Kushal Pal and Others

Vs

Mohan Lal and Others

Civil Appeal No. 175 of 1968

(M. M. Mathew, P. K. Goswami, N. L. Untwalia JJ)

(P. K. Goswami, N. L. Untwalia JJ)

26.11.1975

JUDGMENT

GOSWAMI, J.-

1. In this appeal by special leave from the judgment and decree of the Allahabad High Court the only question that is raised relates to the plea of res judicata.

2. The facts so far as meterial for the purpose of this appeal are as follows.

3. The plaintiff (respondent No. 1 herein) claims to be the adopted son of one Param Lal who is the original owner of the premises in suit. Ram Sahai is the father of defendants Nos. 1 to 3 and husband of defendant No. 4. Both Param Lal and Ram Sahai died sometime in 1946. The plaintiff brought a suit being O. S. No. 114 of 1952 in the court of the Munsif of Etah, Uttar Pradesh, against defendants Nos. 1 to 6. The allegations in the plaint were that defendant No. 5, who is the maternal uncle of defendants Nos. 1 to 3 and brother of defendant No. 4 executed a rent note on November 13, 1946, on behalf of defendants Nos. 1 to 4 in favour of the plaintiff. Since they were in arrears of rent for nearly 2 1/2 years the suit was instituted for rent and possession by eviction of the defendants. Defendant No. 5 did not enter appearance to contest the suit. The defence of defendants Nos. 1 to 4 was that defendant No. 5 never executed any rent note on their behalf in favour of the plaintiff. They disclaimed tenancy and asserted their own title to the premises in suit by adverse possession.

4. The trial Court, inter alia, framed the following issues in Suit No. 114 of 1952 :

> Issue No. 3 : Is the suit barred under Articles 142 and 144 of the Limitation Act ?
>
> Issue No. 8 : Whether the suit against defendants Nos. 1 to 4 is barred by time ?

5. Apart from depending on the rent note, evidence was led by the plaintiff in the trial Court in that suit to establish that Ram Sahai was a tenant under Param Lal and the former executed rent notes, Exts. 29, 30 and 31, in favour of the latter. The trial Court refused to rely upon these rent notes and even characterised these as suspicious documents. The trial Court held that defendant No. 5 did not execute the rent note on behalf of defendants Nos. 1 to 4 and also found that

the plaintiff has failed to prove that Param Lal and after him the plaintiff has been in possession of the kothi in dispute within twelve years of the suit ..... In view of these reasons I hold that it has not

been proved that Ram Sahai and after him the defendants Nos. 1 to 4 are in occupation of the house in dispute as tenants of the plaintiff and so they are clearly in adverse possession of the house in dispute.

The trial Court dismissed the Suit No. 114 of 1952 against all the defendants.

6. The lower appellant Court dismissed the plaintiff's appeal arising out of O. S. No. 114 of 1952 (C. A. No. 152 of 1956) against defendants Nos. 2 and 3 on the ground that the appeal was barred by limitation.

7. We are not concerned with the correctness of the reasons for dismissing the appeal against defendants Nos. 2 and 3 (appellants Nos. 2 and 3 herein) on the ground of limitation. Indeed in considering the plea of res judicata correctness of the finding is not in issue. The findings arrived at in the adjudication have to be taken at their face value between the parties.

8. The appeal was also dismissed by the lower appellate Court against defendants Nos. 1 and 4 on merits after making certain observations which will be dealt with later.

9. The lower appellate Court, however, allowed the appeal against the non-contesting defendant No. 5 and decreed that the defendant No. 5

shall vacate the house in suit on his own account and pay a sum of Rs. 714 as the arrears of rent in respect thereof for the period in suit to the plaintiff.

The appeal was also dismissed against defendant No. 6, Kalawati, since dead, and we are not concerned with her and her heirs in this appeal at all although the latter have been impleaded as parties, the particular portion of the premises having been admittedly sold away by the plaintiff to one Mathura Prasad.

10. The judgment of the lower appellate Court in C. A. No. 152 of 1956 was delivered on September 17, 1958.

11. Later on the plaintiff filed a second suit (No. 6 of 1959) in the same court of the Munsif of Etah claiming declaration of right and title to and possession of the identical premises. The plaintiff and the defendants are identical in the second suit. The suit was decreed by the trial Court and affirmed by the lower appellate Court. Both the courts concurrently held -

(1) That Param Lal was the owner of the house.

(2) That Mohan Lal was the adopted son of Param Lal.

