

Sukhlal and ors. Vs. Deepchand and ors.

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Court : Rajasthan

Decided On : Sep-14-1953

Reported in : AIR1954Raj58

Judge : Dave and; Modi, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 - Order 41, Rules 1 and 2

Appeal No. : Ijlas-i-Khas Appeal No. 22 of 1950

Appellant : Sukhlal and ors.

Respondent : Deepchand and ors.

Advocate for Def. : Makhtoormal, Adv.

Advocate for Pet/Ap. : Badrinarain, Adv.

Judgement :

Modi, J.

1. This is a defendants' certificate appeal against a judgment and decree of the High Court of the former State of Jodhpur, dated 5-1-1949, and was originally filed before the Ijlas-i-Khas of the same State and has come to us for disposal on the integration of that State with the State of Rajasthan.

2. The material facts may shortly be stated as follows. The plaintiff-respondents carried on the business of commission agents under the name and style of Ratanlal Simrathmal at Bombay. The defendant-appellants are members of a joint Hindu family, defendant-appellant No. 1 Sukhlal being the father and Nos. 2 and 3, Ranulal and Misrilal, his sons. The plaintiff-respondents' case was that under instructions from defendant-appellant Sukhlal, they entered into certain transaction's relating to the sale and purchase of gold, silver, groundnuts, linseeds, cotton and wheat, for and on behalf of the appellants in Smt. 1990 and 1991 as a result of which the plaintiffs were entitled to receive from the defendant's a sum of Rs. 9309/2/3 on Jeth Vadi 1, Smt. 1992 as principal to which they added a sum of 332/13/9 as interest up to that date and a sum of Rs. 740/ 8/6 as interest upto the date of suit, and a further sum of Rs. 6/- as notice and other incidental charges thus amounting to Rs. 10,388/8/6. The plaintiffs gave a credit of Rs. 111/15/6 on account of 2231/4 tolas of silver belonging to the defendants which lay with the plaintiffs and thus filed a suit for the recovery of Rs. 10276/9/- with pending and future interest at 6 per cent per annum in the Chief Court of the former State of Jodhpur on 24-8-1936.

3. Defendant-appellants Nos. 2 and 3 were impleaded as minors but became major subsequently and have filed this appeal as such. They filed a 'Jawabdava' through their guar-dian-ad-litem appointed by the Court to the effect that the business carried by their father Sukhlal was not a joint family business, and the debt incurred by their father, if at all, was not Supported by legal necessity or benefit to the family and appeared to, be immoral and illegal, and, therefore, they were not liable.

Defendant-appellant Sukhlal contested the suit on numerous grounds. His main pleas were that the suit was bad for want of jurisdiction, as the cause of action did not arise within the limits of the court of the former Jodhpur State and also as he was not a resident of that State; that the transactions in question were of a wagering nature, and further that the business was entered into by him not as a manager of the joint Hindu family but in his personal capacity. The defendant also attacked certain individual items of business and he finally claimed that the plaintiffs should have given credit to the defendant in respect of certain items for

their failure to carry out his instructions at the proper time, and in the net result, nothing would be found due from him.

4. The learned District Judge to whom the case was eventually transferred decreed the plaintiffs' suit for Rs. 10,276/9/- with costs with a direction that the decretal amount would carry interest at the rate of 6 per cent per annum till realization in the event of the defendant's failure to pay it within two months from the date of the decree. As regards defendants Nos. 2 and 3, they were held to be liable only to the extent of their interest in the joint family property.

