Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

1908
May 25.

DWARKA DAS AND ANOTHER (PLAINTIFFS) *v.* AKHAY SINGH (DEFENDANT) *

Civil Procedure Code, section 13—*Res judicata*—*Question of right to receive a recurring payment*—*Civil and Revenue Courts*—*Revenue Court deciding a question of title.*

The plaintiffs sued to recover their share of an annuity chargeable on a 7½ biswa share of a certain village for the years 1309, 1310 and 1311 Fasli. In a previous suit between the same parties in respect of the years 1306, 1307 and 1308, the plaintiff's right to receive the annuity had been admitted by the defendant, and a decree passed accordingly which had been affirmed by the High Court.

Held that the fact that the two suits related to different years did not prevent the judgment in the former operating as *res judicata* in the latter. *Chandi Prasad* v. *Maharaja Mahendra Mahendra Singh* (1) followed. Neither did the fact that the first decision was that of a Court of Revenue make any difference. Either the suit was wrongly brought in a Revenue Court, a defect which was cured by its coming to a Civil Court in appeal; or the Revenue Court deciding a question of title might be regarded *quoad hoc* as a Civil Court. *Salig Dube* v. *Deoki Dube* (2) referred to.

THE facts of this case as found by the lower appellate Court are as follows:—In 1862 there was some litigation between one William Derridon and his two sisters Rosina and Teresa. Under a compromise decree, dated the 11th of September 1862, the two sisters were given an annuity of Rs. 360, and it was made a charge on 7½ biswas muafi rights in mauza Anwalkhera. The compromise decree provided that the two ladies were to enjoy the annuity for their lives; that after their death it was to devolve on their issue; that the ladies and their heirs had no right to transfer the annuity charge; that the annuity charge was to revert to Major Derridon (father of William) and his heirs on the death of the two ladies without issue. The ladies died without issue and the annuity charged reverted to George Derridon (a nephew of William) and he became the absolute owner of the charge. The father of the plaintiffs purchased half the share in the charge from George Derridon, and he acquired the right to realize the charge from 7½ biswas muafi. William Derridon had transferred 1 biswa and 16 biswansis out of the

* Second Appeal No. 88 of 1907, from a decree of Sheo Prasad, Additional Subordinate Judge of Agra, dated the 23rd of October 1906, confirming a decree of Baidya Nath Das, Munsif of Agra, dated the 21st of December 1905.

(1) (1901) I. L. R., 24 All., 112. (2) Weekly Notes, 1907, p. 1.

7½ biswas to the father of the plaintiffs and the remaining 5 biswas and 14 biswansis muafi were purchased at auction sale by the defendants 2nd set. The plaintiffs' father thus became the owner of the charge on 7½ biswas muafi and of 1 biswa and 16 biswansis muafi itself. The proportionate charge on 1 biswa and 16 biswansis muafi became merged in it and he transferred the said full and absolute muafi to the defendants 1st set.

In 1897, the plaintiffs brought a suit for recovery of their share of the charge for certain years against the defendant Raja Akhay Singh. The suit was decreed on the admission of the defendant. The present suit was for the recovery of instalments of the same charge for other years. The Court of first instance (Munsif of Agra) dismissed the suit and this decision was on appeal confirmed by the Additional Subordinate Judge. The plaintiffs appealed to the High Court.

Mr. *A. E. Ryves*, Dr. *Satish Chandra Banerji* and Maulvi *Ghulam Mujtaba*, for the appellants.

Babu *Durga Charan Banerji*, for the respondent.

KARAMAT HUSAIN, J.—The facts which have given rise to this appeal are as follows:—

The plaintiffs brought a suit for their share, amounting to Rs. 151-8-0, in an annuity which was a charge on a 7½ biswa share in the village Anwalkhera for the years 1309, 1310 and 1311 Fasli. The defendants resisted the claim on various grounds. The learned Munsif dismissed the suit. He held that the judgment of this Court, dated the 14th August 1905, did not operate as *res judicata*, inasmuch as the subject-matter in issue in the case in which that judgment was pronounced was not the same as in the present case. He remarks:—"I do not think (that) that judgment can operate as *res judicata*, the subject-matter being different, *viz.* for a different year's charge."

The plaintiffs appealed to the District Judge. Their fifth ground of appeal was that "the question of the liability of the defendant No. 1 to pay the plaintiffs is *res judicata*."