(3) That Ram Sahai was the tenant of Param Lal and, therefore, defendant Nos. 1 to 4 were also tenants of the premises in dispute.

The High Court dismissed the second appeal of the defendants (No. 1795 of 1965) arising out of this suit. Hence this appeal by special leave.

12. The High Court in Second Appeal No. 4658 of 1958 arising out of O. S. No. 114 of 1952 at the instance of the plaintiff substantially dismissed the same except that it slightly modified the decree of the lower appellate Court only with regard to the quantum of future damages against defendant

No. 5. There is no further appeal by the plaintiff from the judgment and decree in the Second Appeal No. 4658 of 1958 to this Court.

13. As adverted to earlier, it is true that the High Court observed in S. A. No. 4658 of 1958 that

as regards the question of adverse possession the lower appellate Court held that it did not arise and, therefore, no finding was given on that point.

We will assume that the observation is correct. Basing upon the aforesaid observation of the High Court and such of those as are relevant on the particular point in the judgment of the lower appellate Court, Mr. Sarjoo Prasad, on behalf of the first respondent, in answer to the plea of the appellants, submits that no question of res judicata would arise as there was no finding of the lower appellate Court in the earlier suit regarding the plaintiff's title to the premises or with regard to the adverse possession of the defendants. The learned Counsel submits that the finding of the trial Court with regard to adverse possession of the defendants became non est in view of the finding of the lower appellate Court which was even noticed by the High Court, as mentioned above. Both questions, says Counsel, are open.

14. It will be ordinarily true once there is an appeal against a judgment, the appellate order alone will be operative. Mr. Sarjoo Prasad is, however, faced with a peculiar difficulty here, in that, on dismissal of the plaintiff's appeal by the lower appellate Court, as time barred against defendants Nos. 2 and 3, so far as these two defendants were concerned, the trial Court's judgment became final between them and the plaintiff. The lower appellate Court having dismissed the plaintiff's appeal against them has affirmed this position. The High Court in the second appeal did not do anything to the contrary with regard to the appeal against defendants Nos. 2 and 3. It is, therefore, clear that so far as the appellants Nos. 2 and 3 in this appeal are concerned the finding of the trial Court that they had acquired title to the premises by adverse possession stands concluded and these two appellants can legitimately raise the plea of res judicata in the subsequent suit which is the subject-matter of appeal before us.

15. So far as defendants Nos. 2 and 3 of the earlier suit were concerned the finding of the trial Court that they had acquired title to the premises by adverse possession had become conclusive between the parties at the time when the matters came to the High Court in second appeal. At any rate the appellants Nos. 2 and 3 (who were defendants Nos. 2 and 3 in the earlier suit) can definitely claim in this Court that so far as they are concerned with regard to their title to the premises by adverse possession there is a clear finding in their favour by the trial Court which was never disturbed by any court in appeal and the same is binding on the plaintiff.

16. Besides, we find that in the memorandum of appeal before the High Court in S. A. No. 4658 of 1958 the plaintiff had taken a ground that

the lower appellate Court erred in law in dismissing the appeal against defendants Nos. 2 and 3 on the ground of limitation (ground No. 5 at page 324 of the paper book, volume II).

The High Court, however, did not record any decision on this point. It is, therefore, open to the appellants Nos. 2 and 3 before us to call in aid the finding of the trial Court in their favour that they had acquired title to the premises by adverse possession since that finding remains operative between the plaintiff and the said two defendants.

17. The position might have been different if the plaintiff in O. S. No. 114 of 1952 has merely relied

upon the rent note dated November 13, 1946, said to be executed in his favour by defendant No. 5 on behalf of defendants Nos. 1 to 4 in the earlier suit. The plaintiff would then have a different character from that of his deriving title from his adoptive father, Param Lal. Tenancy of the defendants also would have been de hors the earlier tenancy of Ram Sahai under Param Lal. It could, then, be said that in the first suit the question of the title to the property was absolutely irrelevant and that he would succeed or fail on the rent note from which he would establish a relationship of landlord and tenant between him and the defendants without any reference to title to the property or to his relationship with Param Lal and consequently to Ram Sahai's relationship with Param Lal. That is exactly what Mr. Sarjoo Prasad strenuously urges us to assume. We are afraid we cannot.

18. On the other hand, we find the plaintiff himself did not adopt that course in the first suit. The plaintiff joined issue with the defendants, with protest, with regard to the alternative case of tenancy of the father of defendants Nos. 1 to 4 under his adoptive father and produced earlier rent notes executed by Ram Sahai in favour of Param Lal. This evidence was admissible and necessary in view of issues Nos. 3 and 8 earlier quoted. The findings of the trial Court, as referred to above, were in favour of defendants Nos. 1 to 4 and against the plaintiff on the point.

