

# JAMMU AND KASHMIR HIGH COURT

Sham Nath Madan

Vs.

Mohammad Abdullah

Second Appeal No.16 of 1966

(S. Murtaza Fazl Ali, J.)

18.08.1966

## JUDGMENT

### **S. Murtaza Fazl Ali, J.**

1. This is a plaintiff's appeal in a suit for declaration that the sale deed registered on 18th of Maghar, 2004 by defendant No. 1 Uttam Nath in favor of the contesting defendants is null and void as the executant being congenitally insane was a person of unsound mind. The plaintiff's case was that Uttam Nath was the full brother of the appellant but as he was congenitally insane, he was excluded from inheritance and the entire property was inherited by the appellant who was in possession of the same. By a sale deed registered on 18th Maghar, 2004 Uttam Nath sold the entire property consisting of 23 Kanals and 10 Marlas in village Khaniyar in favor of the contesting defendants. The plaintiff further avers that in spite of the sale deed, the plaintiff was in possession of the entire lands in dispute and that certain persons taking advantage of the insanity of his brother got various sale deeds and transfers executed by him.

2. The suit was contested on the ground that the defendant Uttam Nath was not a person of unsound mind but was a fully sane person capable of looking after his interest and had been managing his properties as a prudent owner and that the sale deed was for consideration and further that the possession of the properties in dispute were delivered to the vendee on the execution of the sale deed. The trial Court accepted the plea of insanity taken by the plaintiff and accordingly decreed the suit. On appeal to the District judge Srinagar, he reversed the finding of the trial court on the plea of insanity but gave a declaration that the sale deed would be void to the extent of one half share in 23 kanals and 10 marlas which legally belonged to the plaintiff. Hence this second appeal. I might mention here that before the Court below the passing of consideration was not challenged by the plaintiff although this was disputed in his plaint. Furthermore, reading the plaint as it stands, the plea of insanity taken by the plaintiff is not that the defendant Uttam Nath was insane at the time of the execution of the sale deed only but that he was insane by birth and was thus disqualified from inheriting the ancestral properties of his father which were inherited by the plaintiff alone who was the sole heir to them after excluding Uttam Nath.

3. The present litigation has had a chequered career. I understand that several other suits have also been filed with respect to other properties where the plaintiff has taken the self-same plea of insanity of defendant Uttam Nath. The plaintiff also averred in his plaint that the Court in this case could not go into the question of insanity which having been decided by a Court of competent jurisdiction in a previous suit operated as res judicata. That the lower appellate Court however, negatived the plea of insanity. Both the Courts below have, however, negatived this contention of the plaintiff.

4. Mr. Sunder Lal appearing for the appellant submitted two points before me. In the first place, he has argued that the evidence produced by the plaintiff in this case and the finding recorded by the Courts below on the plea of insanity was incorrect and assuming that the evidence did not prove this plea, the question of insanity having been decided by an earlier judgment in a previous civil suit operates as res judicata. In the second place, it was contended that since the plaintiff was in actual physical possession of the entire properties, the vendor or the contesting defendants had no right to sell any share of a joint property without obtaining partition of the same. I would first take up the contention regarding the plea of insanity.

