Shankar Vs. Prabhakardixit

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Court : Mumbai

Decided On : Mar-19-1936

Reported in : (1936)38BOMLR853; 165Ind.Cas.987

Judge : Broomfield and ;Tyabji, JJ.

Appeal No. : First Appeal No. 133 of 1930

Appellant : Shankar

Respondent : Prabhakardixit

Disposition : Appeal dismissed

Judgement :

Broomfield, J.

1. This appeal arises out of a suit for possession of property which originally belonged to one Appadixit Kashinathdixit, together with mesne profits. Appadixit died without issue in 1865. He left a widow Shivubai who in 1877 transferred the property by a registered-deed to Bhaudixit, a cousin of her husband. Bhaudixit at the same time agreed to pay her maintenance as long as she lived. In 1900 she adopted a son named Ishwardixit, and the latter in 1902 brought a suit (No. 563 of 1902) in the Soundatti Court against Bhaudixit to recover possession of the property. The trial Court and the Court of first appeal allowed the plaintiff's claim,

rejecting the defences of Bhaudixit that the adoption was not proved and was not valid, and that the suit was barred by adverse possession. In second appeal, however, it was held by this Court in Bhaudixit v. Ishwardixit (1905) S.A. No. 146 of 1905 decided by Russeel and Batty, JJ. on August 16, and September 20, 1905 (Unrep.) that the adopted son had. then no cause of action and Bhaudixit was entitled to hold the property as long as Shivubai was alive. The decision was based on a Madras case, Sreeramulu v. Kristamma I.L.R. (1902) Mad. 143, where it was held that ' where there is an alienation by a widow not for a necessary purpose, the subject of the alienation is severed from the inheritance only during the widowhood, and the remainder therein vests, at the moment of adoption, in the adopted son, as a vested remainder to fall into possession at the termination of the widowhood.' At the conclusion of his judgment Mr. Justice Russell said :-

No doubt it would be perfectly competent to the plaintiff to attack this alienation after the death of Shivubai, but during her lifetime we do not think he is entitled to assail it :

and Mr. Justice Batty said :-

I would, therefore, dismiss the suit., .simply on the ground that, as laid down in Sreeramulu v. Kristamma, until the termination of the widow's interest, the plaintiff cannot sue as adopted son to recover possession of the property in suit.

2. Shortly after the decision of the case in the High Court, Ishwardixit sold the property to his natural father Prabhakardixit and the latter in turn- sold it to the present plaintiff. Shivubai died in 1925, and in August, 1927, the plaintiff brought the suit, from which the appeal arises, for possession of the property. The defendants are, Prabhakar the natural father of the adopted son (defendant No. 1), Ishwardixit, the adopted son himself (defendant No. 2), Bhaudixit the alienee (defendant No. 3), and the latter's sons and various other persons claiming under him.

3. Various defences were raised to the suit, but the issues which are material for our purpose in the present appeal are only three, issues Nos. 4, 5 and 6, in the trial Court: viz., (4) when did the cause of action for possession arise? Whether on

the date of defendant No. 2's adoption or on the date of the death of Shivubai (5) Is the suit for possession in time? (6) Whether the suit is or is not barred as res judicata by the High Court judgment in the previous suit The trial Court dismissed the suit on the ground that it is barred by limitation owing to the adverse possession of defendant No. 3 from the date of defendant No. 2's adoption, and also on the ground of res judicata. The trial Judge held that as the former suit brought by the adopted son for possession of the property was dismissed, the plaintiff, who claims under him, is barred by res judicata from suing for the same relief on the same cause of action.

4. It will be convenient to deal with the question of res judicata first. The learned counsel, who appears for the appellant, contends not only that the lower Court is wrong in holding that the present suit is barred by res judicata, but also that the decision in the previous suit is res judicata against the defendants, and stands in the way of their setting up a defence that the present suit is barred by time. As I have already stated, what was decided! by the High Court in the former suit was that it was not open to the adopted son to challenge the alienation by Shivubai during her lifetime, but it was left open to him to sue for possession after her death, and indeed, Mr. Justice Russell expressly stated that it would be perfectly competent to the plaintiff to attack the alienation after Shivubai's death. It is difficult to see, therefore, how it can even be argued that anything was decided in that former suit which is a bar to the adopted son, or the plaintiff who derives title through him, claiming possession after the death of the widow. The trial Judge's finding that the present suit is barred by res judicata is obviously wrong.

