

Bholabhai Vs. Adesang

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Court : Mumbai

Decided On : Aug-12-1884

Reported in : (1885)ILR9Bom75

Judge : West and ;Nanabhai Haridas, JJ.

Appellant : Bholabhai

Respondent : Adesang

Judgement :

West, J.

1. In the present case the material question between the parties was undoubtedly raised in the previous suit between them, That question is, whether the tenancy held by the plaintiff under the Thakurs is or is not subject to enhancement of the rent paid by him. In the former suit it was ruled that the right to enhance by the Thakurs, and by the Government officers representing the Thakurs, existed. This would ordinarily be an adjudication on the question of right or jural relation between the parties which would bind them in any future litigation within the scope to the decision--Mahima Chunder Mojomdar v. Asradka Dassia 21 Cal. W.R. 207, C.R.; Nobo Doorga Dosse v. Fyz Buksh Chowdhry 24 Cal. W.R. 403; Krishna Behari Boy v. Brojishwarij Chowdranee L.R. 2 IndAp 283.

2. But in this instance the earlier decision was in a cause of less than Rs. 500 in amount, and for this reason a special or second appeal made by the plaintiff was dismissed as not cognizable by this Court. The present suit is for more than Rs. 500, and the contention is that the previous decisions on the right to enhance, having been merely incidental, is not binding in this or any subsequent litigation. On the other hand, it is urged that the former decision on the right to enhance having been given by a Court competent to try the present suit (by the same Court, in fact, that has tried the present suit) and on appeal directly and substantially in issue, binds the parties as and the Court and every Court as to the legal relation thus established in all future cases between the same litigants. The District Court was, no doubt, competent to deal with the 'subsequent suit' in this instance, but it could not give a final unappealable decision in the suit. This is implied in the present appeal. The District Court could not, therefore, try the second suit with the same jurisdiction as the first *Chunder Coomar Mundul v. Namni Khanum* See 19 Cal. W.R. at p. 822 Civ. Rul In the earlier suit it could, and did give a decision not 'subject to appeal'; and, therefore, the two decisions would not stand on the same footing, the earlier being conclusive and the later one not so. But from the point of view suggested for the respondent, the decision in the first suit of a particular point would, in the second suit, be binding on the parties in this Court, though had it been decided in the second suit itself it would not be binding. Consequently, the determination of the point in the suit of smaller value would on account of its very smallness, acquire a conclusive importance that it would not have had if the amount had been larger. In the latter case the High Court must have entertained the second appeal against the earlier decision. The insignificance of the amount prevented this; and now it is said that the decision which was statutorily beneath the cognizance of the High Court, binds the High Court in a more important case. Such a result is manifestly opposed to reason, and cannot, we think, have been intended by the Legislature-*Run Bahadur Singh v. Luchokooer* I.L.R. 6 Cal. 406 compd. with Section 13, Civ. P. Code as amended by Act XIV of 1882 But if the prior judgment in a case too petty for appeal is not to bind the High Court, neither can it bind the Subordinate Courts, whose judgments are subject to appeal to the High Court. And this must be so equally in a case which on account of its small valuation is not subject to appeal as in one subject to

appeal to the High Court, since it is impossible that the prior decision should or should not be res judicata for the lower Courts merely according to the admissibility, or not, of a further appeal to the High Court. If it were so, we should sometimes have contradictory decisions, each res judicata on the same point of jural contention.

3. In the continental countries of Europe-in which, as in India, an appeal is generally admitted as a part of the regular civil procedure-the rule is that no matter decided by a lower Court in which an appeal is excluded, can be res judicata for any other case, either in the same or in any other Court Sav. Syst., Section 293. That which has been decided incidentally, but for its purpose finally is regarded merely as an exceptional element of the judgment in such a case, not as the establishment of a principle which may extend to other cases and other Courts. The decision, in fact, is construed, in relation to future cases, as an exceptional law or section is construed,-that is, as not admitting of any extension by inference on account of its admittedly special and singular character. A complete recognition of the same principle in the Indian Courts would afford a ready solution of many difficulties; but, though it has been glanced at on many occasions-Jama valad Goba v. Hulia valad Warn Printed Judgments for 1873, p. 17, O; Mussamut Eaun v. Mussamut Bechun 8 Cal. W.R. 175; Missir Raghobardial v. Raja Sheo Baksh Singh L.R. 9 IndAp 127. Cam The Queen v. Machen, 14 Q.B. 80 S.C.213. The Queen v. Gaunt L.R. 2 Q.B. 466. it has never thus far been precisely formulated either by the Legislature or by the Courts.

4. In the case before us the former decision could not be appealed against to the High Court, and thus, though the Court, which gave that decision, was in one sense competent to try the subsequent suit and did try it, yet it was not competent to try the subsequent suit with final effect as it had tried the earlier one. Though the Court was the same physically, yet it had not on the two occasions an identical jurisdiction. Moreover, for the purpose of establishing a prior decision as res judicata, we must look to the whole series of possible proceedings up to the highest available ordinary tribunal; otherwise, as we have seen, the anomaly must arise of the highest Court in an important case being bound by prior decision in the lowest Court in a case too paltry for an appeal. Section 13 of the Code of Civil

Procedure cannot be applied quite literally; if it could, then the Court trying a second suit would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant for that case, though not formally set aside-*Nilvaru v. Nilvaru* I.L.R. 6 Bom. 110. We must construe the section, if possible, go as to avoid an anomalous result, and this end is attained by saying that the words 'competent to try such subsequent suit' in the section mean competent to try the suit or issue on account of its nature with conclusive effect, since otherwise the higher jurisdiction provided by the Code would be excluded by the lower. Here the District Court could not in the second suit have tried and disposed of the issue tried in the first with conclusive effect. It could have tried it; but, looking to the whole course of procedure, it could not have finally disposed of it, except through the option of the parties.

5. For these reasons we think the previous judgment, delivered by the District Court in a small cause between the same parties, cannot, for the purpose of the present suit, be deemed *res judicata* between them. The litigation, as it may be carried and has been carried in this second case up to the 'highest Court, is of a kind in which the decision of a lower Court could not be final save through the accidental circumstances of the amount at stake being insignificant, and the unappealable decision arrived at in such, a petty case is final in the requisite sense only as to the precise point of liability distinctly adjudicated. In ordinary cases the authority of *res judicata* extends back to the several elements of fact and law of which an adjudication is composed See per Mellish L.J. 9 Ch.A. 25 but in the case of a Court of summary jurisdiction a different principle operates. Such a Court, for the purpose of deciding a question within its final cognizance, may have to form an opinion on a point not within its cognizance or not with its final cognizance. The opinion it forms on such point is to be regarded rather as ancillary or subjective than as an objective conclusion on a matter incidentally, not directly and substantively, cognizable-*Khugowleesing v. Hossein Busto Khan* See per Judicial Committee 7 Beng L.R. 679 and it is only in the latter character that the conclusion can create a permanent and unquestionable *jural* relation See per Lord Selborne in *R. v. Hutchings* L.R. 6 Q.B.D. 300 The jurisdiction of the District Court trying a small cause is to be regarded as summary in comparison with the jurisdiction exercised by it in ordinary cases 'as part of a more elaborate and

deliberate procedure.

6. We, therefore, reverse the decree of the District Court, and direct that the case be re-tried on the merits, with reference to the foregoing observations. Costs to be costs in the cause.

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