5. From the above decree, both plaintiffs and defendants took appeals to the High Court of the former State of Jodhpur. Appeal No. 42/47-48 was filed by the defendants. Appeal No. 45 of 1947-48 was filed by the plaintiffs in which the only contention raised by them was that the trial court had committed an error in not allowing interest to them from the date of the suit to the date of the decree and also for the period of two months from the date of the decree. A Division Bench of the High Court disposed of both the appeals by one judgment and reduced the decree against the defendant to Rs. 8276/9/- and allowed proportionate costs in the trial court, and further allowed interest at the rate of 6 per cent per annum on the decretal amount to the plaintiffs from the date of the suit to the date of the decree. The parties were left to bear their own costs in the High Court in both the appeals. Thereafter the defendants-appellants applied to the High Court for grant of a certificate for leave to appeal to the Ijlas-i-Khas of the former State of Jodhpur, and on that being granted on 3-5-1949, filed the present appeal. It may be pointed out that as a result of the judgment of the former High Court of Jodhpur, two decree-Sheets were prepared, one, in appeal No. 42 which was filed by the defendants, and another in appeal No. 45 which was filed by the plaintiffs. The defendant-appellants while applying for leave to appeal to the Ijlas-i-Khas, filed a copy of the decree in their own appeal, that is, appeal No. 42 of 1947-48 but failed to file a copy of the decree which was prepared in the appeal preferred by the plaintiffs.

6. In these circumstances, learned counsel for the respondents has raised two preliminary objections. Firstly, that the defendants-appellants should have filed a

copy of the decree along with their memorandum of appeal, which was prepared in the appeal filed by the plaintiffs-respondents in the High Court, and that that having not been done, the decree passed in that appeal had become final, and in case this Court came to another conclusion as regards the point raised by the defendants-appellants, that would result in two conflicting decrees remaining Side by side, and, therefore, the present appeal must be dismissed. In the second place, it was urged that while leave to appeal to the Ijlas-i-Khas was sought for from the learned Judges of the High Court of the former State of Jodhpur, all other points had been abandoned except the point as regards interest, and, therefore, the defendants-appellants should not be permitted at this stage to raise such other grounds which had been abandoned by them. We shall deal with both these objections now.

7. Taking up the first objection, we find that there has been a great divergence of judicial opinion on this point among the various. High Courts in India, and it is indeed noteworthy that there is no uniformity of decision even between the decisions of the same High Court. A large number of cases were cited at the bar; but we do not think that any useful purpose will be served by referring to all of them. We shall, therefore, confine ourselves to only a few important authorities cited before us, as those authorities will sufficiently exemplify the diversity of views held on this much vexed point. We shall take up the cases of the Allahabad High Court first.

8. In -- 'Zaharia v. Debia', 33 All 51 (A), which was a Full Bench decision, two rival pre-emptors filed a suit for pre-emption in respect of the same sale, each claiming a preferential right, making the other defendant in the suit brought by himself. A judgment was delivered in one suit, and a copy was placed on the record as the judgment in the other but two separate decrees were framed in each suit. The suit of one was decreed and of the other dismissed. The defeated pre-emptor appealed from the decree of his own suit but not from the decree in the other suit. As the decree in the connected Suit had not been appealed against and had become final, an objection was raised that the appeal filed by the defeated pre-emptor could not be proceeded with. In these circumstances, it was held that the appeal was barred by the doctrine of 'res judicata'. The 'ratio decidendi' was that

on any other view, there would be two inconsistent decrees, and that, that would be a most serious anomaly and would cause a complete 'impasse' in the execution proceedings.

9. The next case of the Allahabad High Court to which we must refer is -- 'Ghansham Singh v. Bhola Singh', AIR 1923 All 490 (2) (FB) (B). This was a decision of five Judges. In that case, the plaintiff sued the defendant for mortgage money with interest, or, alternatively, for sale of the mortgaged property. The trial court decreed the suit but without costs. From the preliminary decree, both parties went up in appeal, as a result of which the first appellate court partially accepted both appeals. It reduced the plaintiff's claim so far as interest was concerned, but allowed him pending and future interest and proportionate costs. Two separate decrees were drawn up but the plaintiff preferred an appeal against the decree drawn up in the defendant's appeal. It may be pointed out that the two decrees that were passed were in identical terms except as regards the contents of the memo-randum of costs on each decree-sheet. An objection was raised on the authority of --'Zaharia v. Debia (A)',, that the plaintiff's appeal was barred. The learned Judges observed as follows :

'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.'

The learned Judges further pointed out that where it may appear to an appellate court that there are two decrees arising out of two suits heard together, or raising the same questions between the same parties, and where such decrees have arisen 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 otherwise by reason of his failure to appeal from the un-appealed decree.

