Shashibushan Prasad Misilra & Anr vs Babuji Rai & Ors on 27 November, 1968

Equivalent citations: 1970 AIR 809, 1969 SCR (2) 971

Author: R.S. Bachawat

Bench: R.S. Bachawat, S.M. Sikri, K.S. Hegde

PETITIONER:
SHASHIBUSHAN PRASAD MISILRA & ANR.

Vs.

RESPONDENT:
BABUJI RAI & ORS.

DATE OF JUDGMENT:
27/11/1968

BENCH:
BACHAWAT, R.S.
BENCH:
BACHAWAT, R.S.
SIKRI, S.M.
HEGDE, K.S.

CITATION:
1970 AIR 809 1969 SCR (2) 971

ACT:
Practice and Procedure-Appeal dismissed by High Court as against a respondent who is not necessary party-Appeal whether abates as against other respondents-Res judicata between co-defendants.

HEADNOTE:
The plaintiffs (appellants herein) obtained settlements of certain land owned by a deity in village Siripur Majrahia in Bihar. The contesting defendants (respondents herein) owned lands in the villages of Kazi Dumra and Shankarpur which were separated from Siripur Majrahia by a river. The plaintiffs claimed that in consequence of the changes in the channel of the aforesaid river the lands in suit were lost to villages Kazi Dumra and Shankarpur by diluvion and were annexed to their land in village Siripur Majrahia by gradual increment and accretion. The deity was also made

defendant No. 18 in the suit although no relief was claimed against it. The trial court dismissed the suit and the plaintiffs appealed to High Court, again impleading the deity as a respondent. They, however, failed to deposit the cost of the guardian ad litem of the deity appointed by the High Court and the Court thereupon dismissed the appeal as against the deity. The contesting defendants urged at the hearing that the entire appeal had become incompetent in view of the dismissal of the appeal against the deity. Accepting the contention the High Court dismissed the appeal. It held inter alia, that the appeal had abated against the deity. The plaintiffs filed appeal, with certificate, in this Court. On behalf of the respondents reliance was placed on Muni Bibi v. Trilokinath and it was urged that the decision of the trial court on the question whether the suit lands appertained to village Siripur Majrahia operated as res judicata between the deity and the contesting co-defendants, that the appellate court could not record an inconsistent finding that the suit lands appertained. to village Siripur Majrahia and that in the circumstances, the entire appeal before the High Court had become incompetent.

HELD: (i) The High Court was in error in holding that the appeal had abated either wholly or in part. None of the parties to the appeal had died and there was no question of abatement of the appeal. [973 E]

(ii) The deity was not a necessary party to the appeal and the plaintiffs were entitled to prosecute: their appeal against the contesting defendants in the absence of the deity. [973 G--H; 974 A--B]

(iii) The case of Muni Bibi v. Trilokinath shows that a decision operates as res judicata between co-defendants if (1) there is a conflict of interest between them; (2) it is necessary to decide that conflict in order to give the plaintiffs the reliefs which they claim and (3) the question between the co-defendants is finally decided. In the present case the third condition was not satisfied. The question whether the suit lands appertained to Siripur Majrahia was not finally decided between the deity and the co-defendants. On the filing of the appeal by the plaintiffs, the question became once more the subject of judicial enquiry between the deity and the contesting defendants. [974 B--D]

Muni Bibi v. Trilokinath, L.R. 58 I.A. 158, referred to.

972

(iv) Before the appeal was finally heard and decided, it was dismissed as against the deity for non-payment of its guardian's costs. The appellate court did not give any decision on the merits of the case in the presence of the deity. There was no final decision against the deity on the question of title to the suit lands. The decision of the appellate court against the contesting defendants would not lead to conflicting and inconsistant decrees. The High

Court was in error in holding that the appeal against the contesting defendants became incompetent. [974 D--E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1110 of 1965. Appeal from the judgment and decree dated July 6, 1959 of the Patna High Court in First Appeal No. 235 of 1951. Sarjoo Prasad and B.P. Jha, for the appellants. C.B. Agarwala, P.K. Chatterjee and R.B. Datar, for the respondents (in Excepting respondents Nos. 15(b) to 15(d). The Judgment of the Court was delivered by Bachawat, J. This appeal arises out of Title Suit No. 12/9 of 1946 instituted in the Court of the First Additional Subordinate Judge, Darbhanga. The plaintiffs claimed declaration of their title and possession in respect of 70 bighas of land in plot No. 1083 in village Siripur Majrahia. They obtained settlements of the lands from the deity Shri Radhakrishan Jee Baldeojee. The deity was the 16 annas proprietor of village Siripur Majrahia Pergana Jankhalpur, Tauzi No. 2794. The river Karey flows between this village and the villages of Kazi Dumra and Shankarpur. The contesting defendants were the landlords and tenants of villages Kazi Dumra and Shankarpur. The deity was defendant No. 18 and was represented 'by one Tantreshwar Singh. The plaintiffs claimed that in consequence of the changes in the channel of the river Karey the lands in suit were lost to villages Kazi Dumra and Shankarpur by diluvion and were annexed to plot No. 1083 in village Siripur Majrahia by gradual increment and accretioan. The trial Court dismissed the suit. It held that (1) the suit lands did not accrete to plots Nos. 1083 and 1089 in village Sirlput Majrahia due to slow, gradual and imperceptible changes in the channel of the river Karey, (2) there was no custom in the village by which the disputed lands became the property of the owner of those plots, (3) the deity Radha Krishanji Baldeoji or the owner of village Siripur Majrahia did not obtain possession of the lands in the manner ,alleged in the plaint, (4) the lands originally belonged to the proprietors of villages Kazi Dumra and Shankarpur and continued to be their property and (5) the plaintiffs failed to prove their title and possession in respect of the suit lands within 12 years before the date of the institution of the suit. The plaintiffs filed F.A. No. 291 of 1951 in the High Court of Patna against the decree passed by the Trial Court. The deity Shri Radha Krishanji Baldeoji, the original defendant No. 18 was impleaded as respondent No. 23 in the appeal. By an order dated January 24, 1952 the High Court appointed the Deputy Registrar as the guardian of the deity. On February 18,.1952 the High Court passed the following order :-

