

Dhan Singh Vs. Jt. Director of Consolidation, U.P., Lucknow and ors.

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Court : Allahabad

Decided On : Dec-20-1972

Reported in : AIR1973All283

Judge : Satish Chandra and ;N.D. Ojha, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

Appeal No. : Special Appeal Nos. 1056 of 1967 connected with 1058, 1070 and 1071 of 1967

Appellant : Dhan Singh

Respondent : Jt. Director of Consolidation, U.P., Lucknow and ors.

Advocate for Def. : G.N. Verma, Standing Counsel

Advocate for Pet/Ap. : S.P. Gupta, Adv.

Disposition : Appeal allowed

Judgement :

N.D. Ojha, J.

1. These four special appeals have been filed against a common judgment rendered by a learned Single Judge in two connected writ petitions.

2. Village Karothi, Pergana Siana, district Bulandshahr was brought under consolidation operations under the U. P. Consolidation of Holdings Act. In the basic year Jamshed Ali and Mukarram Ali appellants in Special Appeal No. 1071 of 1967 were recorded as bhumidhars of plot Nos. 30 and 34/1 M whereas Mushtaq Ali father of Nawazish Ali and Kallu appellants in Special Appeal No. 1070 of 1967 were recorded as bhumidhars of plots Nos. 31 and 34/1 M. Dhan Singh appellant in Special Appeals Nos. 1056 and 1058 of 1967 filed objections claiming to be a grove-holder of the plots in dispute and in the alternative to have become sirdar by virtue of his long continuous possession. This was, however, not the first litigation between the parties. Jamshed Ali and Mukarram Ali had filed a suit on June 28, 1949 for the ejectment of Dhan Singh from plot Nos. 30 and 34/1 under Section 180 of the U. P. Tenancy Act. The said suit was stayed on September 23, 1949 in pursuance of an order passed by the State Government. Subsequently proceedings were initiated under Section 145, Criminal Procedure Code by Jamshed Ali and Mushtaq Ali in respect of plot Nos. 30 and 31. These proceedings were also decided in favour of Dhan Singh. The two plots aforesaid stood attached during the pendency of the proceedings and a Sapurdar was appointed thereof. On the proceedings culminating in favour of Dhan Singh possession was delivered to him by the Sapurdar of January 7, 1951. Mushtaq Ali thereafter filed suit No. 303 of 1951 in the court of Munsif, Bulandshahr on May 30, 1951 against Dhan Singh and impleaded Jamshed Ali and Mukarram Ali as pro forma defendants. As would appear from the Judgment of the learned Single Judge the case set up in the plaint of this suit by Mushtaq Ali was that Jamshed Ali and Mukarram Ali were co-khudkasht holders with him but since they were not present in the locality they were being impleaded as pro forma defendants. This suit as originally filed was for permanent injunction restraining Dhan Singh from interfering in the possession of the plaintiff Mushtaq Ali and defendants 2 and 3 Jamshed Ali and Mukarram AH over all the three plots Nos. 30, 31 and 34/1.

The suit was filed on the allegation that the plaintiff and defendants 2 and 3 were in possession of these plots as Khudkasht holder and that the sugarcane and mango crops of these plots belonged to them and that defendant No. 1 Dhan Singh wanted to take them away forcibly and also wanted to take forcible possession over these plots. The sugar-cane and mango crops were, however,

taken away by Dhan Singh during the pendency of the suit whereupon Mushtaq Ali amended his plaint and claimed a decree for damages in the sum of Rs. 800/-. The suit was contested by Dhan Singh inter alia on the ground that he was a hereditary tenant of the plots in dispute and that neither the plaintiff nor the defendants 2 and 3 were either khudkhasht-holders of these plots or were in possession thereof. An issue about the tenancy right of Dhan Singh was specially framed being issue No. 3 on the pleadings of the parties and was referred to the revenue Court. The Revenue Court recorded a finding that Dhan Singh had been in possession at any rate from 1355 F, and on May 30, 1951 when the suit was filed he had acquired rights of hereditary tenant under Section 18 (2) of the U. P. Tenancy Act. Accepting this finding the Munsif dismissed the suit which decree was upheld even on appeal by the Civil Judge on January 31, 1956.

3. During the pendency of Suit No. 303 of 1951 aforesaid Jamshed Ali and Mukarram Ali filed suit No. 224 of 1953 in the court of Munsif, Bulandshahr for the relief of permanent injunction restraining Dhan Singh from interfering with their possession over plot Nos. 30 and 34/1 and in the alternative for the relief of possession. A similar suit was filed by Mushtaq Ali being suit No. 227 of 1953 in respect of plot No. 31 and remaining part of plot No. 34/1. Both these suits were contested by Dhan Singh and were dismissed. On appeal, however, the suits were remanded to be decided afresh but before they could so be decided the consolidation proceedings intervened and the suits were stayed.