10. This later Full Bench decision undoubtedly shook the authority of Zaharia's case (A).

11. In a subsequent decision viz., -- 'Mohd. Mohtashim v. Joti Prasad, AIR 1941 All 277 (C), which was a Division Bench case, the facts were that a creditor and a debtor filed two suits which were disposed of by a single judgment and the same sum was found due to the creditor from the debtor. The debtor appealed from the decree in suit filed by the creditor but not from the decree in his own suit. It was held that the appeal was incompetent. The learned Judges emphatically pointed out that 'Zaharia v. Debia (A)', was not overruled by the subsequent Full Bench decision, and the latter case was distinguished, and it was held that 'Zaharia v. Debia (A)' was binding..

12. With due deference, we may point out that the state of law in the Allahabad High Court on this point does not appear to us to be free from conflict and even a certain amount of confusion.

13. Turning now to the cases of the Lahore High Court, we may refer to -- 'Mt. Lachhmi v. Mt. Bhulli', AIR 1927 Lah 289 (FB) (D). This was also a Full Bench case. The judgment was delivered by Tek Chand J. with whom three other Judges agreed and Dalip Singh J. dissented. In that case, two widows who were in joint possession of certain land sued each other for a declaration that she was the exclusive owner of the land in dispute and that the other had no right whatsoever therein. Both suits were disposed of by a single judgment. It being held that A was the owner but that B was entitled to hold possession of 'half of the land in lieu of maintenance, two separate decrees were drawn up in each suit declaring the rights of the plaintiff in identical terms. B appealed from the decree given in her own suit but not from the other in which she was a defendant. It was held that the fact that B had not filed an appeal from the decree in A's suit could not prevent B's appeal from being proceeded with.

In an exhaustive judgment, Tek Chand J. reviewed the entire case law and came to the conclusion that the cases on the other side took too technical a view of the doctrine of 'res judicata' which was not justified, and that the rules of procedure were meant to subserve the interests of justice and not to hamper them, and,

therefore, came to the conclusion that B'S omission to prefer an appeal in A's suit could not bar the appeal in her own suit. We may point out that before this case was decided, there was a considerable conflict of opinion in the Punjab also. Subsequent decisions of the Lahore High Court such as -- 'Ram Sarup v. Sarnu Mal', AIR 1938 Lah 114 (E) have followed the Full Bench case referred to above.

14. We may now refer to Madras cases. The earliest Madras case to which reference may be made is -- 'Panchanada Velan v. Vaithinatha Sastrial', 29 Mad 333 (FB) (F). In that case it was held that where cross-suits between the same parties on the same facts were tried together and were disposed of by a single judgment but separate decrees in identical terms were passed and an appeal was preferred against one decree only, the decree un-appealed did not preclude the appellate court from entertaining the appeal.

We may next refer to another Full Bench case of the Madras High Court -- 'Pappammal v. Meenammal', AIR 1943 Mad 139 (FB) (G). The facts there were that three suits were tried together and disposed of by a common judgment. All the three suits were dismissed by a single judgment and separate decrees were passed in each of them. The plaintiff preferred an appeal against one decree only. It was held that the plaintiff's failure to appeal from the other two decrees should not be held to bar his appeal, inasmuch as the object of his appeal was to get rid of the very adjudication which was put forward as constituting 'res judicata'. The learned Judges confirmed the view taken in the previous Full Bench case of 29 Mad 333 (FB) (F). It may be pointed out that the case reported as -- 'Chockalinga Thevar Firm v. Sankarappa Naikar', AIR 1942 Mad 421 (H) was distinguished where a different view was taken on the ground that there were different decisions in different suits which were tried on different occasions by different Judges.

15. As regards the Calcutta High Court, we were referred to -- 'Isup Ali v. Gour Chandra Deb', AIR 1923 Cal 496 (I). There the plaintiffs and defendant filed cross-suits for recovery of possession of certain land on the basis of title by inheritance and adverse possession. Both suits were tried jointly and one suit was dismissed while the other was decreed. Thereupon the plaintiffs in the first suit, who were of course defendants in the other suit, preferred an appeal although the appeal was

directed against the decrees in both the suits and copies of both decrees were attached to the Memorandum of appeal. Only one respondent was impleaded therein and his brothers were not made parties to the appeal. The subordinate appellate court dismissed the appeal.

