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Court : Allahabad

Decided On : Apr-04-1923

Reported in : AIR1923All490; (1923)ILR45All506

Judge : Grimwood Mears, C.J., ;Pramada Charan Banerji, ;Piggott, ;Walsh and ;Ryves, JJ.

Appellant : Ghansham Singh

Respondent : Bhola Singh

Judgement :

Grimwood Mears, C.J., Piggott, Walsh and Ryves, JJ.

1. This appeal was referred to a Bench of five Judges to decide whether the appellant's right of appeal was barred by what has been called 'the principle of res judicata,' in accordance with a preliminary objection taken by the respondent, or, in other words, whether the ruling in Zaharia v. Debia (1910) I.L.R. 33 All. 51 applied to it, or whether, as the appellant contended, it was governed by the ruling in Damodar Das v. Shea Ram Das (1907) I.L.R. 29 All. 730 and in effect, therefore, whether the latter decision was correctly reported as having been overruled by the former.

2. We are of opinion that there is no such bar and that the preliminary objection fails. The facts are simple. The plaintiff sues upon a mortgage executed by the defendant in his favour, on the 28th of May, 1914, and claims re-payment of the

principal amount secured, with interest thereon at the contract rate, or, in the alternative, sale of the mortgaged property. The Munsif decreed the claim, but deprived the plaintiff of costs upon the ground that the rate of interest was excessive and that the sum had swelled to an inordinate amount. From this preliminary decree both parties appealed to the Subordinate Judge, who varied the decree by reducing the plaintiff's claim to one for simple interest only, resulting in the sum of Rs. 488 and further interest pendente lite, and future interest up to the date of realization, and by awarding the plaintiff proportionate costs upon the amount due. He also directed that each party should pay its own costs of the appeal. Two separate decrees were drawn up in the lower appellate court. This fact has given rise to the present difficulty. In spite of the absence from the Code of any provision enabling two cross-appeals from the same decree to be consolidated, the appellate court in such a case has inherent jurisdiction, in disposing of the two appeals, as the court in this case did, by one judgment, so to mould its decree as to merge the result of the two appeals into one decree, representing the final adjustment of the rights of the parties on all the points raised, in a manner similar to the procedure adopted where there is one appeal, and cross-objections are made on behalf of the respondents. We have, however, to deal with a case in which two decrees were in fact passed, the terms of which were identical, except as regards the contents of the memorandum of costs endorsed on each, respectively. The difficulty of carrying out the procedure adopted by the lower appellate court in this case, and the practical objection to it, are sufficiently shown by a perusal of the two decrees. Though each is, ex hypothesi, intended to be independent of the other, and to be confined only to the separate appeal to which it relates, each in fact is framed in terms which refer to and operate upon both appeals, thereby defeating the object which the practice of drawing up two decrees must be presumed to be intended to achieve. So far as concerns the decree drawn up in the plaintiff's appeal to the lower appellate court, both parties were satisfied. The plaintiff achieved his object by obtaining an order in his favour awarding him proportionate costs, and the defendant did not appeal against the. The present appeal is brought by the plaintiff against the decree drawn up in the defendant's appeal to the lower appellate court which reduced the amount of his claim as awarded in his favour by the trial court.

3. It is the absence of any appeal by the plaintiff from the decree in his own favour in the lower appellate court, which except in so far as it repeats the reduced amount of the claim, contains nothing to his prejudice, that is said to create a bar to his present appeal. In other words, the very decree against which he appeals is sought to be used against him as a bar to his right of appeal against it. So stated, the objection is contrary to justice and common sense, and must, therefore, be fallacious.

4. The three-judge decision relied upon *Zaharia v. Debia* (1910) I.L.R., 33 All. 51 certainly did not decide this. In that case there were two suits by two independent plaintiffs asserting inconsistent titles to the same right. One unsuccessful plaintiff appealed, but he did not appeal against the decree in the suit by the successful plaintiff which had been passed against him as defendant. He left outstanding a final decree which so far affected his claim on the merits to his prejudice as to put an end to it altogether in favour of the other party. It would appear that the High Court, as the appellate court in that case, might have dismissed the appeal upon the merits unless the appellant was willing to bring up in appeal the other decree which prejudicially affected his right, and that it was not really necessary to invoke the doctrine of *res judicata*. The case of *Damodar Das v. Sheo Ram Das* (sic) I.L.R. 29 All., 730 was a very different case, substantially resembling the present case. In our opinion it was rightly decided, and not being in *pari materia* with the case of *Zaharia v. Debia* (1910) I.L.R. 33 All. 51 cannot be said to have been overruled by that case. In *Damodar Das v. Sheo Ram Das* (1907) I.L.R. 29 All. 730 the court rightly treated the two decrees as being in substance one, though drawn up in duplicate. But it is clear from the subsequent cases, and from the authorized report, that *Zaharia v. Debia* (1910) I.L.R. 33 All. 51 has been treated as laying down a general rule to be followed in all cases in which an unappealed decree, passed in contemporaneous proceedings arising out of the same dispute, is outstanding in the lower appellate court. It, therefore, becomes necessary to lay down once and for all the practice which should in future bind the court, and to negative the general applicability of the rule in *Zaharia v. Debia* (1910) I.L.R. 33 All. 51.

