Mohan

Vs

Anandi (Smt) and Others

Civil Appeal No. 1994 of 1987

(N. P. Singh, K. Venkataswami JJ)

12.03.1996

JUDGMENT

K. VENKATASWAMI, J. -

1. The only question that was argued in this appeal by the learned Senior Counsel for the appellants, Shri V.A. Bobde was whether the present suit out of which this civil appeal arises was hit by the principles of res judicata. We may at once point out that on this issue, the trial court, the first appellate court and the High Court have concurrently found that the suit was not hit by the principles of res judicata. Nonetheless, learned Senior Counsel strenuously argued the matter to persuade us to hold that the present suit was barred by the principle of res judicata.

2. Before we go into the details of the matter, we would like to point out that this case on an earlier round of litigation came up before this Court in Civil/Appeal No. 473 of 1966 when this Court by judgment dated 3-3-1971 remanded the case to the trial court to consider and decide the issued relating to res judicata. The trial court considered and decided the issue after remand in the negative. The first appellate court and the High Court concurred with the view taken by the trial court. Aggrieved thereby, the appellant has preferred this appeal to the Supreme Court.

3. The issue of res judicata relates to the legality, validity and binding nature of a gift deed dated 2-5-1951 executed by one Bhiwa (father of the respondents) in favour of the respondents herein.

4. The relevant and brief circumstances under which the present appeal came to be filed may now be noted.

5. Bhiwa was the original owner of the suit property. He was the father of the respondents herein. As a result of compromise between the said Bhiwa and his wife Mendri in Civil Appeal No. 21-A of 1942, the latter got 1/4th share of the suit property. Under two gift deeds, she had given away that property in favour of her two daughters, viz., Respondents 1 and 2. The said Bhiwa by a gift deed dated 2-5-1951 registered on 23-8-1951 gave the balance of the suit property to the respondents herein. The said Bhiwa had also sold the suit property to the appellant herein by way of sale deed dated 13-5-1951. As the appellant claimed title to the suit property on the basis of the said sale deed dated 13-5-1951, the respondents were obliged to file the present suit (No. 46-A of 1951) for declaration of their title to the entire suit property and recovery of possession. The trial court by its first judgment held that the gift deed executed by Bhiwa was fraudulent and consequently not binding on the appellant herein. However, the trial court granted decree in favour of the respondents so far as 1/4th share given to Respondents 1 and 2 by their mother was concerned. The respondents filed appeal against the judgment of the trial court in not granting full relief and the appellant filed

cross-objections to the extent he failed in the suit. The lower appellate court dismissed the appeal filed by the respondents herein and allowed the cross-objections of the appellant. In the result, the suit filed by the respondents in its entirety stood dismissed by the appellate court. The appellate court while dismissing the suit found that the gift deed dated 2-5-1951 was fraudulent and antedated. It further held that the suit itself was barred by the principle of res judicata. Aggrieved by the judgment and decree of the lower appellate court, the respondents preferred second appeal to the High Court of Bombay (Nagpur Bench). The learned Single Judge of the High Court set aside the judgment and decree passed by the appellant court dismissed the suit filed by the respondents and remitted the matter to the trial court for fresh disposal in the light of the observations made by him. The learned Judge in the course of the judgment found that the courts below went wrong in entertaining the plea regarding fraudulent nature of the gift deed dated 25-5-1951 as well as the antedating of the same. Consequently findings on those aspects were set aside. However, as the plea of res judicata was taken for the first time in the first appellate court, the High Court remitted the matter to the trial court to go into the question of res judicata after allowing the parties to amend the pleadings. The High Court made it clear that the parties will not be permitted to amend the pleadings regarding fraud, collusion and antedating in respect of the gift deed dated 2-5-1951. Aggrieved by the judgment of the High Court, the appellant preferred civil appeal to this Court being CA No. 473 of 1966. That civil appeal was disposed of by judgment dated 3-7-1971. This Court confirmed the findings and conclusions of the High Court and consequently dismissed the appeal. This is how the matter went to the trial court once over for adjudication on the issue relating to res judicata. As noticed earlier after remand all the three courts have concurrently held that the plea of res judicata is not available to the appellant herein.

6. Let us now give the facts in brief relevant for considering the issue of res judicata.

7. The appellant along with three others (co-plaintiffs) filed Civil Suit No. 47-B of 1951 against Bhiwa for recovery of a sum of Rs 506 on 23-8-1951. Simultaneously, an application for attachment before judgment under Order 38 Rule 5 was also made in that suit. The trial court initially allowed the application for attachment before judgment of the property dealt with in the gift deed mentioned above. Aggrieved by that, the respondents herein preferred an application under Order 21 Rule 58 to raise the attachment before judgment and the trial court after hearing the parties raised the attachment by an order dated 28-9-1951.

