

PRIVY COUNCIL

Shankarlal Patwari

Vs.

Hiralal Murarka

P.C.A.No.44 of 1948

(Lord Simonds, Sir John Beaumont and Sir Lionel Leach JJ.)

01.12.1949

JUDGMENT

SIR JOHN BEAUMONT J.

1.This is an appeal from a judgment and decree of the High Court at Calcutta in its Civil Appellate Jurisdiction dated 23rd February 1944, reversing a judgment and decree of the said High Court in its Original Civil Jurisdiction in favour of Mangtural Bagaria, the predecessor in title of the appellant, whereby it was ordered that the adult defendants personally and the infant defendants out of their shares in their joint family estate should pay to the said Mangtural Bagaria the sum of Rs. 73,186 with interest and costs.

2. The facts leading up to the suit out of which this appeal arises are long and complicated and have been related in the judgments delivered by the learned Judges in the Court of Appeal in India. No useful purpose will be served by repeating them. The only matter which has been argued in this appeal relates to what was the exact decision given by the trial Judge, Ameer Ali J.

3. The suit was a suit by Mangtural Bagaria for royalties due under a lease made in the year 1920 by Popat Velji Rajdeo of whose estate the said Mangtural had been appointed manager by the Court. The defendants were the lessees under the lease or their representatives and are the respondents in this appeal. The defence of the lessees was that the lease had been surrendered in July 1933. In answer to this defence the plaintiff challenged the surrender and also pleaded that the point was covered by res judicata.

4. The issues framed in the suit were these :

"Group-A. - 1. Is the defence barred by *res judicata* : (i) On the questions of surrender by the judgment and decree in the Dhanbad 28 of 1933 Case and appeal 27 of 38 therefrom. (ii) On the question of the plaintiff's right to sue by (a) The decree in suit No. 1571 of 1933 (b) The judgment and decree in the Dhanbad Case?

2. Have the defendants disclosed any defence in the absence of any alleged surrender to or with the leave of the Administration Court in Suit No. 2156 of 1924 in Calcutta High Court ?

Group-B. - 3. Was there a surrender?

4. If so, was it valid ? (a) In the absence of registration. (b) For non-fulfilment of the requisite conditions?

5. Was the alleged surrender *bona fide* and is it binding on the plaintiff?

5. It will be observed that the first issue in group A relates to a plea of *res judicata*. The second issue in that group raised the question whether there was any defence apart from surrender, and no such defence was suggested at the trial. Group B raised questions as to the fact and validity of the alleged surrender.

6. The plea of *res judicata* was based on a judgment of the Subordinate Judge of Dhanbad delivered on 13th August 1936, in Suit No. 28 of 1933. The appellant before the Board did not rely on the decree in Suit No. 1571 of 1933 referred to in issue 1 (ii) (a). In the Dhanbad suit the lessees sued Mangtural and the two widows and brother of the lessor for a declaration that the lease had been validly surrendered in July 1933. The learned Judge held that the suit did not lie since notice should have been served on Mangtural under section 80, Civil Procedure Code and this had not been done. The learned Judge, however, though holding that the suit did not lie, purported to decide other issues in the case. Amongst other things, he held that the notice of surrender had not been served on any of the defendants except Mangtural, and that the surrender was bad on that ground, and also for lack of tender of the amount due and absence of a registered deed. An appeal from the decree of the Subordinate Judge was brought to the High Court at Patna. Such appeal was withdrawn against Mangtural and the brother of the lessor, but a consent decree was taken against the two widows upholding the surrender.

7. On 28th April 1939, Mangtural was given leave by the High Court at Calcutta to institute the suit out of which this appeal arises. Accordingly as manager of the estate of the lessor he filed a suit against the defendants for the recovery of Rs. 64,020 due under the said lease for the period between the month of May 1933 and 30th April

1939 with interest.

8. On 20th January 1942, Ameer Ali J. stated that he would hear the issue of *res judicata* as a preliminary point and that if the issue was decided in favour of the plaintiff he would not try the issues in group B.

9. The trial duly took place before Ameer Ali J. and on 16th April 1942 he delivered judgment. The learned Judge held that Mangtural was the proper person to accept a surrender of the lease and he stated that that being the case he held on the first set of issues in favour of the plaintiff. He expressed the view that the decision of the Dhanbad Court had decided the same issue which had to be decided in his own Court and between the same persons and parties. He then stated expressly that he did not propose to go into the second group of issues. In the result he passed a decree in favour of the plaintiff.

10. The defendants appealed to the High Court of Calcutta in its appellate jurisdiction and the appeal was heard by McNair and Gentle JJ. The learned Judges held that inasmuch as the Subordinate Judge in the Dhanbad suit had held that that suit did not lie by reason of the failure to comply with section 80, Civil Procedure Code, he was bound to dismiss the suit under Order 7, Rule 11 of the Code and the findings of the Court on the merits were obiter and could not support a plea of *res judicata*. They held further that Ameer Ali J. had decided nothing but the issue of *res judicata*. Accordingly they allowed the appeal and remanded the case to the Court of first instance for trial of issues other than issue 1.

11. Before this Board it was conceded, rightly their Lordships think, on behalf of the appellant that the appeal Court was right in the view which it took as to the effect of the Dhanbad decree. Their Lordships have no doubt that the decision in the Dhanbad suit could not support a plea of *res judicata* on the merits, either in favour of or against Mangtural. The contention of the appellant before the Board was that Ameer Ali J. decided not only the issue of *res judicata* but also that the alleged surrender of the lease was invalid : that this decision was plainly right and should be upheld by the Board, though it was not considered by the Court of appeal in India. Their Lordships do not accept this contention. The judgment of Ameer Ali J. is to some extent obscure and there are passages which suggest that he thought the surrender invalid. It is however clear that he did not purport to decide anything beyond the issue of *res judicata* and he expressly stated that he was not deciding the issues in group B. Nor did he notice the question of fact and law discussed by the Dhanbad Judge upon which

the validity of the surrender depended.

12. Their Lordships see no reason to differ from the view of the Appellate Judges that the issues as to surrender were not decided by the trial Judge and if they thought it more convenient to remand the issues for trial in the Court of first instance rather than to decide the issues themselves on the material before them, that was a matter of discretion with which the Board would not interfere.

13. Their Lordships is will therefore humbly advise His Majesty that this appeal be dismissed. As the respondents have not appeared there will be no order as to costs.

Appeal dismissed.