The learned District Judge dismissed the appeal on the ground that the defendant No. 1 was not liable to pay the annuity to the plaintiffs, without deciding the plea of *res judicata*. I may mention here that the former suit was instituted in the Revenue

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Court, and that no objection was taken that the suit was instituted in the wrong Court. The learned District Judge under the provisions of section 206 of the North-Western Provinces Rent Act (Act No. XII of 1881) disposed of the appeal as if the suit had been instituted in the right Court. He remarked :—

"It is a mere quibble to say that (the) defendant admitted it as a share of revenue and not as a share of an annuity. The fact remains that Raja Govind Singh admitted his liability to pay it and offered to pay it. Now that the case has come to this Court, it is immaterial whether the suit was originally instituted in the Civil Court or the Revenue Court. The only objection that Raja Govind Singh's pleader can now raise as to paying it is that if the suit was brought in the Civil Court for the money as an annuity, his client might be able to raise some defence. But the facts have been before him for a long time, and if there is any reason why he should not pay the money, he should be able to state it in this Court. On the state of things at present disclosed the appellants are clearly entitled to receive the money."

The plaintiffs have preferred a second appeal to this Court. It is contended on their behalf that the question of the liability of the defendant No. 1 to pay Rs. 151-8-0 to the plaintiff is *res judicata* by reason of the judgment of the High Court between the same parties, dated the 14th August 1905, in Second Appeal No. 872 of 1903, and that the fact that the claim in the former litigation was for a different set of years cannot prevent the operation of *res judicata*, for the title under which the plaintiffs claimed the share of the annuity, whether for one set of years or another, was one and the same title in both cases.

To meet this contention, it is argued for the respondent (1) that the claim in the former suit was for 1306, 1307, and 1308 Fasli, while in the present suit it was for 1309-11 Fasli, and thus the subject-matter was not identical in both suits; (2) that the question of title was not determined in the former litigation; (3) that the former suit was instituted in the Revenue Court, while the present suit was brought in the Civil Court; (4) that the decision of the question of liability by the Revenue Court could not operate as *res judicata* in the present suit, which was brought in the Civil Court, and in which the question of

liability to pay the share of the annuity was in issue. See *Rani Kishori* v. *Raja Ram* (1), *Ashraf-un-nissa* v. *Ali Ahmad* (2), and *Inayat Ali Khan* v. *Murad Ali Khan* (3); and (5) that the ultimate decision of the appeal in the former suit by the High Court was immaterial, inasmuch as, for the operation of the plea of *res judicata*, the competency of the original Court which decided the former suit must be looked to and not that of the appellate Court in which the suit was ultimately decided on appeal. (See *Shebu Raut* v. *Behari Raut*, (4).

In order to see whether the question of title was raised in the former litigation, I examined the paper book of S. A. No. 872 of 1903, with the following result:—

The plaintiffs in their plaint alleged that "the plaintiffs' share amounted to Rs. 214-14-11 per annum." The defendants in their written statement admitted that "according to the village practice the plaintiffs had always been getting Rs. 151-8-0 per annum on account of the revenue of their share." They further added that the defendants always offered to pay Rs. 151-8-0, and that that sum might be awarded to the plaintiffs. The issue ran as follows:—"Whether the annual amount of revenue was Rs. 214-14-11, as claimed by the plaintiffs, or Rs. 151-8-0 as alleged by the defendants."

The first Court dismissed the claim, considering it a claim for revenue. The plaintiffs appealed to the learned District Judge, who decreed the appeal. His remarks are:—

"Now as to whether the appellants are entitled to the amount admitted in the written statement, the pleader for Raja Govind Singh contends that the written statement was a piece of foolishness on the part of the defendant's karinda, that the defendants never admitted that the plaintiff was entitled to a share of an annuity, and that the admission gives the plaintiff no title. Now formal pleas in a written statement cannot be evaded by saying that they were foolishly made by an agent. The defendant admitted that the plaintiff was entitled to receive from him annually Rs. 151-8-0 out of the assigned revenue of the share in question.

(1) (1903) I. L. R., 26 All., 468.
(2) (1904) I. L. R. 26 All., 601.
(3) (1905) I. L. R., 27 All., 569.
(4) (1908) 7 C. L. J. R., 470.

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"Although that amount has been fixed by the decision of the Court, and cannot fluctuate according to fluctuation in the revenue of the share, yet plaintiff's title is undoubtedly based on the fact that his predecessors in title had a share in the estate. The sum in question has always hitherto been dealt with by the Revenue Court, and it is a mere quibble to say that defendant admitted it as a share of revenue and not as a share of an annuity. The fact remains that Govind Singh admitted his liability to pay it and offered to pay it."

The defendants, Raja Govind Singh and Kunwar Akhay Singh, appealed to this Court, and a Bench of this Court, of which one of us was a member, dismissed the appeal on the 14th of August 1905, with the following remarks:—"It is clear on the findings that this appeal cannot be supported. The defendant appellant admitted his liability to pay Rs. 151-8-0. The District Judge gave a decree in accordance with that admission, and so acted within his right."