4. The claim of Dhan Singh before the Consolidation Officer was contested by Jamshed AH and Mukarram Ali as well as by Mushtaq Ali. The Consolidation Officer did not accept the claim of Dhan Singh that he was grove-holder of the plots in dispute. He, however, held him to be sirdar thereof on the basis of his long possession and directed his name to be recorded as such over all the three plots. On appeal the Settlement Officer (Consolidation) rejected the claim of Mushtaq Ali but allowed that of Jamshed Ali and Mukarram Ali. In second appeal the claims of Mushtaq Ali as well as of Jamshed Ali and Kallu were accepted and both the objections of Dhan Singh were dismissed. Dhan Singh filed two revisions both of which were dismissed by the Joint Director of Consolidation. He thereupon instituted two writ petitions in this Court. A learned Single Judge held that claim of

Mawazish Ali and Kallu who Were sons and heirs of Mushtaq Ali that Dhan Singh was not hereditary tenant of the plots in dispute was barred by res judicata on account of the decision in Suit No. 303 of 1951. He, however, rejected the contention of Dhan Singh that the claim of Jamshed Ali and Mukarram Ali also was barred by res judicata on account of the said decision. The learned Single Judge also took the view that it was necessary to determine as to whether any portion of plots in dispute was grove in order to determine the effect of Section 30 of the U. P. Tenancy Act On these findings he quashed the orders of the Joint Director of Consolidation and the Deputy Director of Consolidation and issued a direction to the Deputy Director of Consolidation to decide the rights of the parties afresh. Against the said judgment Dhan Singh has filed Special Appeals Nos. 1056 of 1967 and 1058 of 1967, Nawazish Ali and Kallu have filed Special Appeal No. 1070 of 1967 and Jam-shed AH and Mukarram Ali Special Appeal No. 1071 of 1967.

5. The only point which has been pressed before us in the four special appeals was as to whether the decision in Suit No. 303 of 1951 did or did not operate as res judicata in the proceedings before the consolidation authorities. The contention on behalf of Dhan Singh was that it operated as res judicata not only as against Nawazish AH and Kallu but also as against Jamshed Ali and Mukarram Ali who were co-defendants along with him in Suit No. 303 of 1951. The case of Jamshed Ali and Mukarram Ali as also of Nawazish Ali and Kallu on the other hand is that the decision in the said suit did not operate as res judicata inasmuch as (1) Suit No. 303 of 1951 after amendment of the plaint remained a suit only for damages in respect of sugar-cane crop and mango fruits and any question of title was foreign to it and (2) that the requirements of a finding being res judicata inter se the defendants were not fulfilled.

6. Suit No. 303 of 1951 as already pointed out was filed on the allegation that the plaintiff and defendants 2 and 3 in that suit were joint khudkasht-holders and that defendant No. 1 namely Dhan Singh had no concern with the same. Dhan Singh not only specifically denied the aforesaid claim of plaintiff and defendants 2 and 3 being Khudkasht-holders but also asserted himself to be a hereditary tenant. The trial court framed an issue specifically on the question as to whether Dhan Singh

was hereditary tenant of the plots in dispute. He claimed even after the amendment of the plaint that he had appropriated the sugarcane crop and the mango fruits in his own right as a hereditary tenant and it cannot be said that the question as to whether Dhan Singh was a hereditary tenant was not directly and substantially in issue in Suit No. 303 of 1951. Moreover, the question can be considered from another aspect too. Relying upon two earlier Privy Council decisions a Bench of this court in Jagdeo Misir v. Mahabir Tewari, : AIR1927 All803 held:

'We think that those two cases are authorities for the proposition that if a party raised an issue, however improperly, in a case which is accepted by the other side and if the Court itself accepts the issue to be one relevant to the enquiry and necessary for the determination of the case, and that issue is argued out by both parties and a judicial decision come to, it is not open subsequently for either of the parties or their successors-in-interest or the person claiming through them, to say that the issue does not constitute res judicata.'

The said decision was subsequently relied upon by another Division Bench of this Court in Lalji Sahib v. Munshi Lal : AIR1943 All340 . We, therefore, find no substance in the argument that Suit No. 303 of 1951 having remained a suit for damages after amendment of the plaint the finding on issue No. 3 in regard to the tenancy rights of Dhan Singh would not operate as res judicata. Mushtaq Ali father of Nawazish Ali and Kallu being the plaintiff in Suit No. 303 of 1951 there seems to be absolutely no doubt that the claim of Nawazish Ali and Kallu in respect of tenancy rights of Dhan Singh was barred by res judicata before the consolidation authorities and the learned Single Judge was right in holding it to be so. Special Appeal No. 1070 of 1967 filed by them, therefore, must fail.

