BOMBAY HIGH COURT

Bhaishanker Nanabhoy

Vs

Morarji Keshavji

(Beaman, J.)

24.07.1911

JUDGMENT

Beaman, J.

1. Upon this preliminary issue two distinct points arise. First, whether a decree passed by consent be res judicata under Section 11 of the Civil Procedure Code. As to that there used to be a considerable conflict of opinion but I think I may now take it as settled by the decision in In re South American and Mexican Company [1895] 1 Ch. 37, that a consent decree has to all intents and purposes the same effect as res judicala as a decree passed per invitum; and this notwithstanding the words in Section 11 "has been heard and finally decided." These words give ground for argument upon one point only, I think, that is, whether the matter in issue has literality been heard by the Court. It has been finally decided, indeed much more finally decided by a consent decree than by a decree par invitum, for against the consent decree there is no appeal; and although it has often been said that a consent decree represents no more than an agreement of parties, I have always felt much doubt whether that correctly expresses, for the purposes of res judicata, the consequences of decrees by consent. For, when a party has raised his defences and has then consented to judgment, it is the same thing as though he had abandoned his defences and admitted them to be untenable. Carrying that one step further, it is the same thing as saying that his case has been heard, for, if a party chooses to admit that he is not in a position to sustain his defences so far as the Court is concerned that is practically the same thing as though he had adduced no evidence and decision had been given against him on all those issues. I have always been of opinion that decrees by consent had the same effect for the purposes of res judicata as decrees given in contested suits. That was my view before 1805 when some of the English Courts at any rate seemed to incline the other way. Since the decision of the case I have cited, I apprehend that no further doubt will be thrown upon the correctness of this proposition.

2. The second question is whether the decree by consent between the predecessors in interest of the present parties is really res judicala of the questions at issue in this suit. Here the defendant

relies upon the case of the *Attorney General v. Birmingham, Tame, and Rea Drainage Board*[1] and the two cases decided by Benches of this Court one in *Vithal v. Sakharam*[2] and the other in *Dahyabhai v. Bapalal*[3] The two latter cases really present no difficulty, for they go no further than affirming, what has never been seriously disputed, that injunctions do not run with the land. In both these cases the point arose in execution proceedings and as the only relief sought to be obtained was by enforcing the injunction upon a person who was not a party to the suit in which it was made, that question could never be answered but in one way. Here it is contended for the defendant that inasmuch as when the predecessors-in-interest of the present parties litigated before, the result of the consent decree was an injunction restraining the defendants then from raising their building so as to diminish or obstruct plaintiffs' ancient lights, this case is exactly on all fours with Attorney General v. Birmingham, Tame, and Rea Drainage Board (1881) 17 Ch. D. 685;(Supra) and I must admit that the cases are very like. In that case it appears as though there were subsequent proceedings and an action to enforce the judgment given against the Birmingham Municipality upon the Birmingham Drainage Board, a body which had subsequently come into existence and taken over the functions of the Municipality touching the matter in suit. It appears, however, the prayer of the action contemplated transferring the whole decree, injunction and all, passed against the Municipality to the Drainage Board and this the Court refused to allow upon the ground principally that the injunction did not run with the land. But it does not appear, as clearly as I could wish, from that case, whether the substantial matter in issue between the parties irrespective of the relief to be given consequent upon its decision, would have been held, if separated from the prayer to transfer the injunction, res judicata. I must admit that on the facts stated in the reports and having regard to the judgment of the Court, it is very doubtful whether this would not have been so. I, however, have to decide the question before me with reference to the language of our own statute, which the defendant thinks strengthens his case rather than weakens it. It is a part of his contention that the matter in issue between the parties now is not the matter which was in issue between their predecessors in interest when the consent decree was passed; and this argument may seem to be fortified by what is undoubtedly the law that the relief given consequent upon the determination of the matter in issue in the former suit cannot be carried over as though if too were res judicata and made a part of the decree in this suit.

3. So far as the injunction is concerned, I am quite clear that the plaintiffs cannot have the benefit of that in this suit merely because it was granted in the former, but it is easy to see that a distinction can be drawn between the matters substantially in issue and the particular form of relief granted. What then was the matter substantially in issue between the predecessors in title of these parties? Clearly I think, whether the defendants were entitled to raise their building beyond its then height, ground floor and one storey; and that is precisely the matter in issue in the present

suit. I cannot myself see any difference between the ground of action in this suit and the defence raised, and the ground of action and defence raised in the former suit.

4. I should like to observe upon the cases which have been cited on both heads of this preliminary point that great confusion is introduced by treating res judicata and estoppel as identical terms. It is only necessary to point out in the first place that a true res judicata ousts the jurisdiction of the Court; while estoppel does no more than shut the mouth of a party. In the next place, to put it colloquially and compendiously, estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it another time; while res judicata means nothing more than that a person shall not be heard to say the same thing twice over. It is particularly with reference to the first part of my decision on this point and to the English cases which have been cited, that I make these remarks. The question I am now considering has, of course, nothing whatever to do with estoppel at all.

5. For these reasons and influenced chiefly by these considerations, it appears to me clear that the consent decree come to between the predecessors in interest of the present parties, touching matters now substantially and directly in issue between them, viz.whether the defendant is entitled to raise his building beyond the height at which it stood when that consent decree was passed, is res judicala. But it does not follow from this that the Court will necessarily grant an injunction as was done in the former suit by consent of parties. for that is a matter personal to the defendant there, and other considerations may now be found warranting the adoption of a different course.

Cases Referred.

1(1881) 17 Ch. D. 685
2(1899) 1 Bom. L.R. 854
3(1901) I.L.R. 26 Bom. 140