19. Now, in the subsequent suit, out of which the present appeal has arisen, he has based his right to evict on the ground that he is the adopted son of the original owner and on his death he became the owner of the premises and similarly Ram Sahai, the father of the defendants, was also a tenant under Param Lal on Ram Sahai's death, the defendants Nos. 1 to 4 become tenants under Param Lal and after his death, of the plaintiff. The difficulty has arisen because the very matter about Ram Sahai's tenancy under Param Lal had been gone into in the earlier trial and the finding was reached by the trial Court in favour of defendants Nos. 1 to 4 that Ram Sahai was not tenant under the plaintiff. The lower appellate Court did not expressly disturb this finding but observed that the trial Court "probed into unnecessary matters". Even so, the suit stood dismissed against defendants Nos. 1 to 4. The lower appellate Court decreed the suit for rent and ejectment against defendant No. 5 only who "shall vacate the house in suit on his own account".

20. We may observe, in passing, the admittedly defendant No. 5 was never in occupation of the premises in suit. Hence this decree for eviction of defendant No. 5 from the premises in O. S. No. 114 of 1952 is in effect a paper decree.

21. It is true, as the High Court observed in Second Appeal No. 4658 of 1958 that

as regards the question of adverse possession the lower appellate Court held that it did not arise and, therefore, no finding was given on that point.

If this observation is held, as we have, as displacing the finding with regard to the adverse possession of the defendants, this will be only true relating to adverse possession by defendants Nos. 1 and 4 and will not bind defendants Nos. 2 and 3 in whose favour there had already been a conclusive finding of the trial Court and which was not disturbed by the lower appellate Court or in the Second Appeal No. 4658 of 1958. The second suit so far as appellants Nos. 2 and 3 are concerned must, therefore, be held to be barred by res judicata. We are prepared to give effect to the High Court's aforesaid observation about the lower appellate Court's judgment in favour of defendants Nos. 1 and 4 against whom alone plaintiff's appeals were disposed of on merits. The case of defendants Nos. 2 and 3 stands on a different footing.

22. It was contended on behalf of the respondent that the scope or the subject-matter of the earlier suit is different from that in the second suit. It is, however, difficult to accept this submission. In the earlier suit the plaintiff prayed for possession of the premises in suit by evicting the defendants who held the premises as tenants under the plaintiff on a rent note executed in his favour. Alternatively the plaintiff sought the same relief for possession of the premises relying on the status of the defendants Nos. 1 to 4 as tenants derived from the position of their father being a tenant under the plaintiff's adoptive father. In either case the relief was claimed on the plea of tenancy of the defendants. Both these pleas were rejected by the trial Court and the defendants Nos. 1 to 4 were held to mature their title by adverse possession. In the second suit out of which the present appeal has arisen, although the suit is one for declaration of title to the premises and for possession, the alternative plea set up in the earlier suit has again been reagitated to defeat the plea of adverse possession set up by the defendants and this time the court found in favour of the plaintiff.

23. It is well established that if a matter directly and substantially in issue in an earlier suit of competent jurisdiction had been finally adjudicated upon the matter becomes res judicata between the same parties with regard to the identical subject-matter in a subsequent suit. As the Privy Council observed in Krishna Behari Roy v. Bunwari Lall Roy (ILR 1 Cal 144 : 2 IA 283)

where a material issue had been tried and determined between the same parties in a proper suit, and in a competent court, as to the status of one of them in relation to the other, it cannot be again tried in another suit between them.

24. Here the parties are the same and the property for possession of which the suit was filed is also identical. The only difference is that in the second suit title to the property is brought in issue which was not an adjudicated issue in the first suit. That however, is not material for the present purpose since the plaintiff's adoptive father has been admittedly out of possession of the premises since about 1938. It is not the plaintiff's case that he or his father was in physical possession of the premises within the requisite period prior to the institution of the suit. The plaintiff, on the other hand, seeks to rely upon constructive possession through the defendants as tenants in the second trial. The matter relating to the status of the defendants as tenants is, therefore, directly and substantially in issue between the parties in both the suits for the reliefs claimed in them. It is, therefore, not possible to hold that the question of even derivative tenancy of the defendants was not directly and substantially in issue in both the suits.

