Iftikhar Ahmed and Others

Vs

Syed Meharban Ali and Others

Civil Appeal No. 1646 (N) Of 1967

(K. K. Mathew, A. Alagiriswami JJ)

26.02.1974

JUDGMENT

MATHEW, J. -

1. In this appeal, by special leave, the question for consideration is whether the High Court of Allahabad was right in setting aside the decree passed by the District Judge, Meerut, in appeal, setting aside an award passed by the arbitrator appointed under the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

2. In order to appreciate the question in issue, the following pedigree is useful :

Buniyad Ali - Smt. Kuri (his widow) (died in 1900) | ---------- | | |Smt. Tarifun Nisa Sri. Aftab Ali - Smt. Matlubun Smt. Majidun Nisa (daughter) (died in 1910) Nisa (died (daughter)(died in 1905 or in 1925) (died in 1920) 1906) | | | | ---------- | | | | Sri. Ishtiaq Smt. Kaniz Syed Meharban Ahmed Fatima Ali (Respondent | No. 1) ---------- | | |Iftikhar Ahmed Intisar Mukhtiar (Appellant Ahmed Ahmed No. 1) (Appellant (Appellant No. 2) No. 3)##

3. The appellants are the legal representatives of Ishtiaq Ahmed. In the consolidation proceedings under the Act with respect to the properties in question which originally belonged to Buniyad Ali, dispute arose between Ishtiaq Ahmed on the one hand and Meharban Ali and Kaniz Fatima on the other hand as regards the title to them. Meharban Ali and Kaniz Fatima claimed that they were co-bhumidhars of the property along with Ishtiaq Ahmed. Ishtiaq Ahmed contended that all the assets of Buniyad Ali were inherited by his son Aftab Ali and that after the death of Aftab Ali in 1910 and his widow in 1925, he became the exclusive owner of the properties as the other heirs had relinquished their rights in them. Ishtiaq Ahmed also claimed title to the properties by adverse possession. As the dispute between he parties was concerned with the title to the properties, the Consolidation Officer referred the matter to the Civil Judge, Meerut who referred the same to an arbitrator appointed under the Act. The arbitrator held that Meharban Ali and Kaniz Fatima had no title and so were not co-bhumidhars of the properties with Ishtiaq Ahmad. For reaching this conclusion the arbitrator mainly relied on a judgment of the High Court of Allahabad which, according to the arbitrator, operated as res judicata between the parties with respect to the title to the properties.

4. Both the parties filed objections to the award before the learned II Civil Judge, Meerut. He held that the judgment of the High Court relied on by the arbitrator did not operate as res judicata between the parties as regards the title to the properties and that the decision of the arbitrator, based

as it was on that judgment operating as res judicata, was manifestly wrong and the award was consequently vitiated by an error of law apparent on the face of the award. He, therefore, set aside the award and remitted the case to the arbitrator for a fresh decision.

5. The arbitrator Mr. R. P. Gupta considered the case. He came to the conclusion, on the basis of the oral and documentary evidence, that the parties were co-bhumidhars of the properties except in respect of 9 bighas 3 biswas 3 biswansis and determined their shares in the properties. The arbitrator was of the view that the judgment of the High Court was not res judicata as regards the title of the parties to the properties.

6. Against this award, Ishtiaq Ahmed filed objections before the II Civil Judge, Meerut. The Civil Judge considered the objections and found that there was no manifest error or illegality in the award and he confirmed the award.

7. Ishtiaq Ahmed preferred an appeal from this decision before the District Judge. Ishtiaq Ahmed died during the pendency of the appeal and his legal representatives the present appellants, prosecuted to appeal. The District the appeal and set aside the decree appealed from the remitted the case to the arbitrator for a fresh decision.

8. The respondents filed a revision before the High Court against the decision of the District Judge and the High Court reversed the decision and restored the decree passed by the Civil Judge confirming the award.

9. Mr. Goel appearing for the appellants submitted that the High Court went wrong in reversing the decree of the District Judge. He argued that the award was vitiated by an error of law apparent on the face of the record as the award proceeded on the basis that the judgment of the High Court did not operate as res judicata in respect of the title of the parties to the properties, and therefore, the decision of the District Judge setting aside the award was correct.