> "Two week's further time is allowed to deposit D.R. guardian's cost for respondent No. 23 (deity) failing which this appeal shall stand dismissed against him without further reference to a Bench."

This peremptory order was not complied with and on the expiry of the two weeks the appeal stood dismissed 'against the deity. At the hearing of the appeal the contesting defendants urged that the entire appeal became incompetent in view of the dismissal of the appeal against the deity. The High Court accepted this contention and dismissed the appeal in its entirety. The High Court held that there was a clear issue between defendant No. 18 and the contesting defendants as to whether the lands formed part of the village Siripur Majrahia, that the issue stood concluded against defendant

No. 18 by the decree of the Trial Court, that the appeal had abated against defendant No. 18 and that as success in the appeal might lead to conflicting and inconsistent decrees, the appeal against all the defendants became incompetent. The present 'appeal has been filed by the plaintiffs after obtaining a certificate from the High Court.

Clearly, the High Court was in error in holding that the appeal had abated either wholly or in part. None of the parties to the appeal had died and there was no question of the abatement of the appeal. Mr. C.B. Agarwala relying on the case of Munni Bibi v. Trilokinath(1) submitted that the decision of the Trial Court on the question whether the suit lands appertained to village Siripur Majrahia operated as res judicata between the deity and the contesting co- defendants, that the appellate court could not record an inconsistent finding that the suit lands appertained to village Siripur Majrahia, and that in the circumstances, the entire appeal before the High Court became incompetent. We are unable to accept these contentions.

The plaintiffs claiming as tenants of the deity sued the contesting defendants for declaration of their title and possession in respect of the suit lands on the allegation that the lands appertained to village Siripur Majrahia of which the deity was the proprietor. The deity was not a necessary party to the suit. It was joined as a defendant, but no relief was claimed against it. The suit was dismissed on a finding that the suit lands did not appertained to village Siripur Majrahi'a. The plaintiffs filed an appeal against the decree impleading the deity as one of the respondents. The appeal was dismissed against the deity for non(1) L.R. 58 I.A. 158.

payment of costs of its guardian ad litem. The deity was not a necessary party to the appeal. The plaintiffs were entitled to prosecute their appeal against the contesting defendants in the absence of the deity.

As soon as the appeal was filed by the plaintiffs in the High Court the decision of the Trial Court lost its character of finality and the question whether the suit lands appertained to village Siripur Majrahia became once again res sub judice. The case of Munni Bibi v. Trilokinath(1) shows that a decision operates as res ludicata between co-defendants if (1) there is a conflict of interest between them; (2) it is necessary to decide that conflict in order to give the plaintiffs the reliefs which they claim and (3) the question between the co-defendants is finally decided. In the present case, the third condition was not satisfied. The question whether the suit lands appertain to Siripur Majrahia was not finally decided between the deity and the co-defendants. On the filing of the appeal by the plaintiffs, the question became once more subject of judicial inquiry between the deity and the contesting defendants. Before the 'appeal was finally heard and decided, it was dismissed as against the deity for non- payment of its guardian's costs. The appellate court did not give any decision on the merits of the case in the presence of the deity. There is no final decision against the deity on the question of the title to the suit lands. The decision of the 'appellate court against the contesting defendants will not lead to conflicting and inconsistent decrees. The High Court was in error in holding that the appeal against the contesting defendants became incompetent. In the circumstances the High Court ought to have decided the appeal before it on the merits. Counsel for the parties agreed that the decision of the present appeal on the merits would abide by the decision in C.A. No. 140 of 1966 arising out of T.S. No. 29/11 of 1946. That suit and T.S. No. 12/9 of 1946 out

of which the present appeal arises were heard together by the Trial Court and disposed of by a common judgment. In C.A. No. 140 of 1966 we have held that the disputed lands appertained originally to village Kazi Dumra and Shankarpur, that due to the recession of the river Karey the lands reformed in situ and that the property in the lands continued to remain with the proprietors of the lands in villages Kazi Dumra and Shankarpur. The plaintiffs failed to prove that the deity Shri Radha Krishnaji Baldeoji came into possession of the disputed land as alleged in the plaint. There was no issue on the question whether the deity had acquired title to the suit lands by adverse possession. The plea of acquisition of title by adverse possession cannot be raised for the first time at the appellate stage. The plaintiffs failed to establish acquisition of title of the deity to any portion cf the suit lands by adverse (1) L.R. 58 I.A. 158.

possession. It follows that there was no merit in F.A. No. 235 of 1951. Although the High Court did not decide this appeal on the merits, it is not necessary to remand the matter to the High Court. Having regard to our findings in C.A. No. 140 of 1966, T.S. No. 12/9 of 1946 also must be dismissed.

In the result, the appeal is dismissed. There will be no order to costs.

Y.P. Appeal dismissed.
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