Jai Prakash And Ors. vs Bishambhar Das And Ors. on 23 September, 1953

Equivalent citations: AIR1954ALL215, AIR 1954 ALLAHABAD 215

JUDGMENT

Agarwala, J.

1. This is a plaintiffs' appeal arising out of a suit for demolition of constructions and for an injunction. The dispute in the case relates to an open piece of land surrounded on all sides by houses. The defendants have constructed a room on a portion of the said open piece of land and it is more or less in front of, but not attached to, their houses. It is marked AECD in the map which has been made part of the decree in the case. There are two outlets from the common court-yard, one to the north-west and the other to the south-east. On the south-east and south-west sides of this court-yard are the houses of the defendants. On the north-west and south are the houses of different people. The houses of the plaintiffs are to the north-east.

The case for the plaintiffs was that the court-yard was generally a court-yard of the owners of the houses on all sides of it, and that the defendants had no right to make constructions in this open 'sehan' which was intended for various purposes, e.g., for use on the occasion of marriages, on festive occasions and for use as a passage. The plaintiffs, therefore, sued for the demolition of the constructions and for an injunction restraining the defendants from making any further constructions in the joint 'sehan'. The plaintiffs based their claim on joint ownership and in the alternative on easements. They also stated that in 1892 on another portion of this joint 'sehan' the defendants had similarly constructed a house and on the suit of the predecessor-in-interest of the plaintiffs the house was demolished oh the ground that the entire land was joint 'sehan.' > They pleaded that the finding in the previous suit operated as 'res judicata' for the purposes of the present suit. The defence was that the 'sehan' was not the joint property of all the owners, that there was no right of easement, that the previous suit did not relate to this land and did not operate as 'res judicata', that the land of the entire 'sehan' has been taken on lease by the defendants from the Zamindar, Sri Liaqat Ali Khan, by means of a document dated 12-10-1945 and that the land on which the construc-tion's in dispute had been made later in front of the defendants' house, belongs to them and since it did not lie in front of the plaintiffs' house, the plaintiffs had no cause of action for the suit. Certain other pleas were also raised with which we are not concerned in this appeal.

The learned Munsif held that the plaintiffs failed to prove that they were joint owners of the land in suit, or that the land in suit was the joint 'sehan' of the parties or that the matter in dispute now was decided in the previous suit and was 'res judicata'. He further held that the plaintiffs had merely a right of passage, but the right of passage had not been obstructed by the construction in dispute. He,

therefore, decreed the suit of the plaintiffs in so far as he issued an injunction restraining the defendants from making any constructions to the north of the constructions already made by them, or to make any constructions so as to interfere with the plaintiffs' right of way to the north or south. But he dismissed the suit for demolition of the constructions already made. Against this decree the plaintiffs appealed to the lower appellate Court and the defendants filed a cross-objection.

2. The lower appellate Court dismissed both the appeal and the cross-objection and affirmed the decree of the trial Court. The plaintiffs have now come up in appeal to this Court and the defendants have filed a cross-objection.

3. Two main points have been urged before me by the learned counsel for the appellants. He has urged that the question whether the parties were joint owners of the entire 'sehan' was decided in the previous suit in 1892 and was 'res judicata'. He further urged that even if that were not so, there was a presumption, in the circumstances of the case, that the land was the joint 'sehan' of the parties unless the contrary was established and that since neither of the Courts below raised this presumption, the view taken by them could not be sustained. In the cross-objection learned counsel for the respondents has urged that since the plaintiffs failed to prove that they were either the sole owners or the joint owners of the land to the north of the disputed constructions the Courts .below were not right in issuing an injunction restraining them from making any constructions in future. No objection has been raised before me on behalf of the defendants-respondents so far as the order restraining the defendants from making any constructions on the passage of the plaintiffs is concerned.

4. So far as the question of 'res judicata' is concerned, I am satisfied that the plaintiff's plea is not sound. The dispute in the previous case of 1892 was no doubt between the ancestors of the present parties but it was in respect of constructions made by the ancestors of the defendants-respondents on another portion of the 'sehan' in dispute. In that case the plaintiffs pleaded that the land over which the constructions had been, made was the joint land of the two parties. The owners of the other houses surrounding the 'sehan' were not impleaded in the suit. It was urged by the then plaintiffs that at one time the houses belonging to the parties formed one house owned by a joint Hindu family and that there was a partition between them in which the house now occupied by the plaintiffs was allotted to the plaintiffs' ancestors and that occupied by the defendants was allotted to the defendants' ancestors, but that there was no partition of the land in front and which continued, therefore, to be a joint land of the parties.