25. It cannot be said that the adverse decision against the plaintiff with regard to the status of the defendants as derivative tenants, which was necessary in order to hold that the defendants had acquired title by adverse possession, was only collaterally or incidentally made in the earlier suit. For the only relief in the manner claimed in the earlier suit the decision with regard to the issue of adverse possession was directly material and relevant in that suit. The submission that the scope of the two suits is different is, therefore, devoid of substance.

26. We are unable to subscribe to the view that defendants Nos. 2 and 3 could raise the plea of res judicata before the High Court. The decision of the lower appellate Court regarding the plaintiff's appeal being barred by limitation was again res sub-judice in the High Court in S. A. No. 4658 of 1958. S. A. No. 4658 of 1958 was heard together with S. A. No. 1795 of 1965 resulting in a common judgment.

27. When second appeals arising out of two suits filed by the plaintiff are treated as connected appeals and disposed of by the High Court by a common judgment, there is, ordinarily, no question

of invoking the plea of res judicata before the High Court as the findings in the earlier suit are not till then final for the purpose of the second suit. That is the exact position here.

28. The plaintiff having not appealed against the decision in S. A. No. 4658 of 1958, defendants Nos. 2 and 3 could for the first time raise the plea of res judicata only in this Court in this appeal after the issue of adverse possession in respect of defendants Nos. 2 and 3 (appellants Nos. 2 and 3 herein) vis-a-vis the plaintiff (first respondent) had been finally decided and set at rest in the High Court in S. A. No. 4658 of 1958.

29. The Privy Council's decisions in Sheosagar Singh v. Sitaram Singh (24 IA 50 : ILR 24 Cal 616) and Ashgar Ali Khan v. Ganesh Dass (44 IA 213 : AIR 1917 PC 201 : ILR 45 Cal 442) do not support the first respondent in the peculiar history of the litigation in the present case.

30. Even in Sheosagar Singh's case (supra) while dealing with the expression "heard and finally decided", the Privy Council observed at page 58 as follows :

If there had been appeal in the first suit the decision of the Subordinate judge would no doubt have given rise to the plea (of res judicata).

This is exactly the position in the case at hand.

31. When there was no appeal in the eye of law by the first respondent against the appellants Nos. 2 and 3 to the lower appellate Court from the trial Court's decree in O. S. No. 114 of 1952, the appeal by the first respondent against other parties to the lower appellate Court could not destroy the finality of the trial Court's decision so far as the appellants Nos. 2 and 3 were concerned.

32. The plaintiff took another opportunity in the High Court by raising the question there in S. A. No. 4658 of 1958 but did not succeed. Therefore the finality of the decision with regard to adverse possession so far as the appellants Nos. 2 and 3 were concerned was not disturbed even in the High Court.

33. Even in Ashgar Ali Khan's case (supra) which followed Sheosagar Singh's case (supra), the Privy Council at page 216 observed :

It is clear, however, that although the two first courts had found against his allegation, the final court of appeal refused to determine the issue.

34. We are not required to consider here what would happen if there were also a competent appeal against defendants Nos. 2 and 3 before the lower appellate Court and the that court had refused to decide the question in their presence. As a matter of fact we are holding in favour of defendants Nos. 1 and 4 since so far as they are concerned the finality of trial Court's decision has been held to be destroyed.

35. It is submitted by the first respondent that adverse possession of defendants Nos. 2 and 3, who were minors, is not independent of the mother or eldest brother (defendants Nos. 1 and 4 respectively) and on failure of the latter's plea of adverse possession the said plea will not be available in favour of the former. We are unable to accept this submission for three reasons.

36. First, the minors' interest even lawfully represented by a party is separate and distinguishable from that party's individual interest, if any, in a particular action. Second, even in the first suit up to

the High Court the plaintiff succeeded in the eviction suit only against defendant No. 5 and "on his account" alone. Third, the second suit of eviction against defendant No. 6 or her assignees from a particular portion of the premises in suit was abandoned. There is, therefore, no difficulty to grant a decree for partial possession.

37. From the above it also follows that the principle applicable in abatement of appeals resulting in possibility of inconsistent decrees, as sought to be relied upon by the appellants, is not at all attracted in the present case.

38. Our attention was drawn to several decisions relating to the application of the principles of res judicata, but we do not find any of the decisions in support of the contention advanced by the first respondent in the peculiar facts and circumstances revealed in this appeal.

39. For example, in Girdhar Manordas v. Dayabhai Kalabhai (1884 ILR 8 Bom 174 (FB) which is a Full Bench decision it was held by the majority in that case that the plaintiffs were not barred by the judgment in the former suit. A perusal of the facts of that suit will clearly show that in the first suit the plaintiffs lost the suit for eviction of the defendants on the ground that the alleged leases were not proved. The plaintiffs gave up the battle on that plea and later on brought another suit to evict the defendants on the basis of title. The decision is clearly distinguishable from the peculiar facts of litigation with which we are concerned in the present appeal.

