Ram Surat Singh vs Ram Murat Singh And Ors. on 14 December, 1954

Equivalent citations: AIR1955ALL543, AIR 1955 ALLAHABAD 543

JUDGMENT

Agarwala, J.

1. This is a plaintiff's appeal arising out a suit for a declaration that the plaintiff is entitled to one-eighth share in the property in suit and for delivery of possession over one-eighth share of one item of the disputed property.

The property in suit belonged to. one Bhagirathi Singh. On his death his widow Smt. Chandra Pati succeeded him. But she too died in April, 1947, leaving the plaintiff Ram Surat Singh and Achhaibar and six others as the next collaterals of Bhagirathi Singh.

There was also the contesting defendant Ragho Sewak Rai who has been arrayed as defendant No. 9 in the present suit and who claims to be the sister's son of Bhagirathi Singh and as such the nearest reversioner of Bhagirathi Singh. During her life-time Smt. Chandra Pati executed a usufructuary mortgage in favour of Prithipal Singh and another person in respect of some of the property left by Bhagirathi Singh. This deed is dated 14-6-1917.

On 31-5-1934 she executed a deed of relinquishment surrendering the whole estate in favour of Ragho Sewak Rai, defendant No. 9, whom she described in the deed of relinquishment as sister's son of Bhagirathi Singh. Then she changed her mind and in 1937 filed a suit (No. 506 of 1937) for the cancellation of the deed of surrender. In this suit she alleged that the deed of surrender had been obtained from her by means of fraud and misrepresentation and that Ragho Sewak Rai was not at all the sister's son of 'Bhagirathi Singh.

This suit was "dismissed on 2-9-1938. Chandra Pati ultimately died in 1947. After her death two suits were filed. One was by Ram Surat Singh appellant one of the collaterals of Bhagirathi Singh, & the other was by Achhaibar Singh respondent No. 6, another collateral of Bhagirathi Singh of the same degree as Ram Surat Singh. The appellant's suit was for a declaration and possession, as already stated, while Achaibar's suit was for redemption of the mortgage of 1917 which had been executed by Chandra Pati.

It may be mentioned that after Chandra Pati had executed a deed of surrender in favour of Ragho Sewak Rai, the latter sold the mortgaged property to one Sanno Devi who redeemed the mortgage, and, therefore, in Achhaibar's Suit Sanno Devi, Ragho Sewak Rai and all the other nearest

collaterals of Bhagirathi, namely the appellant and the other six collaterals, were impleaded, Achhaibar and the other six collaterals were also impleaded by the appellant in his suit along with Sanno Devi and Ragho Sewak. So in both the suits the parties were the same.

2. In Achhaibar's suit the appellant filed a written statement in which he supported Achhaibar Singh & also prayed that a decree for possession over his one-eighth share be also passed a relief which he had claimed in his own suit. Achhaibar Singh's suit was dismissed on the ground that Ragho Sewak Rai was the sister's son of Bhagirathisingh and was the nearest reversioner and entitled to succeed.

The appellant's suit was also dismissed both on the merits upon the finding that Ragho Sewak Rai was the sister's son, as also upon the ground that the decision in the suit filed by Chandra Pati for the cancellation of the deed of surrender operated as 'res judicata' because Chandra Pati must be deemed to have litigated in that suit in a representative capacity on behalf of all the future reversioners to the estate. Achhaibar Singh submitted to the decree and did not appeal. The appellant appealed against the decree in his own suit but did not appeal against the decree in the suit of Achhaibar Singh.

Both the suits, it may be mentioned, had been dismissed by the munsif by a common judgment.

3. The lower appellate Court dismissed the appellant's appeal upon the ground that he not having filed an appeal from the decree in Achhaibar's suit the appeal was barred by the principle of 'res judicata' by reason of the decision in Achhaibar Singh's suit. The lower appellate court did not decide the question whether the decision in Chandra Pati's suit of 1937 also operated as 'res judicata' as the Munsif had held. The lower appellate court did not decide the further question of fact whether Ragho Sewak Rai was the sister's son of Bhagirathi Singh.

4. In this appeal by the appellant, learned counsel for the appellant has urged that the lower court was in error in holding that his appeal was barred by the principle of 'res judicata' on account of his not having appealed against the decree passed in Achhaibar's suit. Learned counsel for the respondents has contested this proposition and has in addition urged that the decision in Chandra Pati's suit of 1937 also operated as 'res judicata'.

To my mind the contention of the learned counsel for the appellant must be accepted and it must be held that the decree in Achhaibar Singh's case did not operate as "res judicata'. I have also come to the conclusion that the decision in Chandra Patis suit did not operate as 'res judicata'.

