Raja Bajrang Bahadur Singh

Vs

Jai Narain

Civil Appeal Nos. 735 and 736 of 1966

(S. M. Sikri, R. S. Bachawat, K. S. Hegde JJ)

08.04.1969

JUDGMENT

BACHAWAT, J. -

1. The appellant filed suit Nos. 87 of 1948 and 2/12 of 1948 in the court of the Assistant Collector, Ist Class, Pratapgarh, (a revenue court), against the respondent and 8 other parsons under Sections 60, 61 and 180 of the U.P. Tenancy Act (U.P. Act XVII of 1939), claiming a declaration that the defendants had no right to the suit lands and a decree for possession in case the defendants were found to be in possession thereof. The suits were decreed in 1948. The appellant took symbolical possession of the lands in execution of the decrees. Appeals against the decrees filed by the respondent and other defendants were dismissed by the Additional Commissioner, Faizabad. The defendants filed second appeals against the decrees. During the pendency of the appeals Rules 4 and 5 of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952, came into force. The Board of Revenue held that in view of Rules 4 and 5 the pending appeals as also the suits had abated.

2. In 1955 the respondent filed applications for restitution of the lands under Section 144 of the Code of Civil Procedure in court of the Assistant Collector, Ist Class, Pratapgarh. The appellant contested the application. One of the issues arising on the application was whether the appellant had acquired Bhumidari rights. The Assistant Collector referred this issue to the Civil Court for decision. He refused to recall the order of reference inspite of the respondent's plea that he had no power to pass the order as no question of proprietary title had arisen. On May 7, 1958, the civil court answered the issue in the negative. On February 18, 1959, the Assistant Collector allowed the application for restitution and directed that the respondent be put in possession of the lands.

3. The appellant filed appeals against the orders, dated February 18, 1958. As he was not certain about the proper forum of the appeals he took the precaution of filing the appeals in the revenue court as also in the civil court. On October 23, 1950, the Additional Commissioner, Faizabad Division held that the Revenue Court had no jurisdiction to entertain the appeals and that the appeals lay to the Civil Court under Sections 236(4) and 265(3) of the U.P. Tenancy Act. Accordingly he returned the memoranda of appeals for presentation to the proper court. The appellant filed revision petitions against the orders before the Board of Revenue. In the meantime the appeals filed before the Civil Court came up for hearing. The respondent submitted to the jurisdiction of the Civil Court. He did not raise the contention that the Civil Court had no jurisdiction to entertain the appeals. On November 12, 1960, the Additional Civil Judge, Pratapgarh, allowed the appeals and dismissed the applications for restitution. He held that (1) the appellant was in possession of the lands on the dates of the institution of the suits; (2) the board of revenue had no

power to abate the suits or to set aside the decree passed therein, and (3) the application for restitution was not maintainable as the appellant had not obtained possession of the lands in execution of any decree which had been reversed or set aside. In view of this decision, the appellant did not proceed with the pending revision petitions before the board of revenue and on November 1, 1960, the revision petitions were dismissed. On February 18, 1961, the respondent filed second appeals in the High Court against the appellate orders of the Civil Court, dated November 18, 1960. In the original memorandum of appeal, he did not take the plea that the Civil Court had no jurisdiction to entertain the appeals. For the first time on January 24, 1964, he took this plea by adding a new ground in his memorandum of appeal. The High Court held that (1) the appellant was in possession of the lands before the passing of the decree; (2) the suits had not abated and the Board of Revenue had no jurisdiction to set aside the proceedings in the suits and (3) the applications for restitution were not maintainable. The High Court, however, held that (1) appeals against the orders for restitution lay to the revenue court, (2) the Civil Court had no jurisdiction to entertain the appeals and (3) the respondent was not estopped from raising the contention. Accordingly on March 26, 1965, the High Court allowed the second appeals, set aside the orders of the Additional Civil Judge and returned the memoranda of appeals for presentation to the proper court. The appellant has filed the present appeals after obtaining special leave.

4. On behalf of the appellant it is argued that (1) the appeal from the order of the Assistant Collector, dated, February 18, 1959, lay to the Civil Court and not to the revenue court; (2) in the circumstances of the case, and in view of Section 289(2) of the U.P. Tenancy Act, the respondent was precluded from raising the objection that the appeals did not lie to the Civil Court.

