

# **Isher Singh vs Sarwan Singh And Ors. on 30 September, 1964**

**Equivalent citations: AIR1965SC948, AIR 1965 SUPREME COURT 948**

**Author: N. Rajagopala Ayyangar**

**Bench: A.K. Sarkar, N. Rajagopala Ayyangar, R.S. Bachawat**

## **JUDGMENT**

N. Rajagopala Ayyangar, J.

1. A very short point whether a finding in a previous suit between the same parties on the issue relating to the relationship of the respondent to the deceased owner \*(See Second Appeal No. 249 of 1957 dated 3-5-1960 -- Punjab.) of the suit property is or is not res judicata in the suit out of which this appeal arises, is the only question for consideration in this appeal by special leave.

2. The original owner of the suit-properties which consist of agricultural land measuring about 66 bighas and odd in the village Kotla and a kutcha house in the same village and another extent of 13 bighas and odd of land in neighbouring village, was one Jati who died childless on May 20, 1951, his widow also having pre-deceased him. The respondents Sarwan Singh and three others claimed to be the collaterals of the deceased and his nearest heirs. Soon after the death of Jati the appellant Isher Singh, who put forward a claim based on an oral will by the deceased Jati, managed to obtain possession of the properties. The respondents made applications to the Revenue authorities for mutation in their favour and they secured favourable orders on these petitions ignoring the appellant's claim under the oral will which he set up. As the mutation proceedings, however, did not conclusively determine the title of the parties to the properties Isher Singh challenged the right of the respondents by filing a suit against them in the Court of Sub Judge, Second Class, Rajpura, on January 20, 1954 for a declaration as regards his title and for a permanent injunction restraining the respondents from interfering with his possession. We shall be referring to the terms of the plaint a little later but it is sufficient to point out at this stage that the specific plea made by Isher Singh was that Jati had disposed of the property in his favour by an oral will. This case was found against and the suit was dismissed. An appeal preferred by Isher Singh to the District Judge also failed and a second appeal preferred to the High Court is stated to have been dismissed in limine. Isher Singh who was in possession at the commencement of the previous suit, did not surrender it on the final dismissal of his suit which he had brought to assert his title to the property. The respondents accordingly brought the present suit before the same Subordinate Judge on May 23, 1956 in which they prayed for possession basing their claim on their title as the nearest collaterals of the deceased Jati. In this plaint the respondents pleaded that Isher Singh had no title at all to the suit property, the title on the basis of the oral will having been negatived, that their relationship to Jati had been established in the previous suit brought by Isher Singh and that the issue as to this relationship was

res judicata between the parties. Isher Singh defended the suit by asserting that the respondents were not the collaterals of Jati and that, therefore, they had no title in themselves to dispossess him and that the finding recorded in the previous proceeding as regards the relationship of the respondents was not res judicata between the parties. The learned Subordinate Judge passed a decree in favour of the respondents for possession of the property holding that the plea regarding relationship was not open to the appellant being barred by res judicata. An appeal filed to the learned Additional District Judge, Patiala was dismissed on the same reasoning and, similarly, a second appeal to the High Court. Thereafter the appellant moved this Court and obtained special leave and that is how the appeal is before us. It is the correctness of this decision of the High Court holding that the plea regarding the title of the respondents to the property as the next heirs of Jati was barred by res judicata that is raised for consideration in this appeal.

3. The point that is raised in this appeal is really not so much as to the scope of a plea of res judicata and the law bearing upon it, but merely the application of well-settled principles to the facts of the case. The main submission of Mr. Bishan Narain -- learned Counsel for the appellant was that the issue as regards the relationship of the respondents to the deceased -- Jati as his collaterals was not, "a matter directly and substantially in issue" in the former suit. Obviously, this question has to be decided (a) on the pleadings in the former suit, (b) the issues struck therein, and (c) the decision in the suit. So far as the pleadings themselves are concerned, they did raise a controversy as to whether the respondents were the collaterals of Jati. The plaint filed by Isher Singh on January 20, 1954 is by no means a long one. After reciting in paragraph 2 the death of Jati without leaving any widow or issue, he set out that he had been rendering service to the deceased and the latter being pleased with him, made an oral will in respect of his entire moveable and immoveable properties in his favour and had thus declared him to be his heir. Paragraph 3 set out the proceedings in regard to mutation and pointed out that the oral will was not permitted to be established in those proceedings, with the result that the matter had been decided by the Revenue authorities against his contention. It is paragraph 4 which is very relevant and we shall read it in full:

"4. The defendants are altogether strangers and not heirs. They are not at all related to Jati deceased. Nor are they his collaterals. On the other hand, they belong to a separate family. Besides it, the 'Will' made in favour of the plaintiff is valid and is not open to objection. So the defendants have no rights of succession qua the plaintiff in respect of the land in dispute."

