whereby the sub-Judge allowed respondent No.1 to raise the question relating to interpolation in the agreement dated 02.09.1978 from the witnesses. Civil Revision No. 1178 of 2003 was dismissed by the High Court on 23.09.2003 with a direction to the Court below to conduct the trial on a day-to-day basis and dispose of both the suits within six months and report it to the High Court. Aggrieved by the said order, the appellants preferred the present appeal

by way of special leave petition.

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We heard Mr. Raju Ramachandran, learned senior counsel, appearing for the appellants and Mr. L.R. Singh, learned counsel, appearing for contesting respondent No.1.

Learned senior counsel appearing for the appellants invited our attention to the earlier set of orders passed by the sub-Judge as affirmed by the High Court in Civil Revision No. 18 of 1999, the order dated 19.07.2001 in Civil Review No. 88 of 1999 of the High Court and the order dated 13.09.2002 of this Court in Special Leave Petition (civil) No. 16513 of 2001. He submitted that as the matter between the same parties with regard to the interpolation in the agreement dated 02.09.1978 has already been settled by which respondent No.1 will not raise the issue of interpolation/forgery with regard to the agreement in question and particularly, in view of the undertaking of respondent No.1 before the High Court, respondent No.1 will never raise the issue of interpolation with regard to the said agreement, respondent No.1 is estopped from raising the issue again. Title Suit No. 382 of 1993 was filed by respondent No.1 for eviction whereas Title Suit No. 15 of 1996 was filed by the appellant for specific performance of the contract. Moreover, in both the suits, the parties are the same and the agreement dated 02.09.1978 is the main issue. He would further contend that respondent No.1 having admitted execution of the agreement and having signed the bilateral agreement and having admitted that while signing the bilateral agreement, she read the agreement and thereafter signed cannot now be allowed to re-agitate the said issue which has been concluded by the orders of the High Court and also of this Court. According to the learned senior counsel, the facts stated above clearly show that the renewal clause in the agreement dated 02.09.1978 was not inserted or interpolated as asserted by respondent No.1.

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Mr. L.R. Singh, learned counsel, appearing for contesting respondent No.1, reiterated the contentions raised before the Courts below and submitted that the appellant has virtually inserted the alleged renewal clause and that the said renewal clause is not at all a renewal clause giving a right to the appellant to exercise the right to renew the lease at his option. He would further submit that nothing is set out in the document regarding the terms and conditions on which the renewal will be given effect to or the manner in which the alleged right of renewal shall be exercised. He would further submit that the sub-Judge has rightly rejected the objection made by the appellant which was later affirmed by the High Court and, therefore, the

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A order passed by the High Court rejecting the prayer of appellant No.1 cannot at all be faulted. He, therefore, prayed for dismissal of the appeal.

On the facts and circumstances of the case, the following questions of law arise for consideration by this Court:

- B “1. Whether the issue of interpolation in the agreement dated 2.9.1978 which stands settled between the same parties by the orders of the High Court and affirmed by this Court in regard to the same subject matter can be allowed to be raised in another proceedings between the very same parties in the same Court.
- C 2. Whether the sub-Judge failed to appreciate that respondent No.1 is precluded from raising the issue of interpolation in agreement dated 2.9.1978 in the course of examination and he is precluded on the principle of issue estoppels and res judicata.
- D 3. Whether respondent No.1 who gave her undertaking in Civil Revision No. 18 of 1999 that she would not raise the question of interpolation in the said agreement and on the basis of which the order dated 15.2.1999 was passed by the High Court and affirmed in Civil Review and also subsequently in the Special Leave Petition filed by her before this Court can be allowed to raise the very same issue again in another suit filed by her.
- E 4. Whether respondent No.1 is precluded from alleging interpolation in renewal clause of agreement dated 2.9.1978 when the said fact was otherwise admitted by her that she will never raise the issue of interpolation.”

F We have carefully perused the entire pleadings and the various documents annexed along with this appeal including the agreement.