On a further appeal to the High Court, a preliminary objection was raised that owing to the plaintiffs' failure to file a proper appeal in the second suit, their appeal was barred. Reliance was placed on 33 All 51 (FB) (A), cited above and certain other decisions of the Allahabad High Court whose authority stood considerably shaken by the subsequent decision of the five Judges in AIR 1923 All 490 (2) (FB) (B), and on certain decisions in the Punjab, and it was held that the decision of the question of title in the Suit under appeal was barred by the decision in the other suit which was not challenged, and which could not be collaterally attacked or implicitly ignored.

16. The next case of the same High Court to which we may refer is -- 'Man Mohan v. Shib Chandra', AIR 1931 Cal 353 (J). This was also a Division Bench decision and took the other view. Reference was made to -- 'Mariamnissa Bibi v. Joynab Bibi', 33 Cal 1101 (K), and it was observed that Mookerjee J. who delivered the leading judgment in -- 'Isup Ali v. Gour Chandra Deb (I)', was not justified in not following the previous decisions of the Calcutta High Court which had taken the other view. 'Isup Ali's case (I)', was, however, distinguished on its special facts inasmuch as the appeal in that case was defective in another respect namely, that some of the successful plaintiffs had not been joined as parties to the appeal, and the learned Judges came to the conclusion that they should follow the decision in -- 'Mariamnissa Bibi v. Joynab Bibi (K)', which was a decision in line with the view adopted by the High Courts of Madras, Lahore and also Allahabad according to its later view in -- 'Isup Ali v. Gour Chandra Deb (I)'.

17. We were next referred to -- 'Sheoram v. Hiranman', AIR 1929 Nag 229 (FB) (L), a decision of the Nagpur High Court. This case need not detain us inasmuch as the appellant had filed with his memorandum of appeal copies of both judgments and both decrees and had stated that he was appealing from both of them. The defect, in any case was, therefore, merely of a formal nature, and it was

considered unnecessary to consider the question as to what the result would have been if the appellant had attached only one of the decrees and ignored the other. In a subsequent Nagpur case reported in -- 'Manohar Vinayak v. Laxman Anandrao', AIR 1947 Nag 248 (M), where two suits were consolidated and disposed of by a common judgment but two separate decrees were prepared and the appellant filed an appeal in one case but not against the decree in the other, it was held that the principle of 'res judicata' did not apply and that the failure of the appellant to prefer an appeal from the other decree could not preclude the consideration of his appeal.

18. We may next refer to a Full Bench decision of the Oudh Chief Court -- 'Shanker Sahai v. Bhagwat Sahai', AIR 1946 Oudh 33 (FB) (N).' It was held overruling an earlier case -- 'Bhagwati Din v. Bhagwat', AIR 1933 Oudh 531 (O) that where the two suits between the same parties involving common issues are disposed of by one judgment but two decrees, and an appeal is preferred against the decree in one but it is either not preferred in the other or is rejected as incompetent, the matter decided by the latter decree does not become 'res judicata'.

19. On a critical analysis of the cases referred at the bar, we find that they fall into two broad classes; first, where there are cross cases involving a common Subject-matter and are disposed of by a common judgment and two decree-sheets are prepared in each case but an appeal is filed by the defeated party from one decree only; and secondly, where there is only one suit which is partially decreed by the trial court and both the plaintiff and the defendant prefer cross-appeals to the lower appellate court which decides them by a common judgment and the aggrieved party prefers an appeal only from one decree and leaves the other unappealed. Most of the cases referred to above are covered by the first category; while the case before us falls within the second.

