

Barkat Ali And Ors. vs Mumtaz Ali Khan And Ors. on 26 September, 1955

Equivalent citations: AIR1956ALL128, AIR 1956 ALLAHABAD 128

JUDGMENT

Kidwai, J.

1. This appeal arises out of a suit instituted by the respondents for a declaration that they are owners to the extent of a half share in plots Nos. 745 and 747 situated in village Mandah in the district of Partabgarh.

2. The trial Court found that the title of the plaintiffs was not established and it dismissed the suit. The plaintiffs went up in appeal. The learned lower appellate Court found that the plaintiffs' title was established and that there was no question of res judicata by reason of any previous litigation.

It consequently reversed the decree of the trial Court and decreed the plaintiff's suit. The defendants came up in second appeal. One of them Mohd. Ali Khan, appellant 2 died during the pendency of the appeal and his heirs not having been brought on the record the appeal so far as his share is concerned abated.

3. It seems that as early as 23-5-1869 the taluqdar of Madhpur granted a patta istamarari of certain plots of cultivatory land including plot No. 185 (which now corresponds to plot No. 747) to one Paran Khan. Paran Khan had two brothers, one of whom Rahman Khan has left no male issue. The other Anwar Khan left issues and the plaintiffs are his successors. The plaintiffs instituted the suit out of which, this appeal arises claiming that the patta istamarari in favour of Paran Khan was for the benefit of the family and not only of Paran Khan.

Since Rahman Khan has left no persons competent to succeed to the property, half of the property was claimed. With regard to plot No. 745 (which corresponds to old number 184 of the first settlement) a title was set up which was not based on the patta istamarari but upon a decree obtained by Paran Khan as a result of the litigation with the taluqdar.

4. Some of these plots have been the subject of a prolonged litigation between the parties, It is not necessary to refer to all that litigation. What is essential is the litigation which took place in 1917. In that year a suit was brought by one of the sons of Anwar Khan for a declaration of right in another portion of land covered by plot No. 185 of the first settlement.

In that case the judgment was delivered on 22-1-1918 (Ex. B2) and it was held (1) that the identity of

the plot in suit with the plots covered by the patta istamrari was not established: and (2) that it was not established that Anwar Khan had any right, title or interest in the patta istamrari granted to Paran Khan.

The suit was therefore dismissed. There has been litigation subsequently also both in the revenue Courts and in the criminal Courts with regard to these plots of land. It is not necessary to refer to that litigation because nothing turns upon it. In respect of them one piece of evidence, viz., a compromise arrived at between the parties in one of the criminal cases has been filed and was relied upon by the lower appellate Court to defeat the plea of res judicata. That document will have to be considered at a later stage.

5. In the present case the facts that must be "deemed to be beyond controversy now are (1) that the patta istamrari was granted to Paran Khan:

(2) that plot No. 745 (which corresponds to old plot No. 184) was not covered by the patta istamrari but the title of Paran Khan with respect to it was that of possession;

(3) That it has been established by the documentary evidence on the record that not only Paran Khan but the plaintiffs' predecessors also were in, possession of a half share in plot No. 745:

(4) That the litigation that took place in 1917 was between, the parties to the present suit or their predecessors-in-interest: and (5) that the plot involved in that litigation was a part of the old settlement plot No. 189 which was covered by the patta istmrari.

6. With regard to plot No. 184 the case turns entirely upon the question whether the plaintiffs and their predecessors were in possession of it along with Paran Khan and his successors and thereby acquired an interest in the land. This question is concluded by the finding of fact arrived at by the lower appellate Court that the plaintiff's predecessors were in possession of this plot jointly with Paran Khan and his successors. This finding is supported by documentary evidence to which the learned Civil Judge has referred. The finding can, therefore, not be challenged and the appeal in so far as it relates to plot No. 184 must be dismissed.

7. With regard to plot No. 185 the appeal in so far as it relates to the share of Mohd. All Khan has abated. The declaration granted to the plaintiffs that they have a half share in the share, among others, of Mohd. All Khan must be maintained. So far, therefore, as plot No. 747 is concerned the plaintiffs must, in any case, be deemed to be co-owners in it along with the defendants-appellants in so far as they are entitled to a half share in the share of Mohd. All Khan.

8. There remains then the question as to whether the plaintiffs have established their title to a half share out of the share owned by the remaining defendants-appellants in plot No. 747. In respect of this plot the plaintiffs' claim was based upon their title as co-sharers along with Paran Khan and his descendants in the patta Istmrari.

The plea that was taken by the defendants was that this question of title could not be inquired into in the present suit by reason of the rule of res judicata inasmuch as it had been held in the suit of 1917 that the predecessors of the present plaintiffs were not co-sharers in the land granted by the patta istamrari.

