Smt. Gangabai W/o Rambilas Gilda

Vs

Smt. Chhabubai W/o Pukharajji Gandhi

Civil Appeal No. 1537 of 1970

(D.A. Desai, R.S. Pathak JJ)

06.11.1981

JUDGMENT

PATHAK, J. –

1. This appeal by special leave arises out of a declaratory suit in respect of title to a house property.

2. The respondent filed a suit in the Court of the Second Joint Civil Judge, Amravati alleging that the house situated near Sarafa Bazaar in Amravati had been purchased by her in 1950 for Rs. 4000 and thereafter improvements had been effected by her to the property. Being in need of money, she entered into an agreement with the appellant for a loan of Rs. 2000/- and it was decided that simultaneously she should execute a nominal document of sale and a rent note. These documents were executed on January 7, 1953. She alleged that the documents were never intended to be acted upon, and that the rent paid by her represented in fact interest at 18 per cent on the loan. She continued in possession of the house property throughout and, it is said, carried on repairs from time to time. It was stated that the appellant was attempting to enforce the document as a sale deed by filing suits in the Court of Small Causes for recovery of rent. As two suits had results in decrees, she considered it necessary to file the present suit for a declaration that she was, and continued to be, owner of the house property. In defence, the appellant maintained that the sale deed represented a genuine transaction and ownership of the house property had passed to the appellant. It was pleaded that the decrees passed by the Court of Small Causes operated as res judicata barring the respondent from pleading that the sale deed was merely a nominal transaction. Reliance was also placed on Section 92 of the Indian Evidence Act.

3. The trial held that the sale deed was never intended to be acted upon and decreed the suit. The appellant appealed to the District Court, Amravati, but the learned District Judge did not accept the case that a sale had taken place. He held, however, that the transaction between the parties constituted a mortgage. He modified the trial court decree to conform to that finding. The High Court of Bombay, in second appeal, did not agree with the finding of the lower appellate court that the transaction was a mortgage and affirmed the findings of the trial court that the sale deed and rent note were sham documents, that the decrees of the Court of Small Causes did not operate as res judicata and that Section 92 of the Indian Evidence Act did not prevent the respondent from establishing the true nature of the transaction. Accordingly, the High Court set aside the decree of the lower appellate court and restored that of the trial court.

4. When this appeal was heard by us, it appeared that the parties may settle the dispute by negotiated compromise. It seems, however, that no compromise has been possible. Accordingly, we proceed to dispose of the appeal on its merits.

5. Two points have been raised before us. The appellant urged that the Small Cause Court decrees, in view of the general principles of res judicata, precluded the trial of the question whether the sale transaction was a genuine transaction. The other point concerns the operation of Section 92 of the Evidence Act.

6. Two successive suits filed by the appellant against the respondent in the Court of Small Causes for recovery of arrears of rent. In each suit the appellant contended that she was the owner of the property and the respondent was her tenant. The tenancy was alleged on the basis of the document dated January 7, 1953 which on its terms purported to be a sale deed by the respondent in favour of the appellant. The respondent resisted the suits. The Court decreed the suits on the finding that the document was a sale deed, and therefore the respondent was not the owner of the property but merely a tenant of the appellant. The question is whether this finding operated as res judicata in the instant suit. The High Court repelled the plea of res judicata on the ground that Section 11 of the Code of Civil Procedure governed the case, and that as a Court of Small Causes is not competent to try a suit for a declaration of title to immovable property, the Court which passed the decrees relied on by the appellant was not competent to try the present suit and therefore an imperative condition of Section 11 was not satisfied.

7. It is contended before us on behalf of the appellant that the High Court erred in applying the statutory provisions of Section 11 of the Code, and should have invoked instead the general principles of res judicata. On that, it is submitted, all that was necessary to find was whether the Court of Small Causes was competent to try the two earlier suits and decide the issues arising therein. We have been referred to Gulabchand Chhotalal Parikh v. State of Bombay where this Court has taken the view that the provision of Section 11 of the Code are not exhaustive with respect to an earlier decision operating as re judicata between the same parties on the same matter in controversy in a subsequent regular suit, and that on the general principal of res judicata, any previous decision on a matter in controversy, decided after full contest or refer affording fair opportunity to the parties to prove their case by a court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary, it was said, "that the court deciding the matter formerly be competent to decide the subsequent suit of that the former proceedings and the subsequent suit have the same subject-matter". The observations were made in considering the question whether Article 226 of the Constitution could operate as res judicata in subsequent regular suits on the same matters in controversy between the same parties.