5. Without differing from that decision as applied to the facts of that and cognate cases, we are of opinion that some of the reasoning and dicta contained in the judgments went further than were 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, or 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. 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.

6. It follows from this that We hold that *Damodar Das v. Sheo Ram Das* (1907) I.L.R. 29 All. 730 was rightly decided, and that the following--*Abdul Basit v. Ashfaq Husain* Weekly Notes 1908 p. 211 *Dakhni Din v. Syed Ali Asghar* (1910) I.L.R., 33 All. 151 *Ram Charon v. Lachman Pershad* (1911) 9 Indian Cases 667 *Anant Das v. Udai Bhan Pargas* (1913) I.L.R. 35 All. 187 and *Balhari Pande v. Shiva Sampat* (1919) 18 A.L.J. 40 must be treated as being no longer law.

7. No doubt, the present case is a particularly strong one. The decree under appeal, which is a counterpart of the decree unappealed, is a preliminary decree in a mortgage suit. It is established law that when a preliminary decree has been modified on appeal, the final decree must follow the appellate decree. It would be indeed strange if the existence of a duplicate preliminary decree in the same suit were a bar to an appeal against such preliminary decree.

Banerji, J.

8. An objection has been taken to the hearing of this appeal on the ground that the appellant has not appealed from the decision by the lower appellate court of a connected appeal, both of which were decided by the same judgment.. The circumstances under which the objection arises are these. The plaintiff appellant brought a suit for sale on a mortgage. The defendant contested the suit on the ground, among others, that the amount of interest claimed was excessive. The court of first instance overruled this plea and decreed the claim for interest, but it disallowed costs to the plaintiff as the amount of interest had swelled to a large figure. Both parties appealed from this decree, the plaintiff on the question of costs, and the defendant on the question of interest. The defendant's appeal was No. 459 and the plaintiff's appeal was No. 460. Both the appeals were disposed of by the same judgment. The lower appellate court allowed both the appeals; reduced the amount of interest awarded by the first court, but allowed costs to the plaintiff. The plaintiff's appeal No. 460 was thus decided in his favour. He accepted the decision and did not appeal from it. As the other appeal No. 459, which' related to interest, was decided against him, he preferred the present appeal from the decision in appeal No. 459. It is contended that as both appeals were decided by the lower appellate court by the same judgment and the plaintiff has not appealed from the decision in appeal No. 460, the present appeal is not maintainable. In support of this contention the Full Bench case of *Zaharia v. Debia* (1910) I.L.R. 33 All. 51 has been relied upon. In my judgment that case has no bearing on the present case and the objection urged on behalf of the respondent is untenable. The question before us is whether the plaintiff is precluded from maintaining the present appeal by reason of his allowing the decision in the connected appeal to become final, and we are not called upon to decide whether the ruling in the case of *Zaharia v. Debia* (1910) I.L.R. 33 All. 51 or that in the case of *Damodar Das v. Sheo Ram Das* (1907) I.L.R. 29 All. 730 is right. The case last mentioned was not relied upon by Mr. Iqbal Ahmad on behalf of the appellant, though it is referred to in the order of reference to the Full Bench. In my judgment, where the same question or issue arises between the same parties or between persons through whom they claim, in two suits or two appeals, the party against whom the question or issue is decided is bound to appeal from the decision in both the suits or appeals, and if he allows the decision in one of the suits or appeals to stand

unreversed and to become final, he is precluded from maintaining the appeal preferred by him from the decision in one of the suits or appeals only. Where an issue has been decided between the same parties or their predecessors in title in two suits or appeals, the decision, if unreversed, is binding on the parties. If the party to whose prejudice the question has been decided allows the judgment in one of the cases to become final and therefore binding on him, the court cannot, in the other case or appeal, go behind the decision which has become final, and the necessary result is that the appeal in which the same question is sought to be re-opened cannot be sustained. This is what was held in the case of *Zaharia v. Debia* (1910) I.L.R. 33 All., 51. In that case two rival suits for pre-emption in respect of the same sale were brought by two claimants, each of whom asserted, as against the other, that he had a paramount title to pre-empt. The claim of one of the two rival plaintiffs was decreed. The defeated plaintiff appealed from the decision in one of the suits and the judgment and decree in the other suit thus became final as between the parties. It was held that as the same issue had been raised and tried in both the suits and the decision of it in one suit became final as between the parties, it operated as *res judicata* and the issue could not be re-opened and tried in the appeal preferred by the party against whom the issue had been decided. I fully agree with this decision and I can find nothing in the judgment of Stanley, C.J., who delivered the main judgment in the case, from which one may dissent. This case does not, in any way, support the contention of the respondent. The ruling in *Damodar Das v. Sheo Bam Das* (1907) I.L.R. 29 All. 730 was not relied upon by the learned advocate for the appellant and we are not called upon to pronounce any opinion as to the correctness or otherwise of the decision in that case. If it be deemed to have laid down any rule of law inconsistent with the decision in *Zaharia v. Debia* (1910) I.L.R., 33 All. 51 I am not prepared to follow it. No reason is stated in the judgment for overruling the objection taken in that case. If the learned Judges intended to hold that no plea of *res judicata* could be raised merely because one judgment was delivered in the two cases, as held by the Calcutta High Court in one of the cases cited in the judgment, I am unable, with great respect, to agree with them. In the present case the only question which was decided in the appeal preferred to the court below by the plaintiff, viz., appeal No. 460, was the question of costs and that was decided in the plaintiff's favour. He