40. Similarly the decision in Dwarkanath Roy v. Ram Chand Aich (ILR 96 Cal 428 : 3 CWN 266 (FB)) is not of any assistance to the first respondent. In that case a decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land was held not be operate as res judicata in a subsequent suit brought by the same plaintiff for establishment of his title to the land not only against the person whose title as landlord the tenant-defendant had set up in the earlier rent suit.

41. The same observation would apply to the decision in Dalip Narain Singh v. Deokinandan Prasad Singh (AIR 1939 Pat 519 : 182 IC 329) relied upon by the first respondent.

42. The first respondent also drew our attention to the decision in Ramagya Prasad Gupta v. Murli Prasad ((1974) 2 SCC 266) in which one of us was a party We, however, find that the ratio of the decision is not at all of any aid to the respondent. This Court held in that appeal that certain appeals which arose out of a subsequent suit were not barred by res judicata since the subject-matter of the earlier suit and that the subsequent suit were entirely different.

43. In the result the appeal in partly allowed, that is to say, the Suit No. 6 of 1959 stands dismissed against defendants Nos. 2 and 3 (the appellants Nos. 2 and 3 herein) and the decree against others stands. There will be no order as to costs in this appeal.

UNTWALIA, J. (dissenting) **[illegible]**

I regret my inability to concur in the judgment delivered by my learned brother Goswami, J. for himself and Mathew, J. I proceed to give my separate judgment.

45. This appeal by special leave arises out of Original Suit No. 6 of 1958 filed by respondent No. 1 in the court of the Munsif of Etah in Uttar Pradesh. In the said suit the four appellants were defendants Nos. 1 to 4 and respondents Nos. 2, 3 and 4 were respectively defendants Nos. 5/1, 5/2

and 6. Since the only point pressed by the appellants in this appeal is that the trial of the suit was barred by the law of res judicata engrafted in Section 11 of the Code of Civil Procedure, the history of the earlier suit being Original Suit No. 114 of 1952 filed by respondent No. 1 in the same court will have to be stated.

46. The dispute relates to an ahta (a house with compound) situated in the town of Aliganj, district Etah. One Dileram was the owner of this house. He transferred it to one Kirpa Ram by a registered sale deed dated March 7, 1914. After the death of Kirpa Ram, his son Hemraj became the owner of the house and he sold it away to Bohre Param Lal by a registered sale deed dated June 11, 1923. Param Lal died in the year 1946. Respondent No. 1 claims to be the owner of the house as the adopted son of Param Lal. Respondents Nos. 2 and 3 are daughters of one Kalawati and were substituted in her place on her death. Kalawati claiming to be the daughter's daughter of Dileram, sold a small portion of the ahta to one Mathura Prasad by a sale deed dated July 31, 1951.

47. Respondent No. 1 filed Suit No. 114 of 1952 in the court of Munsif of Etah and alleged that respondent No. 4, impleaded as defendant No. 5 in that suit, was the brother of appellant No. 4 - widow of one Ram Sahai and maternal uncle of respondents Nos. 1 to 3, sons of Ram Sahai and that he had executed a rent note dated November 13, 1946 in favour of respondent No. 1 taking the house on rent on behalf of the appellants. They had sublet a portion to Kalawati who was impleaded as defendant No. 6 in that suit. Kalawati had unauthorisedly transferred the portion in her possession to Mathura Prasad. The tenancy of the appellant (defendants Nos. 1 to 4 in that suit also) and others was terminated by a notice to quit. The suit was filed for their eviction and certain other reliefs of realization of rent, etc.

48. Respondent No. 4 did not contest that suit. It was contested by the appellants and Kalawati. The appellants denied that they were the tenants of the house under respondent No. 1. They denied that he was the owner of the house and pleaded that they had acquired title by adverse possession. The learned Munsif who tried the suit framed several issues including the issues as to whether were the tenants of the house and Kalawati was their sub-tenant and whether the suit was barred under Articles 142 and 144 of the Limitation Act, 1908.