5. It is common case that suit nos. 87 of 1948 and 2/12 of 1948 were of the nature specified in Group B of the fourth schedule to the U.P. Tenancy Act. In view of Section 265(2), read with Section 271(2) appeals from orders in proceedings under Section 144 of the Code of Civil Procedure arising out of the two suits lay to the Revenue Court. The appeals did not lie to the Civil Court under Sections 265(3) and 286(4), read with Section 271(2) as no question of proprietary title referred to or decided by the Civil Court. But the more important question is whether having regard to the scheme of the U.P. Tenancy Act and the circumstances of the case, the objection as to the lack of competence of the Civil Court to entertain the appeals could be raised in the High Court.

6. The U.P. Tenancy Act, 1939, consolidates and amends the law relating to agricultural tenancies and other matters connected therewith in Agra and Oudh. It repealed the Agra Tenancy Act, 1926 and the Oudh Rent Act, 1886. Chapter XIV of the Act deals with the procedure and jurisdiction of courts. Section 242 provides that certain suits and applications are cognizable by the revenue courts only. The chapter provides for appeals and revisions. No appeal lies from any decree or order passed by any court under the Act except as provided in the Act (Section 263).

7. In some cases an appeal lies to a revenue court; in other cases the appeal lies to the Civil Court. The High Court has no revisional power under Section 276 in a case in which no appeal lies to the Civil Court. It is often a question of extreme nicety whether a suit, application or appeal is congizable by the revenue court or by the Civil Court. Sections 289, 290 and 291 deal with objections regarding the proper forum.

8. Section 290 provides that where in a suit instituted in a civil or revenue court, an appeal lies to the district judge or to the 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 the first instance; and the appellate court shall dispose of the appeal as if the suit has been instituted in

the right court. The section closely resembles Section 21 of the Code of Civil Procedure and is a recognition of the principle that an objection as to the proper forum for the trial of a suit may be waived. Section 291 treats the objection as technical and provides that even where the objection was taken in the court of the first instance, the appellate court may dispose of the appeal as if the suit has been instituted in the right court. It may declare any court to be competent to try the suit and may remand the suit for fresh trial, and the competence of the trial court cannot be questioned later. With a view to avoid conflicts of jurisdiction Section 289 provides for references to the High Court. Section 289 is as follows :

> "289. (1) Where either a civil or revenue court is in doubt whether it is competent to entertain any suit, application or appeal, or whether it should direct the plaintiff, applicant or appellant to file the same in a court of the other description, the court may submit the record with a statement of the reasons for its doubt to the High Court;
>
> (2) Where any suit, application or appeal, having been rejected either by a Civil Court or by a revenue court on the ground of want of jurisdiction, is subsequently filed in a court of the other description, the latter court, if it disagrees with the finding of the former, shall submit the record, with a statement of the reasons for its disagreement to the High Court;
>
> (3) In cases falling under sub-section (1) or sub-section (2) if the court is a revenue court subordinate to the collector, no reference shall be made under the foregoing provisions of this section except with the previous sanction of the collector;
>
> (4) On any such reference being made, the High Court may order the court either to proceed with the case, or to return the plaint, application or appeal for presentation to such other court as it may declare to be competent to try the same;
>
> (5) The order of the High Court shall be final and binding on all courts, subordinate to it or to the Board."

9. Section 289 vests in the High Court a special jurisdiction. The decision of the High Court given on a reference to it under Section 289 is binding on all courts. A reference can be made under Section 289(1) if any court doubts its own competence to entertain any proceeding. The reference under Section 289(1) is optional. Without making any reference the court may refuse to entertain the proceeding on the ground of want of jurisdiction. But the court of the other description in which the proceeding is subsequently instituted is not bound by this finding, see Nathan v. Harbans Singh (AIR 1930 All 264). Before the enactment of Section 289(2) if it disagreed with the finding, it could reject the proceeding on the ground that the matter was cognizable by the other court. As neither court was bound by the finding of the other, the litigant could not get relief in any forum. Section 289(2) has been specially enacted to avoid such a deadlock. In such a situation, Section 289(2) compels the court to refer the matter to the High Court and to obtain a decision which will bind all the courts.

10. Provisions corresponding to Sections 290, 291 and 289(1) were contained in Sections 124-A, 124-B, 124-C and 124-D of the Oudh Rent Act, 1886 and Sections 268, 269 and 267(1) of the Agra Tenancy Act, 1926. It seems that the Oudh Rent Act, 1886, did not contain any provision corresponding to Section 289(2). The absence of such a provision seriously hampered the