The principles which seem to us to emerge from a careful consideration of the cases referred to above which are mostly cases of The first category are, firstly, that the single appeal filed by the defeated party will not be barred by Section 11, Civil P. C. as the two suits are not separate and independent proceedings but are

really one proceeding in which there is no previous trial and former judgment, and therefore, Section 11 in terms cannot apply. Secondly, on the further question whether the principle as contra-distinguished from the rule of 'res judicata' embodied in Section 11, Civil P. C., applies, it also appears to us that it does not because what the general doctrine of 'res judicata' forbids is that nobody should be vexed twice over the same matter and this cannot be said of such cases since there is only one judgment which is under appeal notwithstanding the fact that two decrees have been prepared and it could not be said that the respondent will be subjected to a multiplicity of proceedings while the decree appealed against is being examined. In truth, it must be accepted that in all such cases, there is only one trial; and one judgment, and there is nothing by way of a previous decision or dispute such as may attract the rule of 'res judicata'.

Thirdly, as to the anomaly or the embarrassment which may be caused by the presence of two conflicting decrees existing side by side on the record in the same matter, that undoubtedly raises a question of some perplexity, but the answer to this appears to us to be of a two-fold nature. In the first place, in Such cases, there is really a consolidation, of suits and, therefore, there ought to be, in reality, only one decree in both the suits so as to avoid all confusion, and in the second place, even if there are two decrees, it can be postulated that because one appealable decree requires in law to be heard, its hearing cannot be stifled because an identical decree arising out of a common judgment has not been appealed from. Now, if the above principles are correctly applicable to cases of cross-suits culminating in a common judgment but two decrees and a single appeal, they are, in our opinion, applicable 'a fortiori' to the other class of cases like the present one where there is only one Suit, and two appeals by both parties, which are decided by a common judgment by the lower appellate court and the aggrieved party files only a single appeal from one of the two decrees prepared and leaves the other unappealed. We may point out, however, that the rule will be different where two suits or two appeals between the same parties and raising the same questions are tried together but separate and independent judgments are given in each, or, where such suits or appeals are tried by different courts and separate judgments are pronounced and the party appeals from one decree leaving the other to become final against him.

20. At the end of the argument on this point, we were referred to a case -- 'Narhari v. Shanker', AIR 1953 SC 419 (P), which went up to the Supreme Court. We have not been able to lay our hands on this judgment but from the Indian Digest 1952 by V. V. Chitaley and S. Appu Rao, at page 275 we find that two separate appeals were taken by two sets of defendants from a decree in favour of the plaintiff. The appellate court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed on the file of the other connected appeal. Two decrees were prepared. The plaintiff preferred two appeals. ' One of the appeals was time barred and on the principle of 'res judicata', the High Court, dismissed both the appeals. On an appeal to the Supreme Court, it was held by their Lordships that it was not necessary to file two separate appeals in this case, and that as there was only one suit and both the decrees arose out of it and were based on the same judgment and the matter decided concerned the entire Suit, the principle of 'res judicata' did not apply. It was also observed that the question of 'res judicata' arose when there were two suits. Their Lordships further pointed out that as there was a conflict of decisions on this question, the High Court ought to have given the appellant benefit of Section 5, Limitation Act. We have no hesitation in concluding that this case in principle has approved the view which we have summed up above and which is indeed the view of the majority of the High Courts in India.'

21. Applying the above principles to the case before us, we find that here the plaintiffs filed a suit for recovery of money based on certain business transactions and the trial court partially decreed the suit for Rs. 10276/ 9/-, but without pending, or future interest up to two months from the date of the decree. Both parties appealed to the High Court of the then State of Jodhpur which partially accepted both the appeals. The learned Judges of the High Court reduced the decretal amount by a sum of Rs. 2000/- in favour of the defendants but at the same time awarded a decree for pending and future interest and proportionate costs in favour of the plaintiffs, and directed that both parties would bear their own costs in the High Court in both the appeals. The learned Judges did this by a single judgment but two separate decrees were prepared and attached in each appeal. It is remarkable that the decrees were prepared in exactly the same terms in both the appeals, which may be translated as follows:

'Both appeals are partially allowed and the decree of the trial court is modified and reduced to Rs. 8276/9/- with proportionate costs & interest from the date of suit to the date of decree at 6 per cent per annum. Both parties are left to bear their own costs in the High Court in both the appeals.'