In defence it was pleaded in that suit that the plaintiffs were not the joint owners of the land in dispute and that the defendants alone were its owners. The issue framed in the case was -- "Are the parties joint owners of the land in dispute or only the defendants?" The land in dispute undoubtedly referred to the land over which the defendants had made constructions. It did not refer to the. entire 'sehan' land. Although no plaint of that suit is available, it does appear that at some subsequent state the plaintiffs had put forward the case that the entire 'sehan' was jointly owned by the owners of the adjoining houses. But this point was not even referred to by the trial Court in that case, and the trial Court based its opinion on an inspection of the locality and upon the situation of the 'sehan' and held that the land on which the defendants had built must have been appurtenant to the joint house

of the parties and so was left joint after the partition between them.

This finding was affirmed by the appellate Court. The suit was, therefore, decreed on that basis. The dispute, therefore, in that case was with regard to the particular piece of land on which constructions had been built by the ancestors of the defendants. The issue was raised only with regard to that land and not with regard to the ownership of the entire 'sehan'. The matter now in dispute is whether the entire 'sehan' is a joint 'sehan' of the owners of the houses adjoining it and whether the defendants have a right to build over the portion of the land on which they have made constructions.

As already stated, neither the entire 'sehan' nor the portion of the land over which the disputed constructions have been built now by the defendants was in dispute in the previous case. The decision arrived at in the previous case cannot, therefore, be said to be 'res judicata' in the present case and the stray observations about the joint ownership of the entire 'sehan' would be of no avail to the plaintiffs in the present case, because those observations do not amount to 'res judicata'. Learned counsel for the appellants relied upon -- 'Ram Krishna v. Shiam Chand', 5 Ind Cas 278 (All) (A).

The facts of that case were as follows: The lands in dispute in the previous suit and the suit which was decided by Karamal Husain, J. were parts of the same area. In the previous suit, the plaintiff had claimed the ownership of the part then in dispute on the basis of a sale certificate in his favour. The Court gave him a decree for possession of that part, holding that he was the owner in possession of the whole area comprised in the sale certificate. In the subsequent suit relating to the remaining portion of the same area, it was held by Karamat Husain J. that the finding in the previous suit was binding in the subsequent case.

The issue raised in the previous suit was not merely with regard to the portion of the entire area then in dispute but the issue was a wider one, namely, whether the plaintiff of that suit was the owner of the entire area on the basis of the sale certificate. Since the wider issue was decided in the previous suit, the decision of Karamat Husain J. that it operated as 'res judicata' was, with all respect, perfectly correct. In the course of the judgment, however, the learned Judge referred to a previous decision of this Court in -- 'Chandi Prasad v. M. M. Mahendra Singh', 24 All 112 (B) and on the basis of that decision observed that:

> "It is the identity of the title and not the identity of the subject-matter of the suit on which the doctrine of res judicata is based."

Learned counsel for the appellants has strongly relied upon this observation and has urged that the title of the plaintiffs is the joint ownership of the entire 'sehan' and since the decision in the previous case was given on the basis that the plaintiff was the joint owner of the entire 'sehan' the finding in the previous suit must be taken to conclude the matter in the present case. What had happened in --'24 All. 112 (B)' was that the right of the plaintiff to recover the arrears of revenue in respect of the entire village was decided in a previous litigation, though the previous litigation was to recover the revenue due on a particular khata.

In a subsequent suit which was for recovery of arrears of revenue in respect of another Khata of the same village it was held that the decision in the previous case, that the plaintiff was the assignee of the Government revenue of the entire village, operated as 'res judicata'. It was on these facts that it was observed by that Court that the title under which the plaintiff claimed the arrears of revenue, which had fallen due on one khata or another, was one and the same 'title', and that the identity of the subject-matter was not material whenever a plea of 'res judicata' had to be considered. By this the Court did not mean that in every case the title of the plaintiff has to be considered and not the subject-matter of the suit, irrespective of whether in the previous litigation the title was directly put in issue between the parties or not.