7. In support of special appeal No. 1071 of 1967 filed by Jamshed Ali and Mukarram Ali it was also urged that there was nothing on the record to show as to whether the appellants of this appeal who were arrayed as defendants in Suit No. 303 of 1951 had been served with the summons of the suit, that they being co-defendants with Dhan Singh had no right to appeal against the judgment in the said suit and that the findings of fact recorded in their favour by the Settlement

Officer (Consolidation) and upheld on second appeal and revision could not be set aside in a writ petition. The requirements of res judicata between co-defendants inter se are well established and are these:

(1) that there was a conflict of interest between the defendants concerned.

(2) that it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and

(3) that the question between the defendants must have been finally decided. See *Munni Bibi v. Triloki Nath*, *Kishun Prasad v. Durga Prasad*, *Maung Sein Done v. Ma Pan Nyun*, *Kedar Nath v. Munshi Ram*, *Pooran Chand v. Radha Raman* : AIR1943 All197 and *Chandu Lal v. Khalilur Rahman*, AIR 1950 PC 17.

8. In the last of the aforesaid cases, namely in the case of *Chandu Lal* it was further held that the doctrine of res judicata may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter appearance and contest the question. But to this qualification must be added, that if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. It was further held that the burden of proving this fact would be on the person who pleaded the bar of res judicata and that of the co-defendant against whom the bar of res judicata was pleaded that not entered appearance in the previous suit it is not to be assumed that such defendant was aware of the contents of the co-defendant's written statement.

9. In the instant case *Jamshed Ali* and *Mukarram Ali* did not enter appearance in Suit No. 303 of 1951 and nothing has been brought to our notice on behalf of *Dhan Singh* on whom by the burden to prove this fact that *Jamshed Ali* and *Mukarram Ali* had notice or will be deemed to have notice of the contents of the written statement filed by him. In view of what has been held in *Chandu Lal's* case supra knowledge of the contents of the written statement of *Dhan Singh* cannot be assumed against *Jamshed Ali* and *Mukarram Ali* and this ingredient being lacking the finding in Suit No. 303 of 1951 that *Dhan Singh* was hereditary tenant cannot be held to operate as res judicata as against them.

10. We further agree with the submission made by their learned counsel that the said decision will not operate as res judicata as against Jamshed Ali and Mukarram Ali inasmuch as they did not have a right of appeal against the decision in Suit No. 303 of 1951, the same having been dismissed. See Jumna Singh v. Kamar-un-nisa, (1880) ILR 3 All 152 (FB) and Nirmal Singh v. Zamir Uddin : AIR1937 All368 . On this point learned counsel for Dhan Singh brought to our notice Bhubindra Narain v. Tarupriya Debya, AIR 1950 Assam 119 and Kesavan v. Lakshmy Amma : AIR1968 Ker154 . In these cases it was held that if a finding operated as res judicata as against the co-defendant he would have a right of appeal. We having found that the decision in the earlier suit could not operate as res judicata as against Jamshed AH and Mukarram Ali, it cannot be held on the authority of these cases that they had a right of appeal against the said decision. Since the plea of res judicata as against them fails on these two grounds it is not necessary to go into the question as to whether the three requirements pointed out in the aforesaid cases for the application of doctrine of res judicata between defendants inter se are fulfilled or not in the instant case.

11. On merits all the consolidation authorities except the Consolidation Officer have found in favour of Jamshed Ali and Mukarram AH that they were in possession over plots Nos. 30 and part of 34/1 and had become bhumidars thereof. The findings recorded in this behalf are one of fact and cannot be interfered with in a writ petition. Special Appeal No. 1071 of 1967 filed by them, therefore, deserves to be allowed.

12. The question as to whether any portion of the plots in dispute constituted a grove and whether Section 30 of the U. P. Tenancy Act would operate as a bar in Dhan Singh becoming a hereditary tenant would have been material for the decision of the case between than Singh and the heirs of Mustaq Ali if the issue in regard to his acquisition of hereditary tenancy rights was open to be considered in the present proceedings. In view of our decision that the finding in regard to his tenancy rights arrived at in Suit No. 303 of 1951 operated as res judicata as against the heirs of Mushtaq Ali none of the aforesaid two questions were open to be agitated in the proceedings before the consolidation authorities. Dhan Singh having been held to be hereditary tenant of plot Nos. 31 and part of 34/1 he

automatically acquired the rights of a sirdar under Section 19 of the U. P. Zamindari Abolition and Land Reforms Act by operation of law and the appeal of Dhan Singh qua these plots deserves to be allowed. In view of the aforesaid discussion we are of opinion that on the abolition of Zamindari Dhan Singh became sirdar of plots Nos. 31 and part of 34/1, and Jamshed Ali and Mukarram Ali Bbumidhars of plots Nos. 30 find part of 34/1 and the decision of the Settlement Officer (Consolidation) in this behalf was correct.

13. In the result the judgment of the learned Single Judge is set aside, the orders of the Deputy Director of Consolidation and the Joint Director of Consolidation are quashed and that of the Settlement Officer (Consolidation) restored. Learned Single Judge had directed the parties to bear their own costs. In the circumstances of the case we pass the same order in the appeal.

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