

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Brown.

ANWAR ALLI SOWDAGAR

v.

AMEER ALLI SOWDAGAR *

1924

Aug. 11

Cross suits—Final decision in one suit, whether operating as res judicata to the other—Inconsistent and contradictory state of affairs—Civil Procedure Code (V of 1908), section 11.

A, who had executed certain mortgages in favour of B in respect of three cargo boats, brought a suit for a declaration that the mortgages were made *benami* in order to save the boats from attachment. B instituted a cross suit against A on the same deed for the recovery of the amount alleged to be due on the mortgage. The two suits were tried together, A's suit was dismissed and B's was decreed. A filed two separate appeals against both the decrees but his appeal in the suit brought by B was dismissed for default.

Held, in the appeal against the decree in A's suit that a final decision of the matter in question between the same parties existed and that the dismissal of A's appeal in the suit brought against him by B had the effect of making final the trial Court's mortgage decree which declared that the mortgages were not *benami* or mere colourable transactions.

Ram Kirpal v. Ram Kuari, L.R. 13 I.A., 37—*referred to*.

Anant Das v. Udai Bhan Pargas, 35 All., 187; *Dakhni Din v. Syed Ali Asghar*, 38 All., 151; *Gangadhar Kalwar v. Sakali Telini* 34 C.L.J., 281; *Isuf Ali v. Gour Chandra Deb*, 37 C.L.J., 185; *Muhammad Jan v. Duli Chand*, 3 Lah. L.J., 473; *Raman Chetty v. Muthuveerappa Chetty*, 6 L.B.R., 93; *Zaharia v. Debia*, 33 All., 51—*followed*.

Abdul Majid v. Jew Narain Mahlo, 16 Cal., 233; *Mariamissa Bibi v. Joynab Bibi*, 33 Cal., 1101; *Panchanada Velan v. Vaillhuatha Sastriah*, 29 Mad., 333—*dissented from*

The facts arising in this appeal appear from the judgment reported below.

N. C. Sen—for the Appellant.

Chari—for the Respondent.

ROBINSON, C.J., and BROWN, J.—Anwar Alli was the owner of a cargo boat. He executed three mortgages of this cargo boat in favour of Ameer Alli, the respondent. On the 3rd of July, 1922, Anwar Alli filed a suit alleging that the mortgages

* Civil First Appeal No. 129 of 1923 against the decree of this Court on the Original Side in Civil Regular No. 353 of 1922.

1924

ANWAR ALLI
SOWDAGAR
v.AMEER ALLI
SOWDAGAR.ROBINSON,
C.J.
AND
BROWN, J.

of the boat were merely a *benami* transaction and intended only to save the boat from attachment at the instance of one Abdul Rashid. He alleged that the defendant falsely set up that he was the mortgagee of the boat and threatened to have it sold, and prayed for a declaration that he was the owner of the boat, and for an injunction restraining the defendant from selling or transferring it to others.

On the 16th of November, 1922, Ameer Ali brought a suit for the recovery of Rs. 11,416 due on the three mortgages. The two suits were tried together at the request of the parties, it being agreed that the evidence in one suit should be the evidence in the other. On the 16th of May, 1923, judgment was passed in both cases, the principal judgment being written in Anwar Alli's suit which was dismissed with costs. A separate form of judgment was written in Ameer Alli's suit which was decreed for reasons given in the judgment in Anwar Alli's suit. Two decrees were drawn up. There were two issues which were common to the two suits, and both were decided in favour of Ameer Alli. Two appeals were filed by Anwar Alli, but his appeal in Ameer Alli's suit was dismissed for default, with the result that there is now a final and binding mortgage decree in favour of Ameer Alli.

The appeal in Anwar Alli's suit now comes up for decision; and it is urged that by reason of the decision of the two issues arising in this appeal having become final the principle of *res judicata* applies to the present appeal, which must be dismissed on that ground.

There was at one time considerable diversity of judicial opinion on this question. In *Abdul Majid v. Jew Narain Mahto* (1), *Mariamnissa Bibi v. Joynab*

Bibi (2), (in this case the two Judges differed and the matter was referred to a third Judge), and in *Panchanada Velan v. Vaithinatha Sastrial* (F.B.) (3), the view was taken that the appeal would not be barred by the rule of *res judicata*. These cases were all considered by a full bench of the Allahabad High Court in *Zaharia v. Debia* (4). A large number of other cases were also cited differing from the previous decisions of other High Courts, and it was held that the doctrine of *res judicata* applied and the appeal was barred. That case was followed in *Dakhni Din v. Syed Ali Asghar* (5); and in *Anant Das v. Udai Bhan Pargas* (6). It was also followed by the Lahore High Court in *Muhammad Jan v. Duli Chand* (7). The previous Calcutta rulings were not followed by the Calcutta High Court in the case of *Gangadhar Kalwar v. Sekali Telini* (8). Again, in *Isup Ali v. Gour Chandra Deb* (9), all the authorities were cited, and it was held that the principle of *res judicata* applied.

The same question has been considered by the late Chief Court of this Province in *Raman Chetty v. Muthuveerappa Chetty* (10), when *Zaharia v. Debia* (4) was followed.

It is unnecessary to deal with these authorities again in detail. The question of *res judicata* is not confined only to the provisions of section 11 of the Code of Civil Procedure as has been pointed out by their Lordships of the Privy Council in *Ram Kirpal v. Ram Kuari* (11). It was necessary that two appeals should be filed, and that was recognised.

1924

ANWAR ALLI
SOWDAGAR
v.
AMEER ALLI
SOWDAGAR.

ROBINSON,
C.J.
AND
BROWN, J.

(2) (1906) 33 Cal., 1101.

(3) (1905) 29 Mad., 333.

(4) (1910) 33 All., 15.

(5) (1910) 33 All., 151.

(6) (1912) 35 All., 187.

(7) (1921) 3 Lahore Law Journal, 473.

(8) (1918) 34 Calcutta Law Journal, 281.

(9) (1921) 37 Calcutta Law Journal, 185.

(10) (1911-12) 6 L.B.R., 93.

(11) (1883) L.R.13 I.A., 37.

1924
 ANWAR ALI
 SOWDAGAR
 v.
 AMEER ALI
 SOWDAGAR.
 ROBINSON,
 C.J.
 AND
 BROWN, J.

Anwar Alli's appeal against the decision in favour of Ameer Alli having been dismissed, the position is that there is a final and binding mortgage decree deciding that the mortgages were not *benami* and mere colourable transactions, and the dismissal of that appeal by this Court has the effect of confirming the decree of the Court below to that effect. At the time that this appeal comes to be decided there exists a final decision of the matter in question between the same parties.

That being so, it would be absolutely contrary to the principle of *res judicata* for this appeal to be competent for then it would be possible to raise exactly the same question that was decided between exactly the same parties in another appeal and arrive at a decision to the contrary effect which would simply lead to an impasse in execution proceedings.

In our opinion, there can be no doubt that the decision in *Zaharia v. Debia* (4) is the correct view to take on this question. That view has already been accepted in this province.

The appeal will, therefore be dismissed, the decree of the Court below being confirmed, with costs throughout.