The question whether the title of the plaintiff covered the properties of both the suits was not put in issue in the previous litigation and the issue was confined to the particular subject-matter of the suit. The decision that the plaintiff was entitled to that particular subject-matter, though based upon the reasoning that the plaintiff had the title to the entire property including the property in dispute of e subsequent suit, could not be said to be the atter directly in issue between the parties in the previous suit. It is well settled that it is the decision of the matter in the previous suit which operates as 'res judicata' and not the reasoning or the basis of the decision that operates as 'res judicata', where the title of the plaintiff to the entire property covering the subject-matter of the previous suit and the subject-matter of the subsequent suit is not directly put in issue in the previous suit.

The decision in the previous suit in which observations are made with regard to the title of the plaintiff over the entire subject-matter of the two suits are merely reasonings for holding that the plaintiff was entitled to the subject-matter which was specifically in dispute in the previous suit. It is, therefore, not quite correct to say that it is the title to the property and not the subject-matter that is the basis of res judicata. What one has to decide is, whether in the words of Section 11, the matter in dispute in the subsequent suit was directly and substantially in issue in the previous suit and it was decided.

5. The next point for consideration is whether the plaintiffs can be said to be entitled to claim that they are the joint owners of the 'sehan'. So far as the case for the defendants that they have taken a lease from Sri Liaqat Ali Khan is concerned, both the Courts below have concurrently held that it has not been established by the defendants that the land! they have taken on lease is the same as is in dispute in the present case. Further, it has been pointed out to me that the land in dispute is in the town of Khatauli which is not an agricultural village and that it was not established that Liaqat Ali Khan was the owner of the site. If Liaqat Ali Khan was not the owner of the site, then the lease taken by the defendants from him would be of no avail to them. Learned counsel has not been able to show to me that there is any proof of ownership of the land by Liaqat Ali Khan.

It must, therefore, be assumed for the purposes of the present case that the defendants have established no title to the land over which the disputed constructions have been made by them. On the other hand, it must also be held that the plaintiffs have, apart from any presumption in their favour, which may arise on account of the situation of the land, failed to establish that they are joint owners of the land. But learned counsel for the appellants argues that, in the circumstances of the case, a presumption ought to be drawn in their favour that they are the owners of the land along

with the other owners of the adjoining houses.

To my mind, when a certain piece of open, land is surrounded on all sides by houses and the open piece of land is used for common purposes, e.g., on the occasion of marriages, deaths and other festivities and also used for passage, a presumption may reasonably be drawn that the open piece of land is either the joint property of the owners of the houses surrounding it in the same way as they own the sites of their houses, or if they be not the owners of the sites, that that land has been left for their own use by the owners thereof and that the owners of the houses have rights over the land in the nature of easements.

In either event it is not open to the owner of one house to make constructions over the open piece of land unless he establishes his title to make such constructions either by adverse possession or in some other way. The presumption in all such cases should be drawn. in favour of the plaintiffs. The presumption is no doubt rebuttable, but unless rebutted it must be presumed that the defendants had no right to make constructions over the open 'Sehan' land. In the present case, however, the learned Munsif found that the owners of all the houses had been making constructions over the land in front of their houses for a large number of years without any objection by any party. He himself inspected the locality and found that the 'chabutra' had been built in front of their houses by the owners. In that event it is quite possible that the owners of the houses were by general consent supposed to be the owners of the land in front of their houses. Therefore, in the present case, it cannot be said with any certainty whether the particular piece of land in dispute over which the disputed constructions have been made, and which is mostly in front of the defendants' house, is the property of all the owners or not. It is, therefore, difficult in the present case to interfere with the decision of the Courts below* on this point.

6. As regards the cross-objection it is enough to point out that the injunction has been issued in respect of the land to the north of the disputed constructions. The land to the north of the disputed constructions is not in front of the defendants' houses. They have, therefore, no right to build on it and the plaintiffs in front of whose house that land is situated have clearly a right to restrain the defendants from making constructions over the same. There is, therefore, no force either ir, the appeal or in the cross-objection, which are, accordingly, dismissed with costs.

7. Leave for special appeal is refused.