

Har Gobind and anr. Vs. Gitam and ors.

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Court : Allahabad

Decided On : Feb-26-1929

Reported in : AIR1929All346

Appellant : Har Gobind and anr.

Respondent : Gitam and ors.

Judgement :

Ashworth, J.

1. This second appeal arises out of a suit brought by the plaintiff-appellant against the defendants for possession of a certain plot of land. The suit was against five defendants. Defendants 1-3 did not contest the suit. There has been a previous suit for possession of exactly the same plot against defendants 1 to 3 decided on 12th December 1918. That suit was No. 508 of 1918. At the time when that suit was decided defendants 4 and 5 of the present suit were minors. They are the brothers of Bahore Singh and Zalim Singh defendants 2 and 3 and the nephews of Sitaram defendant 1 all of which 3 defendants were parties in the former suit.

2. The trial Court gave a decree holding that the plaintiff's claim was proved under the rule of res judicata. The lower appellate Court rejected this finding on the ground that defendants 4 and 5 were minors, and no parties to the former suit.

3. In this appeal it is contended that defendants 1-3 in the former suit were litigating bona fide not only for themselves but for the two defendants 4 and 5, and Expl. 6, Section 11, Civil P.C. is invoked. For the respondent this is not denied, but it is stated that the former suit was decided ex parte, and so cannot operate as res judicata against defendants 4 and 5. I understand this to mean that inasmuch as defendants 1 to 3 did not appear to contest the former suit it cannot be said that they litigated bona fide on behalf of the minors.

4. The respondent's counsel was no doubt wise in accepting the position that a decree may be binding on persons who were not actually made parties to that decree if that decree was against persons who were litigating not only for themselves but also for other parties. The decision of their Lordships of the Privy Council in *Lingangowda v. Basangowda* , is clear. As regards the question whether it makes any difference whether the former suit was obtained ex parte or not I would remark that no distinction is made under Section 11 between an ex parte decree and a decree which has been contested.

It has to be seen whether, on examination of all the materials properly admissible, it clearly appears that the party in allowing judgment to go against him by default must have intended to submit not only to the order contained therein but also to a determination of some question of fact or law which was to conclude him, see: *Bower's res judicata*, 1924, 27.

5. In this case it is clear that the question whether the plaintiffs were entitled to possession in the former suit or are entitled to possession in the present suit can only be determined after a finding as to their title. The plaintiffs set up their title in the former suit in the same language and on the same grounds as in this suit. Defendants 1 to 3 must in the ordinary course of events have resisted that suit if they thought that they could do so on the merits. Their failure to do so binds them and binds defendants 3 and 4 who were equally interested with defendants 1 to 3 in the former suit. It is reasonable to suppose that the elder brothers of two minors who have identical interest with the minors will adequately represent them in a suit asking for a declaration as to the title of other people in property to which the minors must have a title if the defendants have a title and in which the minors can

have no interest if the actual defendants have no interest.

6. For the above reasons I accept this appeal. It is allowed with costs and the decree of the trial Court is restored. The appellant will get their costs in the lower appellate Court and in this.

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