5. On the question of res judicata my attention was drawn to a judgment of the District Judge Srinagar in civil suit No. 5 of 1999, dated 22nd Har, 2000 where it was held that the defendant Uttam Nath had been proved to be mentally infirm and incapable of protecting his interests in the suit. Mr. Lal on the basis of this judgment has strenuously contended that the finding of the District Judge aforementioned operates as res judicata, in the present case. In my opinion, the contention of the learned counsel for the appellant is wholly untenable in law. It is well settled that before the principle of res judicata as embodied in Section 11 of the Code of Civil Procedure would apply, the identity of title in both the suits must be established. A perusal of the plaint in the present suit would clearly show that the question involved in the present case was not that the defendant Uttam Nath was of weak intellect or of feeble mind but that he was a person of unsound mind being born insane. Thus the question of title involved in the present case and that in the proceedings before the District Judge referred to above, was essentially different. In these circumstances, it cannot be said that the plaintiff had established identity of title in the two suits. The first condition of res judicata being completely wanting in this case, the plea of res judicata must fail on this ground alone. Furthermore, in the previous suit, only an interlocutory order has been produced before me from which it appears that by this order, the Court had applied his mind to the question as to whether or not in the suit before him Uttam Nath was capable of defending his interests being a person of weak intellect. Neither the pleadings of the previous suit, nor any document regarding the context in which the order of the District Judge was passed have been produced before me. It is well settled that a bare finding in an interlocutory order, can never operate as res judicata in a subsequent suit, although such a finding may operate as res judicata in subsequent proceedings of the same suit, the same cannot be res judicata in a subsequent suit unless it is shown that this finding was embodied in the decree which was subsequently passed. There is no evidence in this case, as to what happened to the suit after the interlocutory order appointing a guardian for defendant Uttam Nath was passed.

I am fortified by a decision of the Supreme Court, in *Satyadhyan Ghosal v. Smt. Deorajin Debi*<sup>1</sup>, where their Lordships observed as follows :-

"Interlocutory orders which have the force of a decree must be distinguished from other interlocutory orders which are a step towards the decision of the dispute between parties

by way of a decree or a final order.....

In our opinion, the order of remand was an interlocutory order which did not terminate the proceedings and so the correctness thereof can be challenged in an appeal from the final order." Furthermore, the finding in the judgment referred to above, was given only for the limited purpose of that suit and that too for the question as to whether or not a guardian for Uttam Nath should be appointed, as would be clear from the finding itself.

"I have therefore no hesitation in holding upon the material on the record, that Dewan Uttam Nath has been proved to be mentally infirm and incapable of protecting his interests in this suit. Under Order 32 Rule 15 Civil Procedure Code , it is not of a person of unsound mind only that a guardian ad litem can be appointed but such a guardian ad litem can be appointed of a person proved to be mentally infirm and and incapable of protecting his interests in the suit. It is, therefore, necessary for safe-guarding the interests of the defendant that a guardian ad litem on his behalf should be appointed. The plaintiff is therefore ordered to appoint a proper person as guardian ad litem on behalf of the defendant to look after his interests in this suit, because Birajander Nath has refused to act as such. The case shall come up for this purpose on 28th Har, 2000."

On the other hand, the clear finding of the learned District Judge was that Uttam Nath was not insane as alleged in the present case. Thus it would appear that the finding given by the District Judge in the proceedings referred to above, was not given either on merits of the suit itself and did not involve the identical question of title which is involved in the present case. It is not the plaintiff's case in the present suit that the sale deed should be declared to be void because the defendant Uttam Nath being a man of weak intellect was persuaded to execute the sale deed in favour of the contesting defendants who perpetrated a fraud on him. In fact, such a plea could only be taken either by the executant or by some other person who was the guardian of the executant if he were actually insane. In the present case, however, the plaintiff has founded his title on the ground that Uttam Nath being congenitally insane was excluded from inheriting the property as a result of which the plaintiff alone was the sole heir of the property. This question was, however, not involved in the suit in which the judgment of the District Judge was given. It is well settled that even where the right claimed in the previous suit is different from the right claimed in the subsequent suit, the plea of res judicata must fail. This was so held in AIR 1954 SC 82. Analysing therefore, the position is as follows :-

1/- That the question of title in the two suits is not identical.

2/- That the properties covered in the two suits also are different.

3/- That the rights claimed in the two suits are also absolutely different.

<sup>1</sup> AIR 1960 SC 941

4/- That the finding in the previous suit was given in an interlocutory order and there is nothing to show that such a finding forms a part or the decree which followed the suit.

6. For these reasons, therefore, the contention of the learned counsel for the appellant on the plea of res judicata must be overruled.