Paragraph 5 after setting out the mutation proceedings, stated that the defendants were bent upon denying the plaintiff's ownership, and added:

"They are threatening to take possession of the land. So the plaintiff has a right to file this suit."

and paragraph 6 was the sequel and it read:

"The defendants were repeatedly asked to acknowledge the right of ownership of the plaintiff and to refrain from taking possession of the land, but they did not agree and after evasive replies they flatly refused at Kotla a week ago. The right to sue has

accrued to the plaintiff from the 7th October, 1953, the date of the order of the financial commissioner Patiala."

The relief claimed was a declaration that the plaintiff had title to the suit properties and that a permanent injunction be issued restraining the defendants from taking possession of the land in suit.

4. In the written Statement that was filed by the present respondents paragraph 4 of the plaint was answered in paragraph 4 of the Written Statement. There the respondents asserted that the defendants were collaterals and reversioners of Jati -- deceased and therefore were his legal heirs after the latter's death. They denied the oral will and also denied that in law the property could be disposed of by such a will and that, in any event, no claim based on the will could be asserted in a Court without probate first obtained. It was on these pleadings that the parties went to trial. There were three main issues framed by the learned Subordinate Judge on these pleadings of the parties. The first was whether Jati had executed an oral will and whether it was valid. Closely related to this was an issue which was raised by reason of a plea in defence that even if the will was established the same not having been probated, it could not confer any title. But what is of relevance to the present appeal was issue No. 3 which ran:

"Whether the defendants are collaterals of Jati deceased?"

5. The parties led evidence on the third issue as well as, of course, on the first issue regarding the truth of the oral will. The learned Subordinate Judge recorded a finding on issue No. 1 that the oral will was not proved. On issue No. 3 he also recorded a finding that the defendants (now respondents) had not established that they were the collaterals of Jati. Notwithstanding this finding the learned Subordinate Judge dismissed the suit for the reason that the oral will was not established.

6. As stated earlier, there was an appeal by Isher Singh from this decree of dismissal of the suit. The memo of grounds of appeal is not before us or on record and so we are not in a position to ascertain what exactly were the contentions he raised before the appellate court. The respondents -- Sarwan Singh and others also filed an appeal to the District Judge in which they challenged the correctness of the finding that they were not the collaterals of Jati. Both the appeals were, of course, heard together and the learned District Judge dismissed the appeal of Isher Singh regarding the genuineness of the oral will set up by him and allowed the appeal of Sarwan Singh and others and recorded a finding that they were the collaterals of Jati -- deceased. As stated earlier, Isher Singh moved the High Court in respect of both the appeals and the attempts failed, the High Court dismissing the second appeal and the revision in regard to the judgment in Sarwan Singh's appeal in limine.

7. The question is whether in these circumstances, the issue recorded by the learned Additional District Judge in the appeal preferred by Sarwan Singh is res judicata in the present suit. Taking first the proceedings before the trial Court in the former suit, it would be seen that the terms of Explanation 3 to Section 11, Civil Procedure Code are satisfied, in that there was an assertion by one

party and a denial by the other of a question of fact. Not merely that, the learned trial Judge struck an issue with regard to it and the parties led evidence to establish their respective contentions. Mr. Bishen Narain, however, submitted that still the issue as regards the collateral relationship of the respondents with the deceased was not a matter that was "directly and substantially in issue" in that suit because notwithstanding a finding in favour of the plaintiff on that issue the suit had been dismissed. It is this submission of learned Counsel that requires to be seriously considered.

8. Undoubtedly, the question whether a matter is "directly and substantially in issue" would depend upon whether a decision on such an issue, would materially affect the decision of the suit. A close examination of the plaint has satisfied us that the plea regarding the relationship was not an irrelevant matter which accidentally got into the suit but did possess some significance in relation to the relief to be granted. Isher Singh asserted that he had title to the property by reason of the oral will. If he succeeded in his plea as regards his title he would, of course, be entitled to succeed in the suit because in such an event his possession would have been lawful and referable to a legal title which he had established, but that was not the only basis of his claim. He also pleaded that he was, apart from his title under the will lawfully in possession of the property. Even if, therefore, his title under the oral will was negatived he would still be entitled to the relief (a) of declaration as regards his possessory title, and (b) a permanent injunction restraining the defendant from interfering with his possession so long as the defendants were not able to assert and establish a title superior to his own, to that property. Learned Counsel for the appellant did not also dispute this. This meant that his possessory title was good against all the world except the true owner and by paragraph 4 of his plaint Isher Singh sought to raise the plea that the defendants had no title on the basis of which they could claim a superior right to possession of the property. It is in this context that the form of the prayer sought in paragraph 6 of his plaint derives some significance. The prayer was "A declaratory decree in respect of agricultural land etc. be passed in favour of the plaintiff against the defendants". In other words, the declaration sought was not confined to his title under the oral will but was general and attributable to every source of his title, either as legatee or as person in peaceful possession, and the permanent injunction was consequential upon the declaration in respect of both these sources of title. The plea raised on behalf of the defendants bore upon both the points (a) the genuineness and legal effect of the oral will and (b) an assertion that if the oral will were out of the way the defendants had a title which would prevail over the possessory title of the plaintiff. It was apparently because the pleadings were understood in this manner that the trial court framed the third issue as regards the collateral relationship of Sarwan Singh and others to Jati. Otherwise, it is not possible to explain why this issue was framed at all, because according to the submission of learned Counsel it had no relevance, be it directly or even incidentally to the matters arising for decision in the suit on the basis of which the plaintiff could be granted relief. No doubt, the trial court dismissed the suit notwithstanding its finding on issue No. 3 but from this we are unable to draw an inference against the respondents either as regards the proper construction of the pleadings or of the issues and of the course of the trial, or on the question whether the issue as regards the heirship of the respondents was or was not "a matter directly and substantially in issue" in the suit. It is possible that the dismissal of the suit on this finding might have been erroneous, the Court misdirecting itself when it came to pronounce the judgment as to the title in law of a person merely in possession of property. But the proceedings, however, did not stop here because if it did, it is possible that questions might arise as to whether it would not be *res judicata* against the