5. No doubt, in Achhaibar's suit the same questions of the fact and law were canvassed as in the appellant's suit, and undoubtedly if one had to deal with the result of Achhaibar's suit alone, the decision could have been binding not only upon Achhaibar Singh but also upon all the pro forma respondents including the appellant. But the question is whether the appellant could file only one appeal in his own suit to get rid of that adverse decision against him in Achhaibar's suit. It has been mentioned already that the judgment in the two suits was common and the same questions of fact and law arose in both the suits. If the appellant's appeal in his own suit were allowed, he would get all the reliefs that he claimed "for himself, whether in the suit of Achhaibar Singh or in his own suit.

The doctrine of 'res judicata' is based upon the 'principle that a particular matter in dispute between parties has been litigated upon and finally decided and that, having-thus become finally decided, it should not be allowed to be reopened in a subsequent litigation. As the two suits were decided By a common judgment, the matter in dispute between the parties in both the suits could not be said to have been finally decided until the appellate court had disposed of the appeal in which, the same question was agitated.

It is immaterial that there was only one appeal from the judgment in one of the suits.

This question was discussed at length in a Full Bench. decision of the Lahore High Court in -- 'Mt. Lachhmi v. Mt. Bhulli, AIR 1927 Lah 289 (FB) (A). In that case there were two cross-suits about the same subject-matter. They were filed simultaneously between the same parties. The suits were, consolidated and one judgment was given in both the suits but two decrees were drawn up. There was an appeal from one decree only and there was no appeal from the other decree.

It was held that the fact that no appeal was preferred against the other decree could not prevent the appeal from one of the decrees being heard. It was observed:

> "The 'raison 'detre' of the doctrine of 'res judicata' was that two proceedings should be so independent of each other that the trial of one could! not be confused with the trial of the other. Where two suits having a common issue are, by consent of parties or by order of the court, tried together, the evidence being written in one record and both suits disposed of by a single judgment, it cannot be said that there have been two distinct and independent trials.
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> The test is whether the Judge has applied his mind to the decision of the issue involved in the two suits twice or whether there has been in reality but one trial, one finding and one decision.....
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> Res judicata is either estoppel by verdict or estoppel by judgment, and there is no such thing as estoppel by decree. The determining factor is not the decree but the decision of the matter in controversy."

6. To the argument that if the decree in one suit is allowed to remain unappealed there would be two contrary judgments, it was answered that:

> "There was no anomaly in that case. It is well-settled that, if two or more conflicting decrees happen to be passed regarding the same property in two different proceedings, it will be the last one which will prevail."

7. This decision is contrary to a . Full Bench decision o this Court in -- 'Zaharia v. Dibia', 7 All LJ 861 (FB) (B). In 'Damodar Das v. Sheoram Das', 29 All 730 (C), there were two appeals from a decree in one suit. Both the appeals were decided by one and the same judgment and two decrees were passed. The plaintiff appealed from the decree in one appeal only, and it was held that the appeal

was not barred by reason of his not having appealed also from the decree in the other appeal. This decision was considered to be not in consonance with the Full Bench decision in 7 All LJ 861 (FB) (B), and so the matter was referred to another Full Bench in the case of -- Ghansham Singh v. Bhola Singh', AIR 1923 All 490(2) (FB) (D). In that case the decision in Damodar Das's case (C) was affirmed by all the Judges. In the judgment delivered on behalf of the majority of the Judges, it was observed:

> "We are of opinion that some of the reasonings and 'dicta' contained in the judgments in Zaharia s case (B) went further than was necessary, or than we ourselves are prepared to go; and that they have been misapplied in some of the subsequent cases. Where it appears to an appellate court that there are two decrees arising out of two suits heard together or raising the same question between the same parties and arising out of two appeals to a subordinate appellate court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of 'res judicata', or at all by reason of his failure to appeal from the decree which does not prejudice him.
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> It would be indeed wrong for an appellant to appeal against a decree which did not prejudice him and to which he did not object or to appeal against two duplicate decrees where an appeal against one of them would be sufficient and he is certainly under no obligation to do so. The ultimate rights of, the parties must be adjusted and regulated according to the final decision of the last court of appeal."

The" words in the last quotation, "which is not raised and cannot be set right if the appeal which he has brought succeeds" are important. This judgment virtually upholds the principle of law enunciated in the 'Lahore Full Bench case', (A).

8. In the present case although in essence the decree in Achhaibar Singh's case was against the appellant, yet there was nothing in that decree which was not raised or could not be set right if the appeal which he brought in the court below succeeded.

9. In subsequent decisions of this Court, in some cases the strict view taken in -- 'Zaharia's case (B), was followed without giving full effect to the observations of the latter Full Bench which I have quoted above, while in others full effect was given to the above observations in -- "Bijai Bahadur v. Prcmeshwari Ram', AIR 1924 All 834 (E), where a common judgment was given in two appeals arising out of two suits and in the High Court only one appeal was filed against that judgment but the parties to the other appeal were also impleaded and where it was objected that the failure to file a separate appeal against the decree in the other appeal should result in the dismissal of the appeal in the High Court, it was held that the appeal was not barred by res judicata. In Mohmmad Mohtashim v. Joti Prasad, AIR 1941 All. 277 (F) a suit was filed by J against M and another suit by M against J.

