The Indian Law Reports.

Calcutta Series.

APPEAL FROM ORIGINAL CIVIL.

Before C. C. Ghose A. C. J. and Costello J.

ABDUL SOBHAN

v.

BENIMADHAB KSHETTRI.*

1933

May 30;
June 16.

Res Judicata—*Code of Civil Procedure, if exhaustive—Code of Civil Procedure (Act V of 1908), s. 11.*

The plea of *res judicata* rests upon the principle that there should be finality in litigation.

Ram Kirpal v. *Rup Kuari* (1), *Sheoparsan Singh* v. *Ramnandan Prasad Singh* (2), *Hook* v. *Administrator-General of Bengal* (3) and *Kalipada De* v. *Dwija Pada Das* (4) referred to.

Section 11 of the Code of Civil Procedure is not exhaustive of the circumstances in which an issue may be *res judicata.*

To operate as *res judicata* the finding must be material and necessary.

APPEAL by defendant No. 2 from the judgment of Buckland J.

The material facts and arguments will appear from the judgment.

Page and *S. K. Dutt* for the appellant.

Pugh and *H. Banerjee* for the respondent.

Cur. adv. vult.

GHOSE A.C.J. The facts involved in this appeal are as follows: The plaintiffs alleged that, on various dates between the 25th September, 1930, and

*Appeal from Original Decree, No. 15 of 1933, in Original Suit No. 1510 of 1932.

(1) (1883) I. L. R. 6 All. 269; L. R. 11 I. A. 37.
(2) (1916) I. L. R. 43 Calc. 694; L. R. 43 I. A. 91.
(3) (1921) I. L. R. 48 Calc. 499; L. R. 48 I. A. 187.
(4) (1929) L. R. 57 I. A. 24.

1933

Abdul Sobhan v. *Benimadhab Kshettri.*

Ghose A. C. J.

the 5th November, 1930, they advanced to the two defendants Abdul Razak and Abdul Sobhan a sum of Rs. 10,000, which the latter undertook to repay with interest at the rate of 12 per cent. per annum. The plaintiffs further alleged that both the defendants, who are father and son, carried on business in co-partnership. The second defendant Abdul Sobhan in his written statement denied that he carried on business in co-partnership with Abdul Razak and further contended that the plaintiffs' suit was barred by the principle of *res judicata*. He also added as follows:

> This defendant denies that the plaintiffs lent and advanced to this defendtant in the defendants' businesses mentioned in the cause-title to the plaint the sum of Rs. 10,000 with interest at the rate of 12 per cent. per annum on the various dates given in the particulars of paragraph 1 of the plaint. This defendant had nothing to do with the business referred to above, and if any sum was lent this defendant is not liable to pay the same.

The suit came on for hearing before my learned brother Mr. Justice Buckland. The first defendant did not deny the loan; and his defence to the suit having been previously disposed of a decree had been made against him.

As regards the defendant Abdul Sobhan, Mr. Justice Buckland's attention was drawn to the judgment of Mr. Justice Ameer Ali given in the Insolvency Jurisdiction of this Court, whereon it was contended on behalf of this defendant that the suit was barred by the principle of *res judicata*, but Mr. Justice Buckland was of opinion, for the reasons given by him, that the present suit was not barred by the principle of *res judicata*. On the question whether or not Abdul Sobhan was a partner with his father Abdul Razak in the businesses for which the money was borrowed, Mr. Justice Buckland, after considering the evidence, came to the conclusion that the defendant Abdul Sobhan was a partner at all material times with Abdul Razak and that he must be held liable with him for the monies claimed in the present suit. He, accordingly, passed judgment against Abdul Sobhan for the amount claimed.

1933

Abdul Sobhan
v.
Benimadhab Kshettri.

Ghose A. C. J.

It is against this judgment that Abdul Sobhan has preferred the present appeal. At the hearing before us, the learned counsel on behalf of the appellant did not seriously dispute the correctness of the finding of Mr. Justice Buckland on the facts whether or not Abdul Sobhan was a partner with his father Abdul Razak. After going through the evidence on record, we intimated to the learned counsel for the appellant that we were not prepared to take a different view on the facts. The learned counsel for the appellant thereupon intimated that he relied most strongly on the judgment of Mr. Justice Ameer Ali in the Insolvency Jurisdiction of this Court and contended that the conclusion of Mr. Justice Buckland on the question of law, namely, whether the present suit was or was not barred by the principle of *res judicata* was unsustainable.