7. On the other hand, if the plea of res judicata is to operate, it would operate in favor of the

respondents. It appears from a judgment Ex. DWA which was passed in a suit inter-parties that a similar question of congenital insanity was raised before the Court and a finding was given that Uttam Nath was a person of sound mind. It is true that while giving this finding the suit of the plaintiff was dismissed but nevertheless the finding on the question of sanity was a fundamental part of the decree and, therefore, could operate as res judicata. Mr. Sunder Lal, however, submitted that this finding was given against the plaintiff who was arrayed as defendant in that suit, which was eventually dismissed and therefore since the defendant was precluded from filing an appeal, against this finding it could not operate as res judicata. It is true that generally an adverse finding against a defendant in a decree for dismissal of the suit would not operate as res judicata but it is equally well settled that where such an adverse finding forms a fundamental part of the decree itself it operates as res judicata in spite of the fact that the decree is one of dismissal. I am supported in this view by a decision of the Privy Council reported in AIR 1927 PC 252 where their Lordships, in similar circumstances upheld the decision of the High Court and observed as follows :-

"The learned Judges state in their judgment that when the appeals came on for argument it was pointed out that the foundation of all title of the defendants was the sale deed to the first defendant; that the decrees of the lower court declared the sale deed to be perfectly valid as between the plaintiff and the defendant 1; that owing to the failure to make the defendant No. 1 a respondent, there was no appeal from this finding, which had consequently become res judicata as between the plaintiff and the first defendant, and must also be regarded as res judicata against the respondents who claimed through the first defendant or in other words as it was put by the learned Judges at the end of the judgment, the finding that the sale to the first defendant was good carried with it a finding that it was also good as between the plaintiff and the purchasers from the first defendant.

As regards this question, their Lordships agree with the learned Judges of the High Court that the plaintiff cannot be allowed in these appeals to question the validity of the sale to the first defendant or to set up in the first suit the benami character of the purchase by the E. N. M. K. firm from the first defendant so long as the findings in favor of the first defendant and the E. N. M. K. Firm stand and are therefore of opinion that as regards this part of the case, the plaintiff must fail unless the first defendant and the E. N. M. K. Firm are made parties to the appeal." In *Murad Biswas v. Basti Mandal*<sup>2</sup>, the High Court of Calcutta decided this very specific question in the following words :-

<sup>2</sup> AIR 1929 Cal 449

"Now on reference to the record it seems that the previous suit was one in which the plaintiff has asked for declaration of his title to the land and for khas possession thereof, and the defence of the defendant in that suit was that he was not a tenant holding under the plaintiff but was a co-sharer of his. This defence was gone into and ultimately it was found that the plaintiff's title to the land was made out but notice had not been served on the defendant and upon that the suit was not dismissed but a decree was made in the plaintiff's favour in the following terms :

"Ordered that the plaintiff's alleged title to the land in suit be declared; he cannot recover

khas possession of the land but he may sue for settlement of fair rent and recovery of nazar if he likes"

From this decision, the plaintiff preferred an appeal and the defendant a cross objection, and the appellate court to which the said appeal was preferred, upheld the decree which the trial court had passed. The facts therefore are not that the suit was dismissed on a preliminary point making it unnecessary for the court to go into the other questions that arose in the suit but that the questions were decided and made the foundation of a decree declaring the plaintiff's title and one of the prayers in the suit, namely, that for khas possession was refused on the ground that notice had not been served on the defendant \*\* \*\* \* \* \* \* \* The real reason on which this doctrine of res judicata is founded in so far as a case of the present description is concerned, has been given by the Judicial Committee in the case of *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy*<sup>3</sup>, where their Lordships say that they do not consider that a decision will found an actual plea of res judicata where the defendants having succeeded on the other plea, had no occasion to go further as to the finding against them. This cannot be said of the present case in view of the fact that the plaintiff's title was declared and it is only one of his prayers namely that for khas possession was refused on the ground that no notice was served. We are of opinion that the courts below were right in the view that they took on the question of res judicata."