8. While the matter stood at that stage and the suit was pending, the appellant along with three others filed an independent Civil Suit No. 42-A of 1952 under Order 21 Rule 63 CPC (before the CPC was amended by 1976 Act) challenging the order of the civil court dated 28-9-1951 raising the attachment at the instance of the respondents herein in Civil Suit No. 47-B of 1951. That suit viz. 47-B of 1951 was decreed on 30-9-1952 against Bhiwa. The said Bhiwa preferred an appeal against the appellant Mohan along though there were three other co-plaintiffs. That appeal was numbered as CA No. 64-B of 1952. The learned Additional District Judge, Bhandara while allowing the appeal by order dated 27-2-1953 found that the document on the basis of which the appellant and the three other co-plaintiffs filed Civil Suit No. 47-B of 1951 was obtained by fraud. The appellant who was respondent in the said appeal did not challenge that appellate order and thus allowed that to become final. It must be noted that in the light of the abovesaid appellate order whatever rights or title the appellant had to attach, the property in execution of the decree passed in Civil Suit No. 47-B of 1951 stood completely extinguished. In other words, the appellant on his own had no right to continue the proceedings in Civil Suit No. 42-A of 1952 which was filed under Order 21 Rule 63 and was dismissed by the trial court. In order to get over that difficulty it appears the appellant purchased the decree which stood intact in favour of his three co-plaintiffs and got himself

substituted in their place in the decree passed in Civil Suit No. 47-B of 1951 and on that basis he continued the proceedings in Civil Suit No. 42-A of 1952 by preferring an appeal against that decree in Civil Appeal No. 4-A of 1956. It must be noted that his continuance to file and proceed in Civil Appeal No. 4-A of 1956 was not in his own right but as an assignee or transferee of the rights of his co-plaintiffs as noted above. In this appeal, namely 4-A of 1956, a finding was given to the effect that the appellant was entitled to attach 4.83 acres of land Khasras Nos. 472/54 and 485/29 (properties dealt with in gift deed referred to above).

9. It is the contention of the learned counsel for the appellant that the judgment rendered in Civil Appeal No. 4-A of 1956 operates as res judicata in the present suit.

10. The High Court after thoroughly examining the pleadings observed as follows :

> "I have gone through the copy of the plaint in Civil Suit No. 42-A of 1952. In my view the real issue in this suit was as to whether the land admeasuring 4.83 acres within Khasras Nos. 472/54 and 485/29 could be attached or not ? In my view, the validity of the gift deed dated 2-5-1951 (Ex. P-3) was not directly and substantially in issue. The emphasis of Mohan in his application for attachment before judgment as well as in the plaint in Civil Suit No. 42-A of 1952 was on the ground that it was Bhiwa who was throughout in possession of Khasras Nos. 472/54 and 485/29. Mohan has also referred to the dispute between Bhiwa and Mendri and asserted that Mendri never got possession of the land in dispute and it was only Bhiwa who was throughout in possession of the same. He also referred to the proceedings under Section 245 of the Code of Criminal Procedure between Bhiwa and Mendri which ended in favour of Bhiwa on 3-2-1948. In my view, all these narrations are only to emphasize that Bhiwa was in possession of the suit property throughout. The question of possession and the question of title are two different things. Man may be in possession of a property and yet he may not have any title to that. The sum and substance of the case of Mohan was that since Bhiwa was throughout in possession of the suit land, the same was liable for attachment in execution of the decree against Bhiwa. This will also be clear from para 8 of the plaint in Civil Suit No. 42-A of 1952 which reads thus :
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> 'The suit to cancel the order dated 28-9-1951 which is filed herewith. The plaintiff will file other documents on the first date.'"

11. We entirely agree with the above well-reasoned conclusion of the High Court.

12. Moreover, the learned counsel for the appellant placed heavy reliance on an observation in the appellate judgment in Civil Appeal No. 4-A of 1956 which reads as follows :

> "The only point to be decided is whether 4.83 acres belong to Bhiwa and not to the defendant. None of the defendants claim title on the basis of the gift deed dated 2-5-1951. There facts clearly show that the gift deed is fictitious. It must have been executed for defrauding the plaintiffs' claim."

13. If we read the last sentence in the above extract in isolation that might support the contention of the learned counsel for the appellant. However, the conclusion of the Appellate Judge in para 14 which is the relevant part in the judgment cannot be ignored. That part reads as follows :

> "14. The plaintiffs are not entitled to the declaration claimed by them in the last para of the plaint as their suit is under Order 21 Rule 63. I, however, think that in the ends of justice, it should be declared that the above land is liable to attachment and sale in execution of the decree in Civil Suit No. 47-B of 1951."

14. If this part of the judgment is read along with para 7 extracted above, we cannot find fault with the conclusion reached by the High Court, namely, that in the present suit the decision in Civil Appeal No. 4-A of 1956 will not operate as res judicata.

15. In view of the above discussion and in the light of the narration of facts, we conclude that no interference is called for in this appeal. However, we feel from the conduct of the parties that there may not be an end to the litigation which started in the year 1951 and came to this Court on an earlier occasion. In the best interest of both parties and to do complete justice and in order to put an end to this litigation between the parties, while dismissing the appeal we make the following order.

16. The appellant shall hand over vacant possession of the suit lands to the respondents herein within three months from this date and if the appellant hands over peacefully vacant possession to the respondents within the above stipulated period of three months, he will not be liable for mesne profits. If he fails to do so, the respondents will be entitled to execute the decree including for the mesne profits. There shall be no order as to costs.