The learned lower appellate Court has overruled the plea of res judicata on the ground that the decision on this question was not necessary for the purpose of that case. Further it has held that the possession established by the judgment in that case was greatly modified by a compromise arrived at in 1918 which is Ex. 19 on the record.

9. With regard to Ex. 19 it may be said at once that this does not affect, in any way, the question of res judicata. It was a compromise in case under Section 107 Criminal P.C. and it indicated an agreement between the parties that they should remain in possession of shares in accordance with the entries in the revenue papers but that each party should have a right to get its title established by recourse to competent courts. The effect of the judgment in the litigation of 1917, cannot, therefore, be affected by this decision.

10. The question then remains as to whether it was necessary for a decision of the case in 1917 to decide whether the predecessors of the plaintiffs had any title in the property covered by the patta istamrari. The lower appellate Court has held that it was not necessary for the Court at that time to decide whether the plaintiff in that case had any title to the land covered by the patta istamarari because the Court found that the identity of the land involved in that litigation with the land covered by the patta istamrari was not established.

It is true that on a decision that the land covered by the litigation was not shown to be covered by the patta the plaintiff's suit was bound to fail. But the plaintiff's suit was equally bound to fail if it was not shown that he had any interest in the patta. In the same way, therefore, as the finding on the question of identity of the property in respect of which the suit was brought was sufficient to dispose of the litigation the question as to whether the plaintiff was entitled to be treated as a sharer under the patta was equally sufficient to dispose of the litigation.

It cannot be said that logically either of these questions of fact had a priority over the other. Merely because the Court has given a finding on one question before it gave a finding on the other it does not make the first finding res judicata and leaves the second finding in the realm of matters not decided.

11. The principle which has been laid down in -- 'Gajodhar Lal v. Secretary Husainabad Trust, Husainabad, Lucknow', AIR 1927 Oudh 625 (A) by a Bench of the then Chief Court of Oudh is that when a matter which is directly and substantially in issue in a subsequent suit had been directly and substantially in issue in a previous suit and had been finally heard and decided between the same parties, the issue cannot be reopened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue. The learned Judges discussed the law at considerable length and the principle established there is that Section 11, Civil P. C. makes any decision on a question which is directly and substantially in issue res

judicata in a subsequent litigation.

This decision was followed by a learned single Judge of the Chief Court of Oudh in --'Husaini v. Shankar', AIR 1942 Oudh 309 (B) and the same view was taken in -- 'Gur Prasad v. Gur Prasad', AIR 1944 Oudh 321 (C).

12. Learned counsel for the respondents relied upon certain other decisions of the same Court in support of a contrary proposition but one of those cases is distinguishable and the other does not lay down any different law. In -- 'Har Sahai v. Ali Muhammad Khan', 16 Oudh Cas 178 (D) it was laid down that if there has been a decision on a preliminary issue the decision on other issues does not operate as res judicata.

In that case, however, it was held that if two issues have to be decided upon either of which the plaintiff's case may fail the decision on both the issues operates as res judicata. Similarly in -- 'Ram Das v. Bhagwan Kunwar', AIR 1925 Oudh 390 (E) a learned single Judge of the Chief Court held that it is only if the decision on one issue must precede the decision on the other that it can be said that the decision of the first issue disposes of the case and the decision on the subsequent issue does not operate as res judicata.

In the present case it cannot be said that logically either of the decisions preceded the other. If the plaintiff of that case failed to establish that he had any interest in the patta istamarari his suit would fail. Similarly if he failed to establish that the land in respect of which he brought the suit was covered by the patta ista-mrari he would also fail.

Both the findings stood on exactly the same footing and the questions under both the heads were substantially involved in the decision of the case. The decision on both the points, therefore, by the Court in 1917 must be deemed to operate as res judicata.

13. As I have already said the plaintiffs did not set up any right to plot No. 747 except title derived from the patta istamrari in which they claimed to be equal co-sharers by reason of the litigation of 1917 their claim to be co-sharers in the patta istamrari was barred by res judicata. They should therefore not have been granted a decree with regard to plot No. 747.

14. The result, therefore, is that I partly allow this appeal and direct that the suit with regard to plot No. 747 except in so far as it relates to the share of Mohd. Ali Khan shall be dismissed while the decree of the lower Appel-late Court with regard to plot No. 745 and with regard to the share of Mohd. Ali Khan in plot No. 747 shall be maintained.

In the circumstances the parties shall bear their own costs of this appeal.

15. Sri B. K. Dhaon prays for leave to file a special appeal but the point which I have decided is really covered by a Bench decision of the Chief Court of Oudh and must be deemed to be settled law. Leave is, therefore, refused.