8. It would thus appear that the test laid down by the Privy Council in ILR 48 Cal 460 : AIR 1922 PC 241 is that where the particular plea has been fully gone into by a court in a previous suit, and forms a fundamental part of the decree, even if the decree is one of dismissal, of the suit, this finding will operate as res judicata in the subsequent suit. In these circumstances, therefore, it is manifest that the judgment Ex. DWA clearly operates as res judicata against the plaintiff and it must be held that defendant Uttam Nath has been adjudicated to be fully sane person and not a person of unsound mind, in the previous litigation inter-parties where an identical question of title was involved. Furthermore, it would appear that in the suit which was the subject matter of the judgment Ex. DWA, the defendant Uttam Nath was also examined as a witness and the court after testing the demeanour of the witness before it, was satisfied that he could not be a person of unsound mind. Even therefore, if the said judgment does not operate as res judicata it has got a strong probative value in order to show that the plea taken by the plaintiff that defendant Uttam Nath was not a person of sound mind is false.

9. Coming now, however, to the evidence led by the plaintiff to prove his plea, I am

<sup>3</sup> ILR 48 Cal 460 at p. 467 : (AIR 1922 PC 241 at pp. 242-243)

fully in agreement with the learned Judge that the evidence led by the plaintiff does not at all justify the conclusion that the defendant Uttam Nath was a person of unsound mind. It is well settled that in such cases the law always presumes in favour of sanity and the onus is on the person who puts forward the plea of insanity to prove the same. In the instant case, the only evidence led by the plaintiff consists of two doctors namely Dr. Omkar Nath and Dr. Atri. None of these doctors are mental experts and are general practitioners with a degree of simple MBBS. Dr. Omkar Nath has admitted in his evidence that he was essentially a Pathologist but had been working as a General Practitioner for about two years before the date of his deposition. The witness says that he knew Uttam Nath since he started his career but has not seen him for the last few years. The doctor's positive finding is that he considered Uttam Nath to be a person of weak intellect and belonged to the class of persons of feeble mind. The evidence of this witness taken

at its face value does not prove the case of the plaintiff alleged by the plaintiff namely that the defendant Uttam Nath was insane from his very birth. There is a world of difference between a person being insane and a person being feeble-minded. The distinction has been clearly brought about in the decisions reported in AIR 1923 Patna 187, and AIR 1944 Nagpur 232.

10. Furthermore, the witness admitted in his cross examination that he saw the defendant Uttam Nath for the first time in the years 1933, 1934 and 1935 when he used to enquire about his mother and did not see Uttam Nath doing anything seriously. The witness further states that he has talked to Uttam Nath on several occasions and found that he gave irrelevant answers and was impulsive. The witness further states that whenever Uttam Nath came to him he saluted him in the hereditary manner. The witness further admits that he could not recall any definite question put by him to Uttam Nath and the answers given by him. His evidence would thus show that his finding regarding Uttam Nath was derived from a very casual and stray contact with Uttam Nath. The witness does not appear to have kept Uttam Nath under his observation nor did he examine him thoroughly in order to find out whether he was a person of unsound mind or for that matter a person of weak intellect. Such evidence can hardly be relied upon to adjudicate on the question as to whether or not a person is of unsound mind. Lastly as already indicated above, as this witness was essentially a Pathologist, his evidence does not carry much weight on the question of insanity of Uttam Nath. The learned Judge, therefore, rightly rejected the evidence of this witness.

11. As regards Dr. Atri the less said the better. The witness says that some time before 1947, Uttam Nath was examined by him and he had put him some questions of mathematics and common sense and Uttam Nath gave answers after taking some time and some of the replies were not correct. The witness further admits that Uttam Nath was kept under his observation only for 15 minutes on two occasions. The witness further made a categorical admission that it was not possible for him to say whether Uttam Nath could protect his interest or not. In cross examination, the witness further admitted that he was not an expert of mental diseases.