8. A number of other cases have been cited on behalf of the appellant in support of the plea of res judicata. We have considered them and we do not think that they help the appellant. In Muhammad Abdul Ghafur Khan v. Gokul Prasad the Allahabad High Court limited itself to observing that a Court of Small Causes possessed a discretion on whether to return the plaint under Section 23, Provincial Small Cause Courts Act on a finding that the relief claimed depended on proof of title. The same High Court in Madan Kishor v. Mahabir Prasad merely observed that it was for the Court of Small Causes to decide under Section 23 of the Provincial Small Cause Courts Act whether a question of title was invoked in the suit and on finding so it was open to it to return the plaint. That was also the view expressed by it in Ram Dayal Sonar v. Sukh Mangal Kalwar. So also in Ganga Prasad v. Nandu Ram, the Patna High Court said that the Court of Small Causes had power under Section 23 to return the plaint where it was of opinion that the question of title raised was so intricate that it should not be decided summarily. To the same effect was the view expressed by the Lahore High Court in Ganesh Das v. Feroz Din. In Puttangowda Bin Mallangowda Patil v. Nilkanth Kalo Deshpande, the Bombay High Court declared that a Court of Small Causes could render a finding on an issue as to title to immovable property but only in a suit which did not ask for that

relief and merely for payment of a sum of money. Our attention was drawn to Asgarali Roshanalli v. Kayumalli Ibrahimji, but we find nothing there of assistance to the appellant. Reliance was placed on the decision of the Allahabad High Court in Lalla Jageshwar Prasad v. Shyam Behari Lal. There a learned Single Judge took the view that as a Court of Small Causes is a court of exclusive jurisdiction the restrictive conditions imposed by Section 11 of the Code of Civil Procedure requiring "two-fold competency" of the court whose decisions is to operate as res judicata cannot be invoked. It was sufficient, he observed that the decision had been rendered by a court of competent jurisdiction and it was not necessary that that court should also be competent to decide the subsequent suit. the judgment was brought in appeal to this Court but while disposing of the appeal, Shyam Behari Lal v. Lalla Fageshwar Prasad this Court declined to decide whether a Court of Small Causes could be regarded as a court of exclusive jurisdiction. We find, however, that the view taken by the High Court in Lala Fageshwar Prasad was expressly overruled by a Full Bench of that High Court in Manzural Haq v. Hakim Mohsin Ali and it was laid down that a Court of Small Causes could be described as a court of "preferential jurisdiction" but not as a court of "exclusive jurisdiction". It was also held by the Full Bench that a decision rendered by a Court of Small Causes in a suit for arrears of rent would not operate as res judicata in a subsequent suit filed in the Court of the Munsif.

> 2. AIR 1914 All 527 : 12 All LJ 334 : 25 IC 81 3. AIR 1929 All 816 : 119 IC 285 4. AIR 1937 All 676 : 1937 All LJ 727 : 171 IC 736 5. AIR 1916 Pat 75 : 1 Pat LJ 465 : 20 Cal WN 1080 : 37 IC 129 6. AIR 1934 Lah 355 (I) : 150 IC 980 7. 15 Bom LR 773 : ILR 37 Bom 675 : 20 IC 974 8. AIR 1956 Bom 236 9. AIR 1967 All 125 : All WR 782 (HC) 10. (1970) 3 SCC 591 11. AIR 1970 All 604 : 1970 All LJ 670 : 1970 All WR 419 (HC)

for recovery of arrears of rent for a different period and for ejectment. That the principle of res judicata could not be availed of where a decision given by a Court of Small Causes we relied on in a subsequent regular civil suit was the view also taken by the Punjab High Court in Pateshwari Parshad Singh v. A. S. Gilani.

9. It seems to us that when a finding as to title to immovable property is rendered by a Court of Small Causes res judicata cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as res judicata the finding must be one disposing of a matter directly and subsequently in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. It has long been held that a question of title in a small cause suit can be regarded as incidental only on the substantial issue in the suit and cannot operate as res judicata in a subsequent suit in which the question of title is directly raised (Poholi Mullick v. Fukeer Chunder Patnaik, Chet Ram v. Ganga, Anwar Ali v. Nur-ul-Haq and Khandu Valad Keru v. Tatia Valad Vithoba. See also Mohd. Yusuf v. Abdul Wahid and S. A. A. Annamalai Chettiar v. Molaiyan). Our attention has been drawn to Explanation VIII to Section 11 in the Code of Civil Procedure recently inserted by the Code of Civil Procedure (Amendment) Act, 1976. Section 97(3) of the Amendment Act declares that the new provisions applies to pending suits, proceedings appeals and applications. In our opinion the Explanation can be of no assistance, because it operates only where an issue has been heard and finally decided in the earlier suit.

10. Accordingly, we hold that the finding rendered by the Court of Small Causes in the two suits

filed by the appellant that the document executed by the respondent is a sale feed cannot operate as res judicata in the present suit.

11. The next contention on behalf of the appellant is that sub-section (1) of Section 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parol evidence in support of the contention. Section 91 of the Evidence Act provides that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any

12. AIR 1959 Punj 420 : 61 Punj LR 875 : ILR 1959 Punj 1503. 13. (1874) 22 Suth WR 349 14. 1886 All WN 44 15. (1907) 4 All LJ 517 : 1907 All WN 218 16. (1871) 8 Bom HCRAC 23 (24) (DB) 17. AIR 1948 All 296 : 1948 All LJ 62 : 1948 AWRHC 63 18. AIR 1970 Mad 396 : (1970) 2 Mad LJ 562

matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, Sub-section (1) of Section 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to Section 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties (Tyagaraja Mudaliyar v. Vedathanni). The trial court was right in permitting the respondent to lead parol evidence in support of her plea that the sale deed dated January 7, 1953 was a sham document and never intended to be acted upon. It is not disputed that if the parol evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must also fail.

12. In the result, the appeal is dismissed with costs.

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