ALLAHABAD HIGH COURT

Mata Prasad

Vs

Ram Charan Sahu

(Muhammad Rafiq and Piggott, JJ.)

02.05.1914

JUDGMENT

Muhammad Rafiq and Piggott, JJ.

1. This is on appeal from ah order of the learned Additional District Judge of Gorakhpur, remanding the case under order XLI, Rule 23, of the Code of Civil Procedure. The circumstances which led to the making of that order are as follows: Baijnath and Jagannath were two brothers who were members of a joint Hindu family. In 1878 a simple money decree was passed in favor of Baijnath against one Ramjas. There was a partition among the two brothers, Baijnath and Jagannath, in 1881 when it was declared that Jagannath had also a share in the decree of 1878. Subsequent to the partition, among the two brothers they applied jointly for the execution of the decree of 1878 against Ramjas. In execution of that decree the entire village of Karma with some other property was attached on the 20th of September, 1884. During the continuance of that attachment and before the property was brought to sale, Ramjas executed a deed of mortgage in respect of 8 annas of village Karma in favor of the defendants, first party. On the 10th of January, 1891, while this attachment was still pending, Ramjas executed a deed of sale in respect of 9 annas, 6 pies, of village Karma out of 16 annas in favor Musammat Sheolagna, the mother of the sons of Jagannath. The consideration of the sale deed consisted of the decretal amount due from Ramjas and Rs. 127 cash. Baijnath and Jagannath had died prior to the execution of the sale-deed. Rupees 127 were paid in cash to Ramjas and the remainder of the consideration was left in

the hands of the vendee for payment of the decree of 1878 and another decree Which Baijnath alone held against Ramjas. In the early part of 1893 the defendants, first party, brought a suit on foot of their mortgage for recovery of the money due on it by sale of the mortgaged property, The suit was brought against the son of Ramjas, as Ramjas had already died, and also against Musammat Sheolagna. She resisted the suit, principally on the ground that she was a benamidar and that the real purchasers under the sale deed of the 10th of January, 1891, were her sons who should be brought on the record as defendants in the case. This allegation of hers was denied by the defendants, first party, who were plaintiffs in that case. On their denial an issue was framed as to whether Musammat Sheolagna was a benamidar or not. The learned Subordinate Judge who tried the case held that she was not a benamidar and on the merits of the case decreed the claim for recovery of the mortgage money by sale of the mortgaged property. The defendants, first party, put their decree into execution and 6 annas of village Karma, which included admittedly 4 annas out of 9 anna 6 pie share conveyed by the deed of the 10th of January, 1891, were put up to auction and purchased by the plaintiffs decree-holders themselves. They obtained possession through the court on the 14th of April, 1900. On the 16th of December, 1911, the sons of Jagannath, plaintiffs respondents in the present case, sued in the court of the Subordinate Judge of Gorakhpur for the recovery of possession of 4 annas out of 6 annas sold in execution of the decree of the 2nd of June, 1893, on the allegation that they were the real purchasers under the deed of the 10th of January, 1891, and were not bound by the decree and sale in favor of the defendants, first party, whose mortgage they challenged on several grounds. The defendants in the case objected to the suit on the ground, among others, of res judicata. The learned Subordinate Judge held that the claim was barred by the rule of res judicata and dismissed it. On appeal the learned Additional Judge took a different view and held that the rule of res judicata did not apply and remanded the case for trial on the merits. The point, therefore, in appeal before us, is whether the claim of the plaintiffs respondents is barred by res judicata. It is urged on behalf of the appellants that on the admitted statements of the plaintiffs respondents in their plaint their mother Musammat Sheolagna was a benamidar for them, and if she was a benamidar for the plaintiffs respondents a decree passed against her in that capacity is binding upon the plaintiffs also, if the parties in the present litigation are the same who. were parties in the former litigation and the questions in issue were the same. In support of this view the learned advocate for the appellants relies on *Khub Chand v. Narain Singh*[1] *Nand Kishore Lal v. Ahmad Ata*[2] *Tad Ram v. Vmrao Singh*[3] and *Kaniz Fatima v. Waliullah*[4] We do not think that the rule of res judicata is applicable to the circumstances of the present case. It appears to us that the rule has been made applicable in cases of decrees in favor of or against a benamidar where the real owner has allowed the dispute to be fought out between his benamidar and a third party and has abstained from coming forward. The principle upon which the rule has been applied to cases fought in the name of a benamidar is well expressed in *Gopi Nath Chobey v. Bhugwat Pershad*[5] where the learned Judges held that "the proper rule is that in the absence of any evidence to the contrary it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself ". In other words, if the litigation is carried on with the full knowledge and authority of the real owner and the latter does cot wish to come forward he is bound by the decree. In the present case Musammat Sheolagna protested that she was a benamidar and she did not want to carry on the litigation which the defendants first party, brought against her, though not in her capacity as a benamidar, but wanted her sons to be brought on the record as defendants in the case. She gave information of the real state of the transaction of the 10th of January,1891, to the defendants, first

party who not only failed to take advantage of this information but contradicted it. It cannot, therefore, be said that the rule contended for by the learned advocate for the appellants is applicable to the circumstances of the present case. Moreover, the decree against Musammat Sheolagna was not passed as benamidar for her sons but on an express finding that she was the real owner and not a benamidar of her sons. The rule, therefore, that a decree against the benamidar binds the real owner does not hold good in the present case. There is another consideration why the plea of res judicata should not be given effect to in this case. There were certain defenses open to the present plaintiffs which were not open to their mother in the suit of 1893. In fact one of those defenses Was put forward by Musammat Sheolagna and formed the subject-matter of the fourth issue. The learned Subordinate Judge overruled it by saying that she had no interest in the decree of 1878. We therefore, hold that the rule of res judicata does not bar the present suit and the order of the court below is a correct order. The appeal, therefore, fails and is dismissed with costs.

Cases Referred.

1(1881) I. L. R. 3 All. 812
2(1895) I. L. R. 18 All. 69
3(1899) I. L. R. 21 All. 380
4(1907) I. L. R. 30 All. 30
5(1884) I L. R. 10 Cal. 697 (705)