

PATNA HIGH COURT

Dukh Haran Tewary

Vs

Dulhin Bihasa Kuer

A.F.O.D. No. 406 of 1959

(H. Mahapatra and Tarkeshwar Nath, JJ.)

04.03.1963

JUDGMENT

H. Mahapatra, J.

1. This is an appeal by the defendants arising out of a suit instituted for declaration of title to and recovery of possession of lands mentioned in the three schedules given in the plaint. Of the two plaintiffs, plaintiff No. 1 is the mother and plaintiff No. 2 is her son. According to the genealogy given in the plaint which was accepted by the trial Court, one Jiba Rai had two sons Deodhari Rai and Saudagar Rai and a daughter Mt. Parichha Kuer. Deodhari and Saudagar are dead. Bataso Kuer is the widow of Saudagar Rai. Plaintiff No. 1 is the daughter of Saudagar Rai. Mt. Parichha Kuer was married and had a son Ramgati Tewari who died on the 16th of December, 1952. The properties in Schedules 1 and 2 of the plaint belonged to Saudagar Rai though during his life-time his sister's son Ramgati Tewari was put in possession of the same by way of maintenance. Ramgati lost his father in infancy and, as there was no land to maintain the child and the mother, Saudagar Rai brought both his sister and her son to his house and maintained them. Ramgati became very helpful to the maternal uncle in management of properties and in fighting litigations over lands in Schedule 2. Saudagar out of satisfaction and sympathy gave the Schedules 1 and 2 lands to be enjoyed by Ramgati. On the death of the latter, the properties were to be inherited by Saudagar's heir, his widow Bataso Kuer. She, however, made a deed of gift in favour of plaintiffs Nos. 1 and 2 and that is how plaintiff No. 1 was joined in the suit and claimed along with plaintiff No. 2 suit properties. The properties in Schedule 3 were acquired by Ramgati Tewari and the plaintiff No. 2 is entitled to the same as nearest Atma-bandhu of Ramgati Tewari. The defendants posed themselves as the agnates of Ramgati Tewari, after the death of Ramgati in Title Suits No. 80/20 of 1949/50 and No. 70/22 of 1950/52 where Ramgati Tewari and some others were defendants. Their claim to be substituted in place of Ramgati Tewari in those two suits was allowed in spite of the objections raised by Ramsingasan Rai, plaintiff No. 2. Being emboldened by that order, the defendants succeeded in dispossessing the plaintiff from the suit lands. On these allegations the present suit was instituted.

2. The contest by the defendants was based on denial of the plaintiffs' genealogy. They asserted that Mr. Parichha Kuer, Ramgati's mother, was not a sister of Saudagar. She was the daughter of

Gagan Rai, brother of Jiba Rai, who was the father of Saudagar. The properties of plaint Schedule 1 belonged to Gagan Rai, and he having no son, brought his daughter Parichha Kuer and her son Ramgati Tewari to live with him. After Gagan Rai's death Ramgati Tewari came over possession of those properties and he also obtained the properties of Schedule 2 of the plaint by inheritance from one Mt. Rajwanti Kuer. Schedule 3 properties were also acquired by him. Thus Ramgati was the full owner of all the suit properties. His father was Lila Tewari having an alias name of Chhabila Tewari who with Juthan Tewari and Kalicharan Tewari were sons of one Takia Tewari. The defendants are the sons of Khedu Tewari who was the son of Juthan Tewari. Thus the defendants claimed that they were the agnates of the deceased Ramgati Tewari and came in possession of all the properties on the death of Ramgati. They denied the plaintiffs' title altogether. They also stressed that their claim to inheritance through Ramgati could no longer be challenged as that question had been decided in the two earlier suits when they applied for being substituted in place of deceased Ramgati. That order would operate as res judicata for the present suit.

3. On these pleadings the parties went to trial. The first Additional Subordinate Judge, Arrah, gave judgment in favour of the plaintiffs holding that the order passed under Order 22 Rule 5, Civil Procedure Code, (substitution) in the two earlier suits would not operate as res judicata, and on evidence, the defendants were not the agnates (gotias) of Ramgati Tewari. They had no title to the suit properties. He found that the plaintiff No. 2 was the nearest Atma-bandhu of Ramgati Tewari and was entitled to inheritance from him in respect of the properties in Schedule 3. The properties in the other two schedules belonged to Saudagar, on whose death his widow Bataso Kuer succeeded to them. She having executed a deed of gift in favor of the plaintiffs, she was a necessary party in the suit as otherwise, plaintiff No. 2 alone could not have been entitled to maintain the suit for the properties. Accordingly, he declared the title of the plaintiffs and decreed the suit for recovery of possession from the defendants. Against that, the appeal is brought by the defendants to this Court.