It is thus obvious that in both decrees, the operative para of the judgment was repeated irrespective of the points raised in the respective appeals, which, in our opinion, rendered the preparation of two decrees a meaningless formality. The defendant-appellants attached a copy of the decree prepared in their case to the memorandum of appeal but failed to attach a copy of the identical decree prepared in the case of the plaintiffs by some accident or miscalculation. We may further point out that in their application for leave to appeal to the Ijlas-i-Khas, which was filed in the High Court, the defendants stated that they were seeking to appeal from both the decrees. We may as well point out that the plaintiffs' appeal in the High Court was only with regard to interest and that the defendant-appellants raised an objection to the award of such interest in paragraph No. 1 of their memorandum of appeal. In these circumstances and in pursuance of the principles set out above, we hold that the defendant-appellants' omission to file a separate appeal from the other decree or their failure to attach a copy of the decree which was prepared in the plaintiffs' appeal in the lower appellate court is not a sufficient, ground for barring the hearing of the present appeal. Consequently, we overrule this objection.

22. The next objection taken before us is that while the defendant-appellants sought for leave to appeal to the Ijlas-i-Khas, and a notice was issued to the respondents by the High Court, Mr. Sohanlal, learned counsel for the defendant-appellants, stated before the learned Judges of the High Court that he wanted to contest the point of interest only in the Ijlas-i-Khas and accordingly no objection was taken to the grant of leave on behalf of the present respondents and, therefore, the defendant-appellants were not precluded from raising any other point in this appeal than the one relating to interest. It may be pointed out that leave was applied for on behalf of the defendants under rules 18 and 19 of the Rules regarding Appeals and Petitions to the Ijlas-i-Khas which had come into force from 1-1-1946. The valuation of the appeal was above Rs. 4000/- and so

also the subject-matter of the suit in the court of the first instance. It is clear that the decree was not one of affirmance merely. Be that as it may, learned counsel for the defendant-appellants made a statement before the learned Judges of the High Court that all he wanted to do was to canvass the objection as regards the grant of interest in the appeal to the Ijlas-i-Khas. The order recorded by the learned Judges on 3-5-1949, when the application came for hearing before them runs as follows:

'The learned counsel for the petitioners urges that the only question which he is contesting before the Ijlas-i-Khas is that of interest from the date of the suit till the date of the-decree and that this amounts to more than Rs. 4000/-. The trial court did not award-any interest whereas interest at 6 per cent per annum was awarded by this Court. Accordingly on this point, the judgment is not one of affirmance. The learned counsel for the respondent does not oppose the application on this point. Accordingly a certificate for leave to appeal to Ijlas-i-Khas is hereby granted. The court-fee will be paid within the period of 30 days and in default the petition shall stand dismissed.'

It is plain from the order cited above in ex-tenso that the learned counsel who was in charge of the defendants' case at that time had unequivocally stated before the learned Judges of the High Court that the 'only' question which he proposed to contest before the Ijlas-i-Khas was the question of interest pendente-lite which amounted to more than Rs. 4000/-.

We do not propose to speculate as to what were the reasons which impelled learned counsel to do so. But what he did, cannot but amount to this that he had abandoned all other points in his appeal and which we may mention he had himself raised in his memorandum of appeal filed in that very court on 9-3-1949. We are of opinion that we must accept as accurate the record made of the statement of learned counsel for the appellants by the learned Judges of the High Court in their order granting leave to appeal. Indeed, we see no reason to act otherwise in the absence of any evidence that the order was erroneous on this point. There is nothing on the record to Show that the statement attributed o the learned counsel for the appellants was erroneous and was never made. If it was

erroneous, we should have expected to find an application to that' effect during the last four years the appeal has been pending. It is indeed well settled that it is open to the parties or their counsel in the trial of civil suits to abandon such issues as they like and if that is done, they cannot be revived. See -- 'Annada Mohan v. Gour Mohan', AIR 1923 PC 189 (Q) and -- 'Lala Kalyandas v. Haqbul Ahmed', AIR 1918 PC 53 (R). Accordingly, we are constrained to come to the conclusion that this objection must be allowed to prevail and we hold, therefore, that the appellants cannot by reason of their own abandonment, raise any other point in this appeal save that of interest from the date of suit to the date of decree.

23. This appeal will now be set down for hearing accordingly.

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