Before we go further into the question on the point of *res judicata*, it may be useful to summarise very briefly what the position was before Mr. Justice Ameer Ali in the insolvency case. The matter came on before Mr. Justice Ameer Ali on an application by six creditors to adjudicate two persons, namely, Abdul Razak and Abdul Sobhan described as carrying on business in co-partnership under the name, style and firm of Abdul Razak and Abdul Sobhan and Company. Among the six creditors were the present plaintiffs. Mr. Justice Ameer Ali held definitely that neither Abdul Razak nor Abdul Sobhan had committed any available act of bankruptcy. The father, Abdul Razak, had not committed any act of bankruptcy, and it appeared that the only allegation against Abdul Sobhan was that he was affected by Abdul Razak's bankruptcy in the circumstances stated, assuming the court found Abdul Razak had committed an act of bankruptcy. The learned Judge observed as follows:

> In a petition like this, where two individuals are sought to be adjudicated on a joint petition, it is necessary to establish: (1) that the persons in question are partners; (2) that the debt is a joint debt and (3) that there is either a joint act of insolvency of the two persons or (4) that each person has committed some act of insolvency. With regard to Abdul Sobhan, the difficulties are as follows:—In the petition, beyond the mere statement that

1933

Abdul Sobhan
v.
Benimadhab Kshettri.

Ghose A. C. J.

Abdul Razak and Abdul Sobhan are sole proprietors, there is no evidence as to this. The affidavits in opposition in dealing with the prosecution of Abdul Razak in the police court (referred to in paragraph 10 of the petition) give details, from which I think it is to be inferred that, during the prosecution, the *hundi* creditors, including the petitioning creditors, regarded Razak as the sole proprietor of the firm. Benimadhab Kshettri, in more than one place, alleges that Razak when drawing the *hundi* represented that he was doing so on behalf of the firm in question, but this, in the circumstances, I do not credit. In reply, there are affidavits directly to the effect that Abdul Sobhan is a partner. There is further a reference to a suit brought by a firm of Abdul Razak Abdul Sobhan. As regards the latter, it would appear to indicate that there must be business relationship of some kind or other between the father and son and as what, if any explanation could be given, is a matter with which I am not concerned. Having regard to Razak's denial, the fact may be used to discredit his evidence. The fact remains that, in this application, it must be established that Sobhan is a partner in the firm of Razak. In my view, that has not been satisfactorily established. Apart from this, I am not satisfied with the evidence of either of the acts (b) and (c). With regard to (b), the mortgage, for which no date was given, was apparently of the 11th August, 1931. With regard to (c), there is the fact which always appears to me anomalous that the petitioning creditors had no difficulty in serving (in this case on Razak only) the notice personally. Further, in some of the affidavits or in one of the affidavits in reply, it is stated "that both may be found almost daily in their place of business." I am not satisfied with this class of evidence on those points and therefore the petition as against Sobhan must be dismissed.

Mr. Justice Buckland held that section 11 of the Code of Civil Procedure did not refer to a case, application, matter or other proceedings, but it only referred to a suit and, therefore, the judgment of Mr. Justice Ameer Ali, in the proceedings before him, could not operate as *res judicata*. Dealing further with the argument that the Civil Procedure Code was not exhaustive and that the general principles of *res judicata* applied in this case, Mr. Justice Buckland was inclined to take the view that the question of partnership never arose in the earlier proceedings before Mr. Justice Ameer Ali and that his judgment on this point was superfluous, because, until it was held that there had been an act of insolvency, the question of partnership was immaterial. Mr. Justice Buckland observed as follows:

> Where there are two or more issues and any one of which would dispose of the suit, it may well be said that a decision on any one of them will be *res judicata*, but that is by no means the case here, and in my judgment this suit is not barred by the principles of *res judicata*.

I am not in agreement with Mr. Justice Buckland in the view he took of the scope of section 11 of the

Civil Procedure Code, referred to in the opening sentence of the previous paragraph. Section 11 of the Civil Procedure Code is not exhaustive of the circumstances in which an issue may be *res judicata*. The plea of *res judicata* rests on the principle that there should be finality in litigation and the plea still remains apart from the limited provisions of the Code of Civil Procedure. See the cases of *Ram Kirpal* v. *Rup Kuari* (1), *Sheoparsan Singh* v. *Ramnandan Prasad Singh* (2), *Hook* v. *Administrator-General of Bengal* (3), *Kalipada De* v. *Dwijapada Das* (4). I am, however, in agreement with Mr. Justice Buckland in the view he took in the concluding words of the previous paragraph. In the insolvency case before Mr. Justice Ameer Ali, the main question for decision was whether the two persons before him or either of them had committed an available act of bankruptcy. The Judge's finding was that neither the two together, nor either of them, had committed an available act of bankruptcy. That really had the effect of finishing the matter of the application for adjudication before Mr. Justice Ameer Ali. It was not necessary to go into the question of the partnership between the two persons. Any finding which was not required cannot have the effect of operating as *res judicata*. In other words, to operate as *res judicata*, the finding must be material and necessary.

In this view of the matter the present appeal is without any substance and must be dismissed with costs.

COSTELLO J. I agree.

Appeal dismissed.

A. K. D.

Attorneys for appellant: *Mitter & Baral.*

Attorneys for respondent: *Prafulla Chunder Ghosh* and *R. C. Bose.*

(1) (1883) I. L. R. 6 All. 269; L. R. 11 I. A. 37.
(2) (1916) I. L. R. 43 Calc. 694; L. R. 43 I. A. 91.
(3) (1921) I. L. R. 48 Calc. 499; L. R. 48 I. A. 187.
(4) (1929) I. L. R. 57 I. A. 24.