5. However, it is not enough for the plaintiff to show that there is no bar of res judicata against him. He has to show that his suit is within time. In that connection it must be pointed out that in Ramakrishna v. Tripurabai I.L.R. (1908) 33 Bom. 88 : 10 Bom. L.R. 1029 this High Court (dissented from Sreeramulu V. Kristamma I.L.R. (1902) 26 Mad. 143, and also from the decision in this very case which had followed that Madras ruling. The Madras rulings was itself overruled in Vaidyanatha Sastri v. Savithri Ammal I.L.R. (1917) Mad. 75. It appears, therefore, that the law was wrongly laid down, and according to the proper view of the law the present suit, but for the decision in the previous suit, would be barred by time,

the possession of defendant No. 3 having been adverse from the date of the adoption in 1900. Therefore, it is necessary for the plaintiff to show that the decision of the High Court in the former suit is res judicata in his favour, or that the defendants are estopped in some way from setting up the plea of limitation.

6. The learned counsel for the appellant contends that the decision of this Court in 1905 is conclusive on the point that the cause of action for the adopted son to recover possession of the property arose only on the death of the widow, and that the present defence, accepted by the trial Court, that the cause of action arose on the date of the adoption in 1900, is barred by res judicata and estoppel, and by the principle that a man cannot be allowed to approbate and reprobate. In our opinion these contentions are correct and must be accepted. Prima facie it is a case which comes clearly within the terms of Section 11 of the Code. The matter is inter partes. The plaintiff claims under the adopted son. Defendant No. 3 is the alienee. The other defendants claim under him. They are litigating under the same title. There is no question of the competence of the Courts, and inasmuch as the only matter decided by this Court in the second appeal was that the plaintiff as the adopted son was not entitled to possession, because the cause of action had not arisen, that must be held to have been a matter directly and substantially in issue. On the face of it, moreover, it is difficult to see why that matter should not also be held to have been finally decided. It is true that the finding that the adopted son had no right to obtain possession till after the widow's death was based on a mistaken view of the law. Subsequent decisions have corrected that view of the law and have shown that the reasons on which the judgment was based were unsound, and that in the absence of proof of necessity for the alienation the adopted son should have been awarded possession in the former suit. But that does not affect the binding nature of the decision as to the rights of the parties.

7. The only ground on which the learned advocate for the respondents has attempted to support the decision of the trial Court is a passage in Sir Dinshah Mulla's Edition of the Code, 10th Edition, p. 80, where it is stated that ' a decision cannot be said to have been based upon a finding unless an appeal can lie against that finding.' The authority cited for this proposition is a passage from Savigny; ' everything that should have the authority of res judicata is, and ought to

be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of res judicata'; and a decision of the old Punjab Chief Court, Narain Das v. Faiz Shah (1899) P.R. No. 157 of 1899.

8. The proposition, we think, is much too broadly stated, and the Punjab judgment, which we have looked at, does not really support it in that general form. The point actually decided was simply that a finding on an issue which is not necessary is not res judicata. As to that, of course, there can be no dispute. Ghela Iccharam v. Sankalchand Jetha is a decision of this Court to the same effect. But here of course it is impossible I.L.R. (1893) 18 Bom. 597to say that the finding in question was not necessary for the decision of the suit. It formed the one and only basis on which the decrees of the lower Courts, awarding . the adopted son possession, were set aside.

9. There seems to be no real authority for the view that an adverse finding against a successful party or against a party who has no right of appeal can never be res judicata, though it is quite true that a finding on an issue is not res judicata if the decree has been made in spite of the finding and not in consequence of it : Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer and Midnapur Zamindari Company v. Naresh Narayan Roy (1920) L.R. 48 IndAp 49. Mohammad Ismail v. Sharfutullah I.L.R. (1929) Cal. 872 is an authority, if any be needed, for the proposition that even a successful party may be bound by res judicata. That case may also be referred to on the point that a party cannot be permitted to take up two inconsistent positions in Court especially when the one preceding arises out of the other. The principle of res judicata is mutual. A judgment if binding upon one party is binding upon both and not merely as against the person who is defeated in a suit : Lilabati Misrani v. Bishun Chobey (1907) 6 Cri.L.J. 621.

10. In Raja Bahadur Shivlal v. Rajeevappa (1908) 11 Bom. L.R. 46 it was held that-

Where in a suit the plaintiff sets up a certain right and asks for relief but the Court holds that he is not entitled to the right and dismisses the suit on the ground that the right has not come into existence, the plaintiff can bring another suit for that right and relief when the right accrues.

