

Phool Chand Sharma and Others

Vs

Chandra Shanker Pathak and Others

Civil Appeal No. 310 of 1960

(Syed Jafar Imam, K. Subha Rao, N. Rajgopala Ayyangar, J.R. Mudholkar JJ)

07.12.1962

JUDGMENT

AYYANGAR, J. –

This is an appeal by special leave against an order of the Board of Revenue, Uttar Pradesh which declined to order restitution under s. 144, Civil Procedure Code in the following circumstances. The father of the 1st respondent was the Zamindar who filed a suit in the court of Sub-Divisional Officer, Tehsil Iglas at Aligarh for the eviction of Ram Prasad - father of the appellants from certain plots of land situated in village Kanchiraoli in the district of Aligarh. The suit was decreed and in execution of that decree the Zamindar took possession. Thereafter Ram Prasad filed an appeal to the Additional Commissioner but this was dismissed in November, 1944. He then preferred a further appeal to the Board of Revenue but before it came on for hearing the dispute was settled and on March 28, 1948 an application was filed for recording this compromise. The term of the compromise which is of relevance to the present appeal is that Ram Prasad was to be recognised as tenant of the land in dispute; in other words, the order for eviction was nullified. The compromise was recorded and a decree in terms thereof was passed. Some attempt was made by the Zamindar to have the compromise set aside on grounds which it is not necessary to mention, but these attempts failed with the result that it left the compromise decree passed by the Board in full force. It might however, be mentioned that the Zamindar immediately obtained possession in execution of the decree of the Sub-Divisional officer, admitted one Data Ram and certain others as tenants and put them in possession of the property and this has led to all the subsequent complications in this case.

On the strength of the compromise decree Ram Prasad applied for restitution of possession under s. 144 of the Civil Procedure Code. This application was resisted particularly by Data Ram and others who had been inducted as tenants on the land, while the eviction proceedings were pending before the Additional Commissioner on appeal. The trial court allowed the application on the ground that Data Ram and others were bound by the rule of lis pendens and were not, therefore, entitled to retain the possession which they obtained during the proceedings for ejectment. From this order an appeal was taken by Data Ram and others to the additional commissioner who, for reasons which it is not necessary now to canvass, held that the newly inducted tenants could not be dispossessed and that Ram Prasad was entitled only to symbolical possession as against the Zamindar. This order was taken to the Board in revision where, however, it was dismissed. It is to challenge the correctness of this order that this appeal has been filed.

Learned Counsel for the respondent raised two preliminary objections to the hearing of this appeal. The first objection was that this appeal was barred by res judicate. To understand this objection it is necessary to state a few more facts. When the Board of Revenue upheld the order of the Additional

Commissioner declining the prayer of the appellants for restitution they filed an application for review and when this was dismissed they brought the matter before the High Court by an application made to it under Art. 226 of the Constitution. The actual judgment rendered by the High Court is not on record but it was admitted before us by learned Counsel for the appellant that the High Court dismissed the petition after elaborately discussing the merits of the contentions raised and on that ground Data Ram and others who had been let into possession by the Zamindar obtained a statutory right to possession under the U.P. Zamindari & Land Reforms Act, 1950 and could not therefore be evicted by the application of the rule of *lis pendens*. No attempt was made by the appellant to prefer any appeal against this judgment by either applying to that court and obtaining a certificate of fitness or by moving this Court for the grant of special leave. The result is that there is now a decision of the High Court which has become final and binding on the parties. Learned Counsel for the respondent therefore contends that without the correctness of the decision of the High Court being challenged before us and the finality of that judgment impaired, the appellant is not entitled to bypass that decision and seek to practically obtain a reversal of it by attacking the correctness of the decision of the Board of Revenue.

We consider this preliminary objection well-founded. Learned Counsel for the respondent relied in support of his submission on the decision of this Court in *Daryao v. The State of U.P.* [[1962] 1 S.C.R. 574.]. The question before the Court was whether, when the High Court dismissed a writ petition under Art. 226 after hearing a matter on the merits on the ground that no fundamental right was proved or contravened, a subsequent petition to the Supreme Court under Art. 32 of the Constitution on the same facts and for the same reliefs filed by the same party was permissible. This Court held that where such a petition was heard on the merits and dismissed by the High Court the decision pronounced was binding on the parties unless it was modified or reversed in appeal or by other appropriate proceedings. If thus the rule of *res judicata* were a bar even to a petition under Art. 32 which is a Constitutionally guaranteed right, it looks to us that it would be *a fortiori* so as regards an appeal under Art. 136 where the right to relief is discretionary.

Learned Counsel for the appellant invited our attention to the decision of this Court in *Chandi Prasad Chokhani v. State of Bihar* [[1962] 2 S.C.R. 276.] as lying down a rule not quite so inflexible as the decision in *Daryao's* case would suggest, that it depended upon the facts of each case and that in a proper case dependent upon the discretion of the Court, this Court was competent to waive this rule and here the appeal notwithstanding that it meant that the decision of the High Court was bypassed. No doubt, there are a few observations of S.K. Das, J., who spoke for the Court which are capable of being understood in the manner suggested by learned Counsel but as ultimately the learned Judges upheld the preliminary objection and dismissed the appeal, these observations are only by way of *obiter* and cannot outweigh the express decision on the point in *Daryao's* case. We might, however, point out that in *Indian Aluminium Co. Ltd. v. Commissioner of Income-tax, West Bengal* [(1961) 43 I.T.R. 532.] in which also the judgment was delivered by S.K. Das, J., the reasoning of the learned Judge who upheld a similar preliminary objection is more in line with the decision in *Daryao's* case [[1962] 1 S.C.R. 574.] though the latter judgment which was delivered on the same day as in the *Indian Aluminium Co.'s* case [(1961) 43 I.T.R. 532.] is not naturally referred to. The learned Judge observed :

"The question which has arisen in this appeal by way of a preliminary objection is whether in the circumstances set out above - (no appeal was preferred against the order of the High Court refusing to make a reference under s. 66(2) of the Income Tax Act) - special leave to appeal from the decision of the Tribunal dated May 29, 1956, was properly given under article 136 of the Constitution and whether the

appellant is entitled to ask this Court to exercise its discretion under the said article when it did not move against the subsequent orders of the Board and the High Court under section 66 of the Act..... We hold that special leave to appeal from the decision of the Tribunal dated May 29, 1956, was not properly granted in this case and the appellant is not entitled to ask us to exercise our power under article 136 of the Constitution, when it did not move against the subsequent orders of the Board and the High Court."

This preliminary objection therefore has to be upheld.

The other preliminary objection raised was this. The application for special leave filed by the appellant was out of time and the delay in filing it was condoned by this Court without notice to the respondent. Learned Counsel sought to urge that there were no grounds for condoning the delay and that for this reason the leave granted should be revoked. In view, however, of our decision on the first objection raised we do not consider it necessary to deal with this.

The result is that the appeal fails and is dismissed with costs.

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