had, therefore, no occasion to appeal against the decision in that case and his omission to appeal from that decision does not bar his present appeal. No issue was decided in appeal No. 460 which was adverse to him and no issue which arose and. was decided in that appeal arises in the appeal now before us. There is, therefore, no bar to the hearing of this appeal. The difficulty which arises in this case is due to the fact that one decree only was prepared in both the appeals and a copy of that decree was filed in each case. This, however, did not entitle the plaintiff to appeal from the decision in the appeal in which he was the successful party. As the suit was a mortgage suit and only one decree could be passed in it, the decree drawn up by the court below was the decree which was the result of the decision in the two appeals before it. We must look to the substance and not to mere form. Any ruling which militates against the view enunciated in this case cannot be followed. I would overrule the objection taken on behalf of the respondent.

9. On receipt of the decision of the Full Bench, the following judgments were delivered:

Walsh J.

10. In this case, which is a second appeal, the original appeal came before this Court in last July. A preliminary objection was taken and fought with such determination, on the basis of previous decisions in this Court, that this Bench referred the matter to the Full Bench, which disallowed the preliminary objection and restored the case for hearing. It now comes before us on the merits. The respondent had the great advantage of having his case argued by Mr. Girdhari Lal Agarwala, and we ourselves are able to say that every fact in the case has been investigated. The matter is really a perfectly simple one, once the question of law is defined and understood. Mr. Girdhari Lal has even gone into the respondent's evidence and read us the defendant's original story which, however plausible, is not the defence which has been fought throughout the case. The defendant is a blind man, but nobody, as the first court says, suggests that he is a fool. Indeed, one's experience of life is that the more incurable the defendant's blindness and the greater the antiquity of his deafness, the more likely he is to be able to look

after his own interest. There is no ground to suggest that the lender was in a position to dominate his will or that he used any improper pressure to extract the contract from him. The defendant himself says he did not extract the contract from him, but that his signature was obtained to a written document which was different in its essential terms from what the money-lender read aloud to him because he was blind. The first court felt compelled to allow the claim but endeavoured to punish the plaintiff by a special order relating to the costs. The lower appellate court has found that the bargain is hard and unconscionable but there is not a scrap of evidence to support that finding; on the contrary, the defendant stoutly denies he ever made it at all. The law is quite clear in transactions of anterior date to the Usurious Loans Act of 1918, which this was, being dated 1914. The defendant when sued upon the security can only escape payment of interest according to the contract rate, as required by Act XXVIII of 1855 or Section II of Act XXVIII of 1855, by showing either that the contract was tainted by circumstances which brought it within the relief of Section, 16(a) and (b) of the Contract Act or by showing that it was one to which the law of legal necessity applied and that there was no necessity for granting such a high rate of interest. It is only in transactions subsequent to 1918 that he can avail himself of the recent legislation. If the learned Judge had been free to take the course which he did, we should probably have agreed with him. We certainly should not have reversed him. But, however laudable his intentions were, he departed from the strict legal aspects of the case, and we have no alternative but to reverse his decision. The way in which the preliminary objection was fought to the last is now, it appears, explained by the total absence, as Mr. Panna Lal must have realized from, the first, of any chances of success on the points of law argued today by Mr. Girdhari Lal. The appeal is allowed and the decree of the first court restored as modified by the successful appeal of the plaintiff to the lower appellate court.

Ryves, J.

11. I entirely agree. I only wish to add for the information of the learned Judge who relied on the case of Kirpa Ram v. Sami-ud-din Ahmad Khan (1903) I.L.R., 215 All. 284 that that case turns on its own particular facts. There the money-lender was dealing with a young man in a state of intoxication. The learned Judge might

consult Debi Sahai v. Ganga Sahai (1910) I.L.R. 32 All. 589 and the recent Privy Council case in Aziz Khan v. Duni Chand (1918) I.L.R. 23 C.W.N. 130.

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