10. Now, let us consider the nature of the judgment passed by the High Court and see whether it operated as res judicata in respect of the question of title of the parties to the properties and whether there was any manifest error of law apparent on the face of the award. That judgment related to the properties in dispute and was passed in second appeal from a decree in a suit (Suit No. 600 of 1934) instituted by Meharban Ali, Kaniz Fatima and Ishtiaq Ahmed for a declaration that the decree obtained in O.S. No. 128 of 1929 by Ishari Prasad, the defendant in that suit on the foot of a mortgage deed dated November 5, 1925 executed in his favour by Matlub-un-nissa did not affect the shares of Meharban Ali and Kaniz Fatima in the mortgaged properties and that the mortgage, and the decree obtained thereon were invalid to the extent of their shares in the properties. Ishari Prasad, the defendant in that suit, contended that Matlub-un-nissa, the mortgagor alone was entitled to the properties mortgaged and that the decree obtained by him on the mortgage was valid. In substance the contention of Ishari Prasad was that Meharban Ali and Kaniz Fatima had no title to the properties as the latter and the former's mother had relinquished their shares and that the title to the properties vested exclusively in the mother, of Ishtiaq Ahmed namely, Matlub-un-nissa. The trial Court passed a decree dismissing the suit holding that Kaniz Fatima and Meharban Ali's mother relinquished their shares in the properties and that Matlub-un-nissa, the mortgagor, alone was entitled to the properties and, therefore, the mortgage, and the decree based thereon were valid. The plaintiffs in the suit (Suit No. 600 of 1934) preferred an appeal from the decree. That was dismissed. The decree dismissing the appeal was confirmed by the High Court in the second appeal filed by them.

11. There can be no doubt that by the written statement, Ishari Prasad, the mortgagee denied the title of Kaniz Fatima and Meharban Ali to the properties and set up the contention that Matlub-un-nissa, the mortgagor, from whom Ishtiaq Ahmed traced his title, alone was entitled to the properties. There was, therefore, an actual conflict of interest between Ishtiaq Ahmed on the one hand and Kaniz Fatima and Meharban Ali on the other, and it was necessary to decide the conflict in order to give relied to the defendant (Ishari Prasad) and the Court decided that the properties belonged exclusively to the mortgagor, the mother of Ishtiaq Ahmed.

12. The effect of the judgment is that Kaniz Fatima and Meharban Ali failed to establish their contention that they had title to the properties, and, the question is, could they be allowed to agitate the same question ?

13. Now it is settled by a large number of decisions that for a judgment to operate as res judicata between or among co-defendants, it is necessary to establish that (1) there was a conflict of interest between co-defendants; (2) that it was necessary to decide the conflict in order to give the relief which the plaintiff claimed in the suit; and (3) that the Court actually decided the question.

14. In Chandu Lal v. Khalilur Rahaman (AIR 1950 PC 17 : 77 IA 27 : (1950) 1 Mad LJ 241) Lord Simonds said :

It may be added that the doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided.

15. We see no reason why a previous decision should not operate as resjudicata between co-plaintiffs if all these conditions are mutatis mutandis satisfied. In considering any question of resjudicata we have to bear in mind the statement of the Board in Sheoparsan Singh v. Ramnandan Prasad Narayan Singh (AIR 1916 PC 78 : 43 IA 91 : ILR 43 Cal 694) that the rule of res judicata "while founded on ancient precedent is dictated by a wisdom which is for all time" and that the application of the rule by the Courts "should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law".

The raison d'etre of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it and to blow not now when they were blowing cold before would be completely to ignore the whole foundation of the rule. (See Ram Bhaj v. Ahmed Said Akhtar Khan (AIR 1938 Lab 571 : 178 IC 302 : 40 Punj LR 591)).

16. In the award, the arbitrator has stated that the judgment of the High Court in the second appeal would not operate as res judicata as regards the title to the properties but was only a piece of evidence. The arbitrator came to the conclusion that the respondents were in joint possession of the properties and, therefore, there was no ouster. If the judgment operated as res judicata, the respondents had no title to the properties. There was no finding by the arbitrator that by adverse possession they had acquired title to the properties at any point of time. The question which was referred to the arbitrator was the dispute between the parties as regards the title to the properties. If the judgment of the High Court operated in law as res judicata, it would be an error of law appeal in the face of the award, if it were to say that the judgment would not operate as res judicata. The

District Judge was, therefore, right in holding that the award was vitiated by an error of law apparent on its face in that it was based on the proposition that the judgment of the High Court would not operate as res judicata on the question of title to the properties. If an award sets forth a proposition of law which is erroneous, then the award is liable to be set aside under Section 30 of the Arbitration Act. This Court has held that the provisions of the Arbitration Act will apply to proceedings by an arbitrator under the Act (see Charan Singh v. Babulal (1966 Supp SCR 63 : AIR 1967 SC 57 : (1967) 2 SCJ 378)).

17. It might be recalled that the II Civil Judge set aside the first award and remitted the case to the arbitrator for passing a fresh award under Section 16 of the Arbitration Act. That was only on the basis that the arbitrator committed an error of law in relying upon the judgment of the High Court as finally determining the title to the properties. As no appeal under Section 39 of the Arbitration Act lay from an order remitting an award to an arbitrator under Section 16 of the Arbitration Act, Ishtiaq Ahmed could not have challenged the order. There is, therefore, no reason why the appellants should be precluded from challenging the correctness of that order in this appeal and getting relief on that basis.

18. We set aside the order of the High Court and allow the appeal. In the circumstances we think it would be an empty formality to restore the decision of the District Judge and remit the case again to the arbitrator. We restore the award dated March 30, 1959, passed by Mr. K. C. Govil, the first arbitrator. We make no order as to costs.

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