49. The Munsif found that Kalawati was the daughter's daughter of Dileram and she had been living in the small portion which she had sold to Mathura Prasad for a long time; therefore, the suit was barred under Articles 142 and 144 in respect of that portion. I may leave out of consideration the dispute in regard to this small because Mathura Prasad was not impleaded as a defendant either in the first suit or in the second suit. In the second suit, respondent No. 1 stated that he had sold the small disputed portion to Mathura Prasad. The dispute regarding this portion is, therefore, at an end. We are, in this appeal, concerned with the substantial portion of the house and the compound which has been in occupation of the appellants.

50. Although the Munsif framed issue No. 1 as to whether respondent No. 1 was the owner of the house, he did not decide this issue because while deciding the other issues, he held that it was not proved that the appellants were the tenants of the house, rather, they had been in adverse possession.

51. Respondent No. 1 filed Civil Appeal No. 182 of 1956. It was disposed of by the Civil Judge of Etah on September 17, 1958. The appeal against respondent No. 4 who was defendant No. 5 in that suit was allowed and the suit for ejectment as against him and for certain other reliefs for realization of rent etc. was decreed. The Civil Judge observed in the beginning of his judgment

that the learned Munsif did not appreciate the parties' pleading at all. He probed into unnecessary matters and did not give finding on the matters in issue .... The suit aforesaid was filed merely on the tenancy basis but the learned Munsif went into the matter if Articles 142 and 144 of the Indian Limitation Act barred the suit aforesaid and he actually gave a finding thereon. He did not frame correct issues, which all the more led him to error.

The argument in the appeal before him was confined to the question of tenancy of the appellants and sub-tenancy of Kalawati. He found the rent note dated November 13, 1946 executed by respondent No. 4 to be genuine but held that it did not establish the relationship of landlord and tenant between respondent No. 1 and the appellants. He also held that sub-tenancy in favour of Kalawati was not established and then said :

The result of the above findings, in that the plaintiff's suit against the defendants Nos. 1 to 4 and 6 must fail. His suit should of course succeed against the defendant No. 5 who has not come forward to challenge or contest the plaint all allegations against him.

After having said so in his judgment of Civil Judge also found that due to certain technical defects in the description of the guardian of defendants Nos. 2 and 3 (appellants Nos. 2 and 3 here) who were minors then, the appeal would be deemed to have been filed against them out of time. He, therefore, said :

Hence, the appeal against the defendants Nos. 2 and 3 should fail on the ground of want of limitation as well.

52. Respondent No. 1 filed Second Appeal No. 4658 of 1958 in the Allahabad High Court from the decision of the lower appellate Court on Civil Appeal No. 182 of 1956. He wanted a decree against all the appellants and one of the grounds taken in the appeal was that

the view of the learned Judge that the appeal against defendants Nos. 2 and 3 was time barred, is erroneous in law;.

53. Shortly after the decision of the lower appellate Court in Civil Appeal No. 182 of 1956, respondent No. 1 filed the second suit on November 13, 1958 which was eventually registered as Suit No. 6 of 1959. Since in the written statement filed in 1952 by the appellants in the earlier suit respondent No. 1's title to the house in question had been denied, the present suit was instituted for recovery of possession of the house on the basis of title. After tracing the history of his title respondent No. 1 asserted that the appellants were tenants of the house not only on the basis of the rent note executed by respondent No. 4 (defendant No. 6 in the second suit) but also because Ram Sahai, father of appellants Nos. 1 to 3 and husband of appellant No. 4 had been a tenant in the house under Param Lal the adoptive father of respondent No. 1, since 1938. The appellants in their written statement refuted the claim of respondent No. 1 to be the adopted son of Param Lal or that the house belonged to him. They reiterated their stand that they were not tenants of the house and claimed title by adverse possession.

54. The Munsif who tried the second suit decreed it by his judgment dated December 12, 1963 deciding all the issues in favour of respondent No. 1. The point of res judicata was answered by the Munsif against the appellants on the ground that the matter in the earlier suit was sub judicata and it had no substance either. He held that respondent No. 1 was the adopted son of Param Lal. The fantastic claim of appellant No. 4 that Kirpa Ram had gifted the house to Ram Sahai was rejected

and it was held that the house belonged to Param Lal and thereafter to respondent No. 1. He further held that Ram Sahai was the tenant of the house under Param Lal and after his death in the year 1946, the appellants became the lessees.

55. The appellants filed Civil Appeal No. 13 of 1964 in the lower appellate Court. The Temporary Civil & Sessions Judge of Etah who heard the appeal agreed with all the findings of the Munsif and dismissed the appeal. He also held agreeing with Munsif that the suit was not barred under Section 11 of the Code of Civil Procedure. The finding of the Munsif that Param lal was the owner of the house could not be assailed by the appellants before the Civil Judge. It was, however, claimed on their behalf that they had acquired title to the house in suit by adverse possession. The Civil Judge rejected their claim. The appellants filed Second Appeal No. 1795 of 1965 in the High Court from the decision of the lower appellate Court in Civil Appeal No. 13 of 1964.