administration of justice. In numerous cases under the Oudh Rent Act, after a suit, application or appeal was rejected by a Civil Court or Revenue Court on the ground of want of jurisdiction, the court of the other description where the proceeding was subsequently filed came to the opposite conclusion and held that the matter was within the cognizance of the former court. The decision of the court of one description including the decision of the High Court exercising appellate or revisional power over that Court was not binding upon the court of the other description. Such a situation led to great injustice. The litigant was bandied about from court to court and he could not get any relief anywhere. The Oudh Chief Court mitigated the evil by applying the doctrine that a party litigant could not approbate and reprobate in respect of the same matter. A party litigant may not be allowed to take inconsistent positions in court to the detriment of his opponent at successive stages of the same proceeding or in a subsequent litigation growing out of the judgment in the former proceeding, see Bigalow on Estoppel, 6th Ed., pp. 783, 789, Mohammed Mohdi Khan v. Musammat Sharatunnissa (Oudh Cases 32, 35, 37). On this principle it was held in Mohadeo Singh v. Pudai Singh (AIR 1931 Oudh 123), that where a revenue court upheld the plea that it had no jurisdiction to entertain a suit, the party putting forward the plea would be precluded from contending that the civil court could not entertain the suit. Likewise in Saira Bibi v. Chandrapal Singh (ILR 4 Luck 159, 166) it was held that when an appeal was originally instituted properly in the revenue court but on objection being raised by a party was dismissed on the ground that the appeal did not lie to that court, it was not open to the party to raise the objection that the appeal could not be entertained by the Civil Court. This form of estoppel arises when the litigant takes, inconsistent pleas as to jurisdiction in different courts. It cannot be pressed into service, where, as in the present case, the court in which the proceeding was originally filed suo motu raised the objection as to jurisdiction. In the present case it does not appear that the respondent raised before the revenue court the objection that it was not competent to entertain the apples. The doctrine of approbate cannot be invoked to preclude the respondent from raising the objection that the appeals did not lie to the Civil Court. But the effect of upholding his objection is that the appellant is deprived of his right of appeal altogether. His appeals cannot be entertained either by the Civil Court or by the revenue court. Section 289(2) is intended to prevent such grave miscarriage of justice.

11. Section 289(2) re-enacts the provision of Section 267(2) of the Agra Tenancy Act, 1926. The object of Section 289(2) is to avoid a deadlock between the civil and the revenue courts on the question of jurisdiction, and its provisions should receive a liberal construction. Section 289(2) applies whenever any suit, application or appeal having been rejected either by the Civil Court or revenue court on account of want of jurisdiction is subsequently filed in the court of the other description and the latter court disagrees with the finding of the former. In such a case, a reference to the High Court is compulsory and the conflict of opinion is resolved by a decision of the High Court which is binding on all courts. A court subordinate to the collector cannot make the reference without the previous sanction of the collector under Section 289(3). It is implicit in Section 289(3) that if the collector refuses to give the sanction, the case will proceed as if there is no disagreement with the finding of the former court.

12. In a case falling within Section 289(2), only the court in which the proceeding is subsequently instituted can disagree with the finding of the former court on the question of jurisdiction. If it so disagrees, it must refer the matter to the High Court; and only the High Court on such a reference can override the finding. No other court can disagree with the finding and make the reference. In our opinion, if no such reference is made, the finding of the former court on the question of jurisdiction becomes final and conclusive; and the objection that it is erroneous cannot be entertained by the appellate or revisional court or any other court.

13. In the present case the respondent did not raise any objection before the additional Civil Judge that the Civil Court was not competent to entertain the appeals. The Additional Civil Judge did not make any reference to the High Court under Section 289(2). He decided the appeal on the merits and did not disagree with the finding of the revenue court on the question of jurisdiction. Having regard to this decision the appellant did not proceed with the revision petitions filed by him against the orders of the revenue court on the question of jurisdiction. In these circumstances, it was not open to the respondent to raise the objection in the High Court that the Civil Court was not competent to hear the appeals. In view of the fact that no reference under Section 289(2) was made, the finding of the revenue court that the Civil Court was competent to entertain the appeals could not be challenged in the High Court. The case must be decided on the footing that the Additional Civil Judge, Pratapgarh, was competent to entertain the appeals.

14. On the merits the respondent has no case. The Additional Civil Judge found that the appellant was in possession of the lands on the dates of the institution of the suits. The High Court agreed with this finding. We see no reason for setting aside this concurrent finding of fact. The appellant did not obtain possession of the lands by executing the decrees passed in the two suits. Even assuming that the suits had abated and the decrees passed therein had been set aside or reversed, no case for restitution of the lands under Section 144 of the Code of Civil Procedure is made out. The Additional Civil Judge rightly dismissed the application under Section 144.

15. In the result, the appeals are allowed with costs, the orders of the High Court are set aside and the orders passed by the Additional Civil Judge, Pratapgarh, are restored.

</html