The question of res judicata or estoppel did not actually arise in that case. But Mussamut Bibee Effatoonnissa v. Khondkar Khoda Newaz (1874) 21 W.R. 374 is a case clearly in point. That was a suit to recover money lent on a mortgage which the defendant had refused to register. The defendant then put a certain construction upon the agreement between the parties which was accepted by the Court and the claim was dismissed as premature. When the plaintiff sued again after the time fixed by the agreement, it was held that it was not open to the parties or to the Court to say that the first construction was wrong. Markby J. said (p. 374):-

Whether the decision in the first case was right or not it is not necessary (as it seems to me) for us to consider. The defendant upon the former occasion put forward what he considered to be the true construction of the arrangement between the parties. That was accepted by the Court which then tried the suit as the right construction, and it is not open now to the parties to say that that construction was wrong, nor is it open to the Court to say so. That decision is binding as between these parties., and it must be acted upon.

That, in our opinion, applies with equal force to the present case, and it makes no material difference that the arguments of the alienee on the former occasion which were accepted by the Court involved a mistaken view of the law as to the rights of an adopted son.

11. Further, on the point that a party cannot take up inconsistent positions, reference may be made to Caspersz on Estoppel, para. 441, p. 392, and Ambu Nair v. Kelu Nair . It may be noted that Bhaudixit the alienee has had the advantage of the decision in his favour by being allowed to remain in possession of the land for the last thirty years. On this part of the case there is, in our opinion, no effective answer to the argument of the learned counsel for the appellant.

12. One minor point was urged on behalf of the respondents, viz., that the sale in plaintiffs' favour conveyed no title to the property. The argument is that the effect of the decision of this Court in the former suit was that the adopted son had no present interest in the property; that he was in the position of a reversioner merely and had nothing but a spes successions which could not be transferred. This

contention, however, is plainly untenable. Upon the correct view of the law the adopted son was full owner of the land and also entitled to possession even in 1905. But even on the view taken by the Court in the former suit, the adopted son would not be in the position of a reversioner, but would have a vested interest. In either case it is clear that he had an interest in the property which could be validly transferred.

13. The result is that the appeal must be allowed and the decree of the trial Court set aside with costs throughout. There will be a decree in favour of the plaintiff for possession of the property and the trial Court must hold an inquiry as to mesne profits from the date of the suit till the date of delivery of possession or three years from the date of this Court's decree.

Tyabji, J.

14. I agree. The main question before us depends upon the application of the doctrine of res judicata: Civil Procedure Code, Section 11.

15. The fourth issue in the suit out of which the present appeal arises was: ' When did the cause of action for possession arise Whether on the date of defendant No. 2's adoption or on the date of the death of Shivubai ?' The answer given by the learned Judge was that the cause of action arose on the date of the adoption of defendant No. 2, and not on the date of the death of Shivubai.

16. In the previous suit, the only matter decided by the High Court in Bhaudixit v. Ishwardixit (1905) S.A. No. 146 of 1905 decided by Russell and Batty JJ. on August 16, and September 20, 1905 (Unrep.) was stated in these words by Mr. Justice Russell :

No doubt it would be perfectly competent to the plaintiff to attack this alienation after the death of Shivubai, but during her lifetime we do not think he is entitled to assail it.

And Mr. Justice Batty stated :

I would, therefore, dismiss the suit... simply on the ground that, as laid dawn in Sreeramulu v. Kristamma I.L.R. (1902) Mad. 143, until the termination of the widow's interest, the plaintiff cannot sue as adopted son to recover possession of the property in suit.

17. It will be observed that the learned Judge in the present suit decided the question in terms directly contradictory to the decision of the same question by the High Court in the previous litigation. The former suit was between the same parties as the present suit; though in the present suit persons claiming under some of the parties to the former suit litigating under the same title are also parties.

18. The object of Section 11 of the Civil Procedure Code-if I may venture on a general observation- is to give finality to decisions, certainly to prevent contradictory decisions between the same parties. It is not questioned that the previous suit was in effect between the same parties and that the Court was .competent. As I have just stated the learned Judge reconsidered the very question that had not only been decided before, but which was the sole ground of decision in the earlier controversy. The result is that in the earlier decision, the suit was dismissed because it was held that the cause of action had not then arisen, and now it is dismissed on the ground that the cause of action arose at the time when the earlier suit was brought. Moreover, the learned Judge holds that the decision in the previous suit (in conformity with which the present suit is brought) has the operation of preventing the plaintiff from now bringing the present suit,-i.e., that the decision of the High Court operates to make a proposition res judicata which is directly contradictory of what was actually decided. The High Court decided that the suit should be brought on the death of the widow; therefore it has been held to be res judicata that the present suit brought on the death of the widow cannot be brought.