12. The witness further admits that he did not enquire any further particulars from the defendant Uttam Nath nor did he enquire of him about his daily routine of personal life. A perusal of his evidence would clearly show that when the witness himself was not an expert of mental diseases and did not examine Uttam Nath thoroughly and was himself not in a position to state whether or not Uttam Nath was capable of protecting his interest, his evidence can hardly be of any assistance to the plaintiff. This is all the evidence led by the plaintiff in support of the plea of insanity of Uttam Nath taken by him. Apart from this, the learned District Judge has pointed out that no neighbour or relation of Uttam Nath was examined to show that he was not mentally sound. Even the plaintiff himself has not chosen to appear as a witness to swear that his brother Uttam Nath was congenitally insane. The non-examination of the plaintiff is the strongest possible circumstance, in my opinion, to discredit his case that the defendant Uttam Nath was a person of unsound mind because being a full brother he would have been in the best position to know about the mental condition of Uttam Nath. Furthermore, as indicated above, there is absolutely no evidence at all to show that Uttam Nath was congenitally insane so as to disqualify from inheritance as is the positive case made out by the plaintiff in his plaint. In view of these circumstances, I am satisfied that the plaintiff has miserably failed to prove that Uttam Nath was a person of unsound mind. It seems to me that taking advantage of the fact that his brother was a simpleton, the plaintiff cast a covetous eye on his property and with a view to grabbing the same

has bolstered up a false plea of insanity.

13. I would now take up the question of possession.

14. On this part of the case also, there is a very well-reasoned finding of the learned Judge, which is based on complete consideration of the evidence led by the parties. Learned counsel for the appellant, however, drew my attention to the evidence of PW Sona Khan Lambardar who stated that the revenue of the land in question was paid solely by the plaintiff. From this the learned counsel for the appellant wants me to draw an inference that the plaintiff alone was in possession of the property. I am, however, unable to agree with this contention. Although there is oral evidence of Sona Khan yet it is not corroborated by any revenue receipt or by the Bach which is a register maintained for the collection of land revenue. Indeed, if it was the plaintiff who had paid the land revenue, he should have called for the said register in order to corroborate the evidence of Sona Khan PW. My attention was then drawn to the evidence of PWs. Razaq Mir, Qadir Rather, and Ghulam Hassan to show that these witnesses who were the actual tenants of the plaintiff deposed that they were in possession of the land and paid cash rent to the plaintiff and not to the defendant Uttam Nath. A perusal of the evidence of these witnesses, does not, however, show that the plaintiff was in possession of the entire land. The total area of the land in question is 23 Kanals and 10 Marlas in which both the plaintiff and defendant Uttam Nath have one half share. According to the evidence of these witnesses the total area of land cultivated by these witnesses comes roughly to about 10 to 12 Kanals which represents only one half share of the total land i.e. to say the share of the plaintiff alone and not the share of the defendant. On the other hand, the defendants have produced some witnesses namely Rasool Pandit, Badar-u-din, Abdullah, and also two patwaris. The witnesses examined by the defendants clearly show that the land in question was in possession of the defendant Uttam Nath to the extent of his share and after the execution of the sale deed, possession was delivered to the vendees and the tenants surrendered their holding. Reliance was placed by the learned counsel for the appellant on the fact that the name of Uttam Nath was not entered in the Khasra Girdawari and Jamabandis. This, however, is clearly explained by the evidence of one of the Patwaris which is to the effect that since the plaintiff had filed several suits against the defendant an application was made to the revenue department for not making the entry until the disposal of that suit. On the other hand, some documents have been produced by the defendant which shows that Uttam Nath has been in possession of a portion of the properties. In view of these circumstances I hold that the defendants have led sufficient evidence to show that Uttam Nath was in possession of the properties to the extent of his share.

15. No other point was raised before me.

16. The result is that the appeal fails and is accordingly dismissed with costs.

17. Leave to appeal under the Letters Patent has been asked for by the appellant, which is refused.

Appeal dismissed.