Both suits were decided by one single judgment and as a result a decree was passed against M in favour of J. M filed an appeal from the decree in J's suit. It was held that by reason of the failure of the appellants to file an appeal in other suit the appeal was incompetent.

10. Recently the matter came up for decision before the Supreme Court in Narhari v. Shankar, AIR 1953 Section C. 419 (G) and the Supreme Court has approved of the Lahore Full Bench decision AIR 1927 Lahore 289 (FB) A. Their Lordships have observed.

> "It is now well settled that where there has been one trial, one finding and one decision, there need not be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand J. in his learned judgment in AIR .1927 Lah. 289 (FB) (A) mentioned above, the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree it can only be created by the judgment.
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> The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit".

It is true that in the Supreme Court there was only one suit and two appeals arose out of that very suit. But from the observations quoted above it would appear that their Lordships held that even if there were two suits but where there was one trial and one judgment and all the parties concerned were impleaded in an appeal from one of the suits the appeal would not be barred by res judicata by reason of the judgment in the other suit which was not appealed against.

This Supreme Court decision, in my opinion, has the effect of overruling the Full Bench decision of this Court in Zaharia's case (B) and in upholding what was observed in the later Full Bench decision of this Court in AIR 1923 All 490 (2) (FB) (D). There is no point in saying that the observations of the Supreme Court were obiter, because even so, the decision of the Supreme Court is binding on the courts in India, vide the observation on this point in Sm. Bimla Devi v. Sri Chaturvedi, AIR 1953 All 613 (H).

I am, therefore, bound to follow the Supreme Court decision. In this view of the matter it must be held that the learned Judge of the Court below was in error in holding that the appeal before him' was barred by the principle of res judicata.

11. The contention of learned counsel for the respondents that the decision in Chandra Pati's case operated as res judicata in the present suit has no force. Chandra Pati had executed a deed of relinquishment in favour of Ragho Sewak Rai describing him as the sister's son of her husband Bhagirathi Singh. She challenged this deed of relinquishment on the ground that it was obtained from, her by means of fraud and misrepresentation. So far as her suit challenging the deed of relinquishment was concerned, it was. a matter entirely personal to her.

By the relief she was claiming she was to be benefited personally in that she would be enabled' to enjoy the estate till her death. But when she challenged the relationship of Ragho, Sewak Rai to her husband Bhagirathi Singh, she might be said to be not only helping herself in getting the relief which she claimed but also protecting the interests of the future reversioners and thus representing the estate of her husband. If this matter had been challenged and had been decided on the merits, the decision might have operated as res judicata in the present suit.

But Chandra Pati did not press this objection after having filed the suit, for in her statement in court she admitted that Ragho Sewak Rai was the sister's son of Bhagirathi Singh. On her admission, therefore, the matter was not decided by the court on its merits upon evidence on the record.

In the circumstances it cannot be said that the question whether Ragho Sewak Rai was the sister's son of Bhagirathi Singh was litigated in Chandrapati's case by Chandra Pati in her capacity as a widow representing the estate on behalf of the future reversioners to the estate.

12. This point was discussed at length in "a Full Bench decision of this Court which was approved of by the Privy Council. In Risal Singh v. Balwant Singh, AIR 1915 All 360 (I) a suit was brought by D, a widow, to set aside the adoption of B made by her on the ground that she had no authority 'to adopt. B defended the suit on the ground that she had authority to make the adoption and that having in fact made it, she was estopped from denying the authority.

The suit was decided by the courts in India on the ground of estoppel. But in" the Privy Council the question of fact whether there was an authority to adopt was also gone into and decided adversely to the widow. Richards C. J. was of opinion that this decision did not operate as res judicata against the reversioners to the estate, but the majority of the Judges (Banerji and Chamier JJ.) held otherwise, Banerji J. observed:

> "Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heirs. Where, however, the decree relates to a matter personal to her, it is not so binding."

His Lordship went on to observe:

> "The main ground on which the learned counsel for the appellants contends that the decree in the former suit is not binding on the appellants is that in that suit the trial Court did not go into evidence on the question of authority to adopt. That court, it is true, decided the case on the ground of estoppel and refused to record oral evidence on" the issue as to authority. This Court also decided the case on the same ground. Had the matter rested there and had the Rani's suit been finally decided on the ground of estoppel only, the decision would have been on a ground personal to the Rani and would not have been binding on the reversioners."

This decision was affirmed in the Privy Council in Risal Singh v. Balwant Singh, AIR 1918 PC 87 (J). Their Lordships observed that "the principle of law applicable to such a case was correctly applied by Mr. Banerji in his judgment in that case".

The decision in Chandrapati's suit being on a question which was personal to her, cannot operate as res judicata in the present case.

13. I, therefore, allow this appeal, set aside the judgment and decree of the Court below and remit the case to that Court for trial of the other issues involved in the case. The costs here and hitherto shall abide the result.