19. The learned trial Judge was led to these conclusions on grounds which he stated as follows:-

But as the suit of Ishwardixit' (viz., the decision in the suit I have referred to as the previous suit) ' was wholly dismissed, that decision, exhibit 55, does not according to law operate as res judicata against defendant No. 3 and defendants Nos. 4 to

10 who claim through him and does not preclude them from raising their present contentions: vide rule 1 laid down in Mulla's Civil Procedure Code.

Later on the learned Judge says:

The plaintiff who claims under the deceased defendant No. 2 cannot sue defendant No. 3 and defendants Nos. 4 to 10 who claim under him for the same relief on the same cause of action. He is estopped from doing so by the dismissal of the former suit which operates as res judicata against him: vide rule 1 laid down in Mulla's Code of Civil Procedure.

20. It seems to me that if the learned Judge had directed attention to the terms of Section 11, he would not have reached a decision that seems to me with all deference to be manifestly contradictory of the principles of the section.

21. Section 11 in defining the rule of res judicata treats it from three aspects : first, the nature of the matter that must not be tried and dealt with twice;; secondly, the two suits, the former suit and the subsequent suit, are considered with reference to (a) the parties to the suits, (b) the title under which the parties are litigating, and (c) the competence of the Courts adjudicating upon the matters in question; and thirdly, the matter in question must have been heard and finally decided by the first Court. Out of these three heads, under which the section may be considered, the present case is concerned with the first and third; what was the matter that had been previously adjudicated upon and was that matter heard and finally decided, so that it is not to be reagitated on a second occasion ?

22. Following the language of the section as far as possible the relevant provisions seem to be to this effect; ' The matter must have been directly and substantially in issue in the former suit-it must have been alleged in the former suit by one party and either denied or admitted expressly or impliedly by the other; or it might and ought to have been made ground of defence or attack in the former suit; it must have been heard and finally decided in the former suit and it must be the matter directly and substantially in issue in the second suit or in the issue sought to be tried on the second occasion.'

23. The learned Judge has applied different rules instead of directing his attention to the section itself. I do not imply that for the purpose of deciding whether the matter is directly or substantially in issue, whether it is alleged by one party, whether it is denied by the other party, whether it might and ought to have been made ground of defence or attack, whether it has been heard and finally decided, the questions may not be considered and tested in various ways adapted to different sets of circumstances and facts. A variety of tests may help the decision of the questions. Such tests and helps may certainly be availed of. But the rule has to be taken from the section and its explanations, and the section itself must not be lost sight of, neither its terms, nor the mode in which it requires the question to be approached and determined. Whatever tests may at an earlier stage of the discussion be applied, the objective must be to give their proper meaning to the words of the legislature. Ultimately the question and answer-the issue and the decision on it-must conform to the language and the implications of the section. For this purpose the proper course seems to me with great deference to be this. The meaning of the words ' matters directly and substantially in issue ' must first be determined, and then the decision in the previous suit examined to see whether any such matter had been heard and finally decided in the former suit; and if so to refrain from deciding the matter again.

24. The explanations to the Civil Procedure Code, Section 11, Orders XIV and XV, and the Indian Evidence Act, Section 3, throw light on what matters must be deemed to be matters in issue. The explanations to Section 11 state that the matter must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other; and indicate that the grounds of defence or attack in relation to the reliefs sought, have a bearing on what shall be deemed to be directly and substantially in issue. Under Order XIV, (a) before an issue can arise, it is necessary that there should be some proposition of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence; (b) if such a proposition (which is called a material proposition) is affirmed by the one party and denied by the other, then under Order XIV, Rule 1, an issue arises. The close relation between the judgment of the Court and the parties being at issue on any question is indicated also by the rule that if it appears that the parties are not at issue on any question of law or of

fact, the Court may at once pronounce judgment : Order XV, Rule 1.

25. Taking these provisions together the matter directly and substantially in issue between the parties seems to require attention from the three aspects :

(a) The matter must consist of a proposition of fact or law directly and substantially alleged by one party and either denied or admitted expressly or impliedly by the other.

(b) Such a proposition has been, or might and ought to have been directly and substantially the ground of defence or attack,-in the sense that the plaintiff directly and substantially did allege or might and ought to have directly and substantially alleged the proposition to show a right to sue, or the defendant alleged it or might and ought to have alleged it to constitute his defence.