56. Respondent No. 1 filed an application in the High Court for the hearing of both the second appeals together. His prayer was allowed. On the appellants' objection that the decision in the earlier suit operated as res judicata and hence Second Appeal No. 1795 should be heard later, C. B. Kapoor, J. made an order on April 19, 1966 observing that it was open to the appellants to raise the points when the two second appeals were taken up for hearing. Both the appeals were heard and dismissed by S. K. Verma, J., as he then was, by his judgment and order dated November 21, 1967. The point of res judicata was not raised before him. In Second Appeal No. 4658 of 1958 the learned Judge said :

As regards the question of adverse possession the lower appellate Court held that it did not arise and, therefore, no finding was given on that point .... The finding that defendants Nos. 1 to 4 were not the tenants of the plaintiff is one of fact and it cannot be disturbed in second appeal.

The other second appeal was dismissed on the ground that

the courts below have recorded the following categorical findings of fact :

> (1) Param Lal was the owner of the house.
>
> (2) Mohan Lal was the adopted son of Param Lal.
>
> (3) Ram Sahai was the tenant of Param Lal and, therefore, defendants Nos. 1 to 4, were also tenants of the premises in dispute.

These findings, again, are findings of fact and they cannot be disturbed in second appeal.

When a point was taken before the learned Judge that certain documents relied upon by the lower appellate Court had not been legally proved, he observed :

The finding with regard to tenancy has been recorded while the lower appellate Court was deciding the question of adverse possession. The plaintiff could have been granted a decree on the other finding recorded by the lower appellate Court, viz., that the possession of the defendants Nos. 1 to 4 was not hostile : Whether that possession originated as a result of a contract of tenancy or otherwise was wholly immaterial. Therefore, even if it be assumed that certain documents, which were not proved have relied upon, it is of no consequence.

57. As already stated, the appellants have come up in appeal to this Court by special leave from the

decree of the high Court in Second Appeal No. 1795 of 1965. Respondent No. 1 has not preferred any appeal from the decision of the High Court in Second Appeal No. 4658/1958. It is in this situation that Counsel for the appellants submitted that this appeal should be allowed and it should be held that the trial of the second suit was barred under Section 11 of the Code of Civil Procedure.

58. The question of res judicata has got to be decided with reference to the final decision in the earlier litigation because the words in paragraph 1 of Section 11 of the Code are that the matter directly and Substantially in issue in the second suit has been directly and substantially in issue in a former suit and "has been heard and finally decided". In Sheosagar Singh V. Sitaram Singh (supra) the facts were that in a former suit an issue had been raised and decided against the plaintiffs by the first Court on the question whether the defendant was not the son of A. But the High Court concurred in dismissing that suit as not properly constituted, withholding any decision of the issue then raised. The same issue was raised in a second suit. In this background Lord Macnaghten delivering the judgment of the Judicial Committee of the Privy Council said at page 58 :

To support a plea of res judicata it is not enough that the parties are the same, and that the same matter is in issue. The matter must have been "heard and finally decided". If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower court was superseded by the judgment of the court of appeal. And the only thing finally decided by the court of appeal was that, in a suit constituted as the suit of 1885 was, no decision ought to have been pronounced on the merits.

This decision was followed in the case of Ashgar Ali Khan V. Ganesh Dass (supra) while interpreting an identical expression "finally decided" occurring in Section 10 of the British Baluchistan Regulation IX of 1896. The facts of this case were that the appellant in pursuance of a deed of dissolution of partnership executed a bond for the payment of a sum of money to the respondent. He sued to set aside the bond on the ground of fraudulent misrepresentation as to the amount due. The trial Judge and on appeal the District Judge held that the alleged fraud was not established and dismissed the suit. Upon a further appeal to the Judicial Commissioner, it was held without entering into the merits that the appellant could avoid the bond as he did not claim to avoid the deed. In a subsequent suit by the respondent upon the bond the appellant raised as a defence the same case of fraud. The respondent pleaded the bar of res judicata in the trial of the issue of fraud. Rejecting the plea Mr. Ameer Ali delivering the judgment on behalf of the Board has said at page 216 :

It appears to their Lordships that the contention is well founded."The matter in issue" in the present suit is no doubt the same as in the defendant's own action. It is clear, however, that, although the two first courts had found against his allegation,the final court of appeal refused to determine the issue. Section 10 of the Regulation creates an estoppel by judgment only when the "matter in issue" has been "finally decided". These words have received judicial interpretation in the case of Sheosagar Singh v. Sitaram Singh.