The above passages leave no doubt in my mind that in the previous litigation, the question of title was involved, and the liability of the defendant No. 1 to pay Rs. 151-8-0 a year to the plaintiffs was decided on his own admission. Such being the case, the judgment of this Court, dated the 14th August 1905, undoubtedly operates as *res judicata*, notwithstanding the fact that the claim in the present litigation is for a different set of years.

Chandi Prasad v. *Maharaja Mahendra Mahendra Singh*, (1) is an authority for the above proposition. The root of the matter between the parties, whether it related to 1306, 1307 and 1308 fasli, or to 1309, 1310 and 1311 Fasli, was in both cases the same, and the liability of the defendant to pay to the plaintiffs the share of the annuity amounting to Rs. 151-8-0 was decided in the former suit.

It is, however, argued for the respondent that the original Court which determined the question of the liability of the defendant to pay Rs. 151-8-0 annually was the Revenue Court, and its decision cannot operate as *res judicata* in the present suit instituted in the Civil Court.

(1) (1901) I. L. R., 24 All., 112.

There is no force in the argument. The former suit was no doubt instituted in the Revenue Court, which was the wrong Court, but no objection was taken to such institution, and the learned District Judge proceeded under section 206 of the North-Western Provinces Rent Act, which runs as follows:—

"In all suits instituted in any Civil or Revenue Court in which an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the appellate Court, unless such objection was taken in the Court of first instance, but the Appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court."

He disposed of the appeal as if the suit had been instituted in the right Court. Under such circumstances, the Revenue Court must be deemed to be the Civil Court, and the decision of the Revenue Court on the question of title must be held to be the decision of the Civil Court. Apart from the provisions of section 206 of the North-Western Provinces Rent Act (XII of 1881), whenever a Revenue Court has the power of directly deciding a question of title that Court for deciding that question must on principle be deemed to be a Civil Court. The determination of the question of title is the function of a Civil Court, and if the Legislature invests a Revenue Court with the power of directly deciding the question of title in certain cases, the Revenue Court in those cases becomes a Civil Court. The case of *Salig Dube* v. *Deoki Dube* (1) which lays down that when a Revenue Court, under section 199 of the Agra Tenancy Act, decides a question of title against a tenant is barred by the rule of *res judicata*, from reopening the question of title in a Civil Court, is, I think, based on that principle.

The cases of *Rani Kishori* v. *Raja Ram* (2), *Ashraf-un-nissa* v. *Ali Ahmad* (3) and *Inayat Ali Khan* v. *Murad Ali Khan* (4) have no application to the facts of the present case. In those cases the Revenue Court, under section 206 of the N.-W. P. Rent Act (XII of 1881), was not transformed into a Civil Court, nor was it invested with the power of directly deciding the

(1) Weekly Notes, 1907, p. 1.
(2) (1903) I. L. R., 26 All., 468
(3) (1904) I. L. R., 26 All., 601.
(4) (1905) I. L. R., 27 All., 569.

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question of title. Moreover, the question of title was not directly in issue in the Revenue Court in those cases. Regarding the case of *Shebu Raut* v. *Behari Raut*, it is sufficient to remark that it lays down a correct rule of law, but has no application to the case before us, in which the original Court of Revenue, by the provisions of section 206 of the old Rent Act, is deemed to be a Civil Court.

For the above reasons, I would hold that the judgment of this Court, dated the 14th August 1905, in S. A. No. 872 of 1903, operates as *res judicata*, and would allow the appeal and set aside the decrees of the Courts below and decree the plaintiff's claim with costs.

STANLEY, C. J.—I concur in the proposed order.

BY THE COURT.—The order of the Court is that this appeal be allowed, the decrees of the Courts below be set aside, and the plaintiffs' claim be decreed with costs.

Appeal decreed.

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June 13.

Before Mr. Justice Banerji and Mr. Justice Richards.

BITHAL DAS AND OTHERS (DECREE-HOLDERS) *v.* JAMNA PRASAD AND OTHERS, (JUDGMENT-DEBTORS) *

Execution of decree—Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.

On the 7th October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July 1904. The suit was retried; and on the 17th September 1904 the Court of first instance made a decree in favour of plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realized by the plaintiffs and the sum finally decreed.

Held (1) that the plaintiffs were at liberty to proceed either by application or by suit—*Shaman Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), *Collector of Meerut* v. *Kalka Prasad* (2) and *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (3) referred to; and (2) that the application was

*First Appeal No. 45 of 1908, from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 29th of January 1908.

(1) (1865) 10 Moo. I. A., 203. (2) (1906) I. L. R., 28 All., 665.
(3) (1906) I. L. R., 29 All., 143.