(c) The matter so determined to be directly and substantially in issue must have been heard and finally decided.

26. The Indian Evidence Act, Section 3, also deals with these aspects of what must be deemed to be in issue, though from a different situation necessitated by the fact that the Indian Evidence Act and the definitions it contains are concerned with the stage when the trial is in prospect; whereas the doctrine of res judicata operates on the situation arising after the trial has terminated in a decree granting or refusing the relief claimed. The Code refers to questions of law as well as questions of fact which are in issue. The Indian Evidence Act does not define the expression ' issues of law '. On the other hand the expression ' facts in issue ' is stated in the Indian Evidence Act to mean and include ' any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows '. The word ' necessarily ' seems to supply the place of the words ' directly and substantially '-in the Civil Procedure Code.

27. I have collected together what seem to be the relevant directions of the Legislature. Their bearing on the question must first be exhausted before the necessity for calling in extraneous aid can arise.

28. In the previous suit the proposition alleged by the plaintiff and denied by the defendant was that the same cause of action which is now in question had arisen at the time when the previous suit was instituted. That proposition was the direct and substantial ground of decision. It was directly and substantially the ground of defence and attack; the plaintiff had to affirm it to show his right to sue and the defendant denied it as his defence. The High Court decided the appeal on the sole ground that that proposition had to be answered in the negative.

29. The learned trial Judge observes that when a suit is wholly dismissed the decision does not operate as res judicata against a defendant. This statement may represent the operation of the rule of law contained in Section 11 on some cases,- in which several propositions are in issue between the parties, and in which it is not possible to determine whether the particular matter (relied upon as having been heard and finally decided by the Court) was really the proposition directly and substantially alleged by the one party and denied by the other party, and that the affirmation and denial of that proposition was a ground of defence or attack for showing the right to sue or constituting the defence; so that it is not possible to say that that particular matter was finally decided between the parties or that on the decision of that particular proposition depended the grant or refusal of the reliefs sought. A party may fail in spite of the decision of some matters ,n his favour or succeed in spite of the decision of some matters against him. For this or for other reasons it may occasionally be doubtful or impossible to say that a particular matter was really the matter directly and substantially in issue and that on it depended the grant or refusal of the relief claimed by the plaintiff; or to put it in other words, that that was the proposition the affirmation and denial of which formed the direct and substantial basis of the plaintiff's right to sue or constituted the defendant's defence. I will take a concrete example. Where a suit is wholly dismissed and there are several issues in the suit, then the issues-say issues (x) and (y)-decided against the defendant may not operate as res judicata, because since the suit was decided in favour of the defendant in spite of the decision against him on points (x) and (y), it follows that the decision of the suit did not depend on the decision of the issues (x) and (y); that though the defendant may have actually alleged (x) and (y) as constituting his defence, yet they did not in reality constitute his defence. In fact his defence was held to be irrespective of (x)

and (y). The non-existence of the right to the relief sought did not necessarily follow from propositions (x) and (y), though it may have been asserted by the defendant himself. Or, where a number of points are decided against the plaintiff and the suit dismissed, it may or may not be possible to determine whether any particular proposition was the direct and substantial ground for the dismissal.

30. In other cases in order to determine whether the matter was directly and substantially in issue, it may be easiest to apply such a test as this,- whether (assuming that the decision is by a Court subject to appeal) the decision on the matter in question could have been appealed from. This test is apparently based on the following reasoning, viz., that if the decision on a particular matter could not have been appealed from, then the grant or refusal of the relief sought in the suit could not have depended on the decision of that matter.

31. But if is not safe to use such tests without reference to the terms of Section 11. This is well exemplified by the present case.

32. In the present case there was no complication. The fate of the appeal depended on whether or not the cause of action had arisen. The affirmation and denial of that proposition was ultimately the sole ground of defence and attack in relation to the relief sought. The proposition that the plaintiff had to assert to show a right to sue and which the defendant denied so as to constitute his defence, was that the cause of action had arisen on the adoption; the converse proposition that the cause of action would arise on the death of the widow was also explicitly affirmed and denied.

33. Thus the affirmation and denial of this proposition was the matter directly and substantially in issue, i.e., the matter on which the grant or refusal of the relief sought by the plaintiff directly and substantially depended. There is no question that the decision on the point was final. Under Section 11, therefore, the Court ought not to have tried the issue when the cause of action arose, but ought to have decided on the basis that the cause of action arose on the death of the widow as already decided between the parties.

34. I need not add anything further to what has been stated by my learned brother. I agree that the appeal should be allowed with costs throughout.