Ghansham Singh Vs. Bhola Singh

Ghansham Singh Vs. Bhola Singh

SooperKanoon Citation : sooperkanoon.com/481370

Court : Allahabad

Decided On : Mar-21-1923

Reported in : 74Ind.Cas.411

Judge : Girmwood Mears, C.J.,; P.C. Bannerji,; 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. Debt 7 Ind. Cas. 156 : 33 A. 51 : 7 A.L.J. 861 (F.B.). applied to it or whetheras the appellant contended it was governed by the ruling in Damodar Das v. Sheoram Das 29 A. 730 : 4 A.L.J. 587 : A.W.N. (1907) and in effect there fore whether the latter decision was correctly reported as having been overruled byxthe former.

2. We are of opinion that there is no such bar and that the prelim nary objection fails. The facts are simple. The plaintiff sues upon a mortgage executed by the defendant in his favour on the 28th May 1914 and claims repayment 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 due 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-appeal also 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 respondent. We have however a 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 td 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 this. 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. Debi 19 Ind. Cas. 76 : 35 A. 187 : 11 A.L.J. 214 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 ha 1 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 merit 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. Sheoram Das 29 A. 730 : 4 A.L.J. 587 : A.W.N. (1907) 245. 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. Debt 7 Ind. Cas. 156 : 33 A.51 : 7 A.L.J. 861 (F.B.) cannot be said to have been overruled by that case. In Damodar Das v. Sheoram Das 29 A. 730 : 4 A.L.J. 587 : A.W.N. (1907) 245 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 in Zaharia v. Dabi 7 Ind. Cas. 156 : 33 A. 51 : 7 A.L.J. 861 (F.B.) that Zaharia v. Debi 7 Ind. Cas. 156 : 33 A.51 : 7 A.L.J. 861 (F.B.) has been treated as laying down a general rule to be followed in all cases in which un-appealed decree passed in contemporaneous proceedings arising out of the same dispute is outstarding in the LAY Appellate Court. It therefore becomes necessary to lay down once and for all the practice which should in future bin the Court is to negative the general applicability of the rule in Zaharia v. Debi 7 Ind. Cas. 156 : 33 A.51 : 7 A.L.J. 861 (F.B.)

5. Without differing from that decision a 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 by 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. Sheoram Das 29 A. 730 : 4 A.L.J. 587 : A.W.N. (1907) 245 was rightly decided, and that the following Abdul Basit v. Ashfaq Husain A.W.N. (1908 211 : 4 M.L.T. 172.; Dakhni Din v. Syed Ali Asghar 7 Ind. Cas. 909 : 33 A. 151 : 7 A.L.J. 993.; Pimcharan v. Lachman Pershad 9 Ind. Cas. 667.; Anani Das v. Udai-bhan Pargas 19 Ind. Cas. 76 : 35 A. 187 : 11 A.L.J. 214. and Balhari Pande v. Shiva Sampat Pande 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 un-appealed is a prelim nary decree in a mortgage suit It is established law that when a preliminary decree has been modified on appeal the anal 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 5 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 are objection arises are these. The plaintiff-appellant brought a suit for sale on a mortgage. The defendant contested the suit on the in 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. Debi 7 Ind. Cas. 156 : 33 A 51 : 7 A.L.J. 861 (F.B.)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. Debi 7 Ind. Cas. 156 : 33 A 51 : 7 A.L.J. 861 (F.B.) or that in the case of DamodarDas v. Sheo-ram Das 29 A, 730 : 4 A.L.J. 587 : A.W.N. (1907) 245. 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 in 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 for 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. Debi 7 Ind. Cas. 156 : 33 A.51 : 7 A.L.J. 861 (F.B.).In that case to 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. T fully agree with this decision and I can find nothing in the judgment on 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. Sheorami Das 29 A. 730 : 4 A.L.J. 587 : A.W.N. (1907) 245 was not rued upon by the learned Advocate for the appellant and we are not called upon to pronounee any opinion as to the correctness or otherwise of the decision in that case. If it the deemed to have laid down any rule of law inconsistent with the decision in Zaharia v. Debi 7 Ind. Cas. 156 : 33 A. 51 : 7 A.L.J. 861 (F.B.). 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.