59. A Full Bench of the Madras High Court in the case of (Maruvada) Venkataratnama v. M. Krishnama (AIR 1921 Mad 21 : 13 MLW 25 (FB)) followed the above two decisions of the Privy Council. Abdur Rahim, O. C. J. said at page 22, column 2 :

That is just what Section 13 requires; there must be a final decision. The plaintiffs, or rather the persons whose interest they represent, sought a decision in their favour on two questions on the

merits. The court of appeal decided against them on one question and refused to decide the other question, apparently because they thought it unnecessary to do so in that suit. I am of opinion that, under the circumstances, the plea of res judicata fails and the appeal should be dismissed with costs.

60. Applying the principles aforesaid, simpliciter, to the facts of this case there should be no difficulty in holding that the trial of the three issues, namely the issue of respondent No. 1 being the adopted son of Param Lal, his title to the house, and the appellants not acquiring any title by adverse possession, is not barred by res judicata. The first two issues were not decided in the earlier suit even by the trial Court. The third issue, although decided by the trial Court, was thought unnecessary to be decided within the frame of the earlier suit by the lower appellate Court and the High Court. The final decision of the High Court clearly confined the decision in the earlier suit to the issue of establishment of relationship of landlord and tenant in regard to all the appellants. The High Court also said that the question of tenancy could be gone into in the second suit to repel the appellant's claim of having acquired title to the house by adverse possession. Failure of respondent No. 1 to establish the relationship of landlord and tenant between him and the appellants did not, ipso facto, lead to the conclusion that they had any hostile title to the house.

61. But learned Counsel for the appellants endeavoured to advance an ingenious argument. He pointed out that the finding of adverse possession recorded in favour of appellants Nos. 2 and 3 by the trial Court in the earlier suit remained undisturbed, as the lower appellate Court dismissed the appeal as against them on the ground of limitation and hence so far they are concerned the trial of the same issue as against them was barred on the ground of res judicata. In my opinion there is no substance in this point. The lower appellate Court did not intend to pass any inconsistent decree or decision. The lower appellate Court did not make any distinction between the case of the said two appellants who were minors and the case of their brother appellant No. 1 and their mother appellant No. 4 on the question of their acquiring title by adverse possession. In the earlier portion of the judgment when the observations were made that the Munsif had unnecessarily tried the issue, they were made in respect of all the defendants. But the dismissal of the appeal as against appellants Nos. 2 and 3 was also rested on the ground of limitation by use of the words "as well". When the matter came to the High Court, the High Court clearly rested its judgment only on the basis of the finding that there was no relationship of landlord and tenant between respondent No. 1 and the appellants. A special ground, as pointed out above, had been taken by respondent No. 1 in his second appeal that the dismissal of appeal against appellants Nos. 2 and 3 on the ground of limitation was erroneous in law. Although the High Court in express language did not record any finding in that regard by necessary implication, it must be deemed to have done so when it maintained the dismissal of the suit against all the appellants only on the ground of non-establishment of the fact of their being tenants of the house. If the point of res judicata, as presented here, had any substance, it was available to the appellants in the High Court also. Although the two second appeals were heard together, pursuant to the order dated April 19, 1966 made by Kapoor, J. the point of res judicata could be and ought to have been raised. It could be argued even in the High Court, as was done here, that there was a finality of the decision on the question of adverse possession in the judgment of the trial Court given in the earlier suit so far as appellants Nos. 2 and 3 were concerned and, therefore, the second suit either ought to fail in toto or at least against the said two appellants on the ground of res judicata. But no such argument was advanced before the High Court. In these circumstances also I feel no difficulty in coming to the conclusion that the final judgment of the High Court in the earlier suit rested only on the ground of non-establishment of relationship of landlord and tenant between the parties. The question of adverse possession was mutilated and obliterated finally by the final decision of the High Court in the earlier litigation. That being so, the principle to law enunciated by the Privy Council in the two decisions referred to above are

applicable to the facts of the instant case and the decree of possession made in the second suit on the ground of title and right to possession of respondent No. 1 is not vitiated at all on the ground of res judicata.

62. In the result I would dismiss the appeal but make no order as to costs.

ORDER##

63. In accordance with the judgment of the majority, the appeal is partly allowed. There will be no order as to costs.

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