respondents.

9. From this decision of the learned trial Judge two appeals were filed -- one by Isher Singh and the other by Sarwan Singh and others. We are now concerned with the fate of the appeal by Sarwan Singh because in it, as already indicated, the appellate Judge reversed the judgment of the trial court and held that, on the evidence then adduced by the parties, Sarwan Singh and others had established that they were the collaterals of Jati.

10. This leads us to the next point urged by Mr. Bishen Narain that the decision of the appellate court in Sarwan Singh's appeal was really without jurisdiction and that even at the stage of the appeal the issue as to relationship was not necessary for deciding any issue raised in the suit. As regards the competency of the appellate Court to record a finding, Mr. Bishen Narain submitted that under Section 96, Civil Procedure Code an appeal lay only against a decree and not against a finding which is not incorporated in the decree and that since the suit of Isher Singh had been wholly dismissed notwithstanding the finding negating the collateral relationship set up by Sarwan Singh and others, no appeal lay to the District Judge from that finding and therefore the finding recorded by the learned District Judge in the appeal was incompetent and without jurisdiction. For this purpose learned Counsel relied upon the terms of Section 44 of the Indian Evidence Act and upon the use of the words "Competent Court" in that section. We have no hesitation in rejecting this submission of the learned Counsel. A preliminary objection had been raised before the appellate court as regards the maintainability of that appeal on the same grounds as are now urged before us and the appellate court rejected that argument and held that the appeal was competent. A revision had been preferred to the High Court questioning the decision in the appeal adducing the same grounds about Section 96, Civil Procedure Code and that also was dismissed and that order of the High Court has HOW become final. Even assuming that the appellate court erred in its construction of Section 96 or of the pleadings in that case, we do not consider it open to the appellant now to contend that the appellate court had no jurisdiction to decide the appeal. The District Judge had undoubtedly jurisdiction to construe the terms of Section 96, Civil Procedure Code and even if the construction be erroneous, and that is the utmost learned counsel can submit, the appellate judgment was not a nullity and cannot be disregarded or attacked collaterally as passed by a Court not competent to entertain the appeal. That apart, we consider that even in the appeal preferred by Isher Singh which ex concessis was competent and within the jurisdiction of the appellate court to deal with, the finding negating heirship of Sarwan Singh and others could have been challenged by the respondents on the terms of Order 41 Rule 22 in order to sustain the decree in their favour. If, as we hold, the pleadings and the issue framed by the trial Judge raised this question of a claim based on a possessory title it would certainly have been open to Isher Singh to contend that the trial court erred in dismissing his suit on the finding on issue No. 3 and in that event it would have been open to Sarwan Singh to have challenged that finding without filing an appeal. The fact that the matter was brought up by an independent appeal would thus not affect the jurisdiction of the Court which is seized of the suit to enter into the correctness of this finding and give its decision thereon.

11. We thus reach the position that in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a

finding was recorded on it by the appellate court, and (e) that on the proper construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of Section 11, Civil Procedure Code is satisfied.

12. A submission was, however, made that the parties were not litigating under the same title since Isher Singh claimed title only on the basis of an oral will and that was not the title by which he claimed to defend the present suit. We consider it wholly unnecessary to examine this point which we consider is without merit, in any detail because apart from other considerations, we have found that in the previous suit Isher Singh's claim was based both on his title under an oral will as also on his right to remain in possession of property of which he said, he had lawfully entered into possession. There is, therefore, no foundation for this line of argument.

13. The appeal fails and is dismissed with costs.