G In our opinion, the High Court has miserably failed to appreciate that the undertaking of first respondent in Civil Revision No. 18 of 1999 that she will not raise the issue of interpolation is binding on her in the present suit and as such she was barred by the principles of *res judicata*, *waiver* and *estoppel* from being allowed to raise the same issue again between the very same parties in relation to the same subject matter. The Agreement dated 02.09.1978 is an admitted document. Respondent No.1 had sought to raise the issue of its forgery in earlier proceedings, but finally undertook not to do

H so. This was recorded by the High Court and the Civil Revision filed by

respondent No.1 was disposed of accordingly. Later respondent No.1 sought to resile from her stand and filed an application for review before the High Court, which was also dismissed. The said order was challenged in Special Leave Petition (Civil) No. 16513 of 2001. This Court dismissed the same after hearing the parties at the stage of final disposal. In that view of the matter, we are of the opinion that the respondent is precluded from raising the same issue of interpolation/forgery in the renewal clause of the said agreement deed again.

The undertaking and the acceptance not to raise the issue of interpolation is a matter of record. It is well settled that once a issue of fact has been judicially determined finally between the parties by a Court of competent jurisdiction and the same issue comes directly in question in subsequent proceedings between the same parties then the persons cannot be allowed to raise the same question which already stands determined earlier by the competent Court. For that the question of interpolation in the renewal clause of the said deed has been finally decided and the same issue has been raised in the present suit when in both the suits the parties are the same and the basic claim of both the parties are same as in eviction suit, the plaintiff is claiming eviction by termination of lease and denying the renewal clause whereas in the specific performance suit, the appellants are claiming the renewal of the lease on the basis of the said renewal clause. Hence in both the suits, the main issue is substantially and materially one and the same and both the cases are being tried simultaneously. This apart, the judgment of the High Court and of this Court is a judgment in personam which is binding upon both the parties. It is also seen that the order dated 15.02.1999 in Civil Revision is a consent order which creates an estoppel by judgment as the judgment dated 15.02.1999 operates as estoppel as records of the findings are essential to ascertain the judgment. By passing of the impugned judgment, the High Court has virtually allowed the suit in favour of respondent No.1. In any view of the matter, the impugned order is bad in law and fact as well and, therefore, the same is liable to be set aside.

In our view, respondent No.1 wants to revive the dispute which has finally set at rest by this Court by challenging the genuineness of the agreement dated 02.09.1978 on the plea that the said order was passed in Title suit No. 382 of 1993 which has no binding effect in the present case. In our view, respondent No.1 cannot be allowed to challenge the genuineness of the agreement dated 02.09.1978.

- A We are told that in the Title Suit No. 382 of 1993 filed by respondent No.1 herein against the appellant, after examining five witnesses, the respondent has closed the evidence and now the defendant-appellant herein are examining their witnesses. In Title Suit No. 15 of 1996, the plaintiff-appellant herein have closed the evidence after examining 31 witnesses. The defendant-respondent herein has commenced her witnesses. Three witnesses
- B have already been examined and only one witness remains to be examined. We, therefore, restrict respondent No.1, Smt. Usha Sinha, from putting any question challenging the genuineness of the agreement dated 2.9.1978 in the light of our findings made above. It is stated that some witnesses have already been examined on both the sides. If any question is put and any answer is
- C extracted with regard to the genuineness/interpolation or forgery of agreement dated 02.09.1978, the said evidence cannot be looked into by the trial Court and should be eschewed from consideration and the judgment be passed on the merits of the rival claims on other related issues.

- D We answer all the questions in favour of the appellant and hold that respondent No.1 is precluded from raising the genuineness/interpolation or forgery of agreement dated 02.09.1978.

For the foregoing reasons, the appeal succeeds. Though it is eminently a fit case for awarding exemplary cost, we refrain from doing so. No costs.

D.G.

Appeal allowed.