4. Learned Counsel for the appellants contended that the orders passed in Title Suits No. 80/20 of 1949/50 and No. 70/22 of 1950/52 in the Court of the first Additional Subordinate Judge, Arrah, substituting the present defendants as legal representatives of Ramgati Tewari in those two suits would operate as a bar on the principles of res judicata in the present suit. That order is Ext. R (1), dated the 26th of September, 1953. The order no doubt shows that on the death of Ramgati Tewari, who was defendant in those two suits, three sets of claimants asked to be substituted in his place. One was Ramsingasan Rai, plaintiff No. 2, in the present suit. Another was Sarbanand Rai, who alleged that he was adopted son of Ramgati Tewari. The third claimants were Dukhharan and others, the defendants in the present suit. They claimed that they were the agnates of Ramgati Tewari and their claim was finally allowed in those two suits. It is noteworthy that plaintiff No. 1 of the present suit was not a party in that litigation or in the proceeding under Order 22, Rule 5, Civil Procedure Code, for substitution in place of Ramgati Tewari. That order, therefore, will not operate as res judicata, if at all, against plaintiff No. 1 here. Secondly, an order for substitution of the legal representatives of a deceased party is, strictly speaking, confined to that suit. It may be that the rightful heir of the deceased party may not take any interest in a particular litigation and may not therefore waste his time and money to contest in the substitution proceedings, in which case, another person, asking for being substituted in place of the deceased party, may be brought on record without any contest. That could not take away, for all time to come, the rights of a rightful heir of the deceased in all matters. Such an order does not confer

heirship. It is true that an order of that nature is final so far as the suit or appeal in which such order is made is concerned, but it does not pervade beyond that litigation. From the nature of such order, it cannot be covered by the provisions of Section 11 of the Code. The question of substitution of the legal representatives of a deceased party in a suit or in an appeal is not an "issue" in that litigation, and, therefore, a decision on that question cannot bar the adjudication of that matter which is raised as an "issue" in a subsequent suit.

5. Learned Counsel next pleaded that if not Section 11 in terms was applicable, the principles of res judicata could be attracted as a full dressed decision as to who was the legal representative of Ramgati Tewari was given in the two earlier suits. The rule of res judicata ousts the jurisdiction of the Court and has therefore to be construed carefully with reference to the parties, competency of the Court and the issues, on which the parties joined in the previous litigation. A finding without any issue on the point or a matter not in issue in the previous suit cannot be res judicata for subsequent suits where the same question is raised as an issue to be determined by the Court. In the case of *Bhudeo Pandey v. Gupteshwar Misser*¹, it was held that an order passed under Order 22 Rule 5, Civil Procedure Code, will not operate as res judicata. Their Lordships followed the view taken in *Antu Rai v. Ram Kinkar Rai*², *Chirag Din v. Dilawar Khan*³, *Sarvathi Palekhan v. M.K. Pathumma*⁴, and *Balabai v. Ganesh Shankar*⁵, In the case of AIR 1936 Allahabad 412, the learned Judges of that Court preferred to follow the similar view taken in the case of *Parsotam Rao v. Janki Bai*⁶, and dissented from the view expressed in the case of *Raj Bahadur v. Narayan Prasad*⁷. A similar view was taken in the case of *Ram Kalap v. Banshi Dhar*⁸, Thus the objection on the ground of res judicata raised by the appellants cannot prevail.

6. Learned Counsel next contended that on evidence and the materials brought on record, the finding of the trial Court that the defendants were not the agnates and, as such, nearest heirs to Ramgati Tewari, cannot be sustained. He pressed that plaintiff No. 2, as an Atmabandhu, can only come in absence of any Sapindas. The admitted case was that Ramgati Tewari's mother was married in village Nainijor to Lila Tewari; but not a single witness from that village was examined on the plaintiffs' side to say that the line of Ramgati on the paternal side was completely extinct. The defendants' case was that Lila Tewari, Ramgati's father had another name Chhabila Tewari and he was son of Takia Tewari; whereas the plaintiffs asserted that Lila Tewari had no alias name and he was son of Narkhu Tewari. Learned Counsel referred to the evidence of P. Ws. 2, 3 and 6 and pointed out that they admitted that they had made no enquiry in the village Nainijor as to whether any agnates were left by Ramgati in that village. The latter two witnesses admitted that they had no concern with Nainijor or with Lila Tewari's genealogy. The comment of the appellants about non-examination of any witness from Nainijor or absence of any enquiry in that village by the plaintiffs is justified. But there are more dependable documentary evidence in the case which would help a decision on the point. P. W. 1 is a Panda from Mathura. He deposed that Ramgati had gone on pilgrimage to Mathura and was his Jajman. He signed entries in the Jajmanika book of the witness where the names of Ramgati, his father Lila Tewari and his grandfather Narkhu Tewari were written. Those entries were marked as Ext. 1 (e) and the signature of Ramgati as Ext. 2. Several other entries in that book were exhibited to show that other persons from the same village Bachri visited Mathura with Ramgati on that occasion and the names of those persons with the names of their fathers and grand-fathers were written in the book. This Jajmanika book was the subject-matter of a partition suit between P. W. 1 and others and by the decree in that suit, the relevant pages of the book were allotted to the share of P. W. 1. Learned Counsel objected to the admissibility of this book and the entries made therein. Ramgati is dead. His statement, written or verbal, is admissible under Section 32 of the Evidence Act,

when that statement was made in the ordinary course of business and in particular when it consisted of an entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty or when the statement related to the existence of any relationship between persons as to whose relationship Ramgati had special means of knowledge and when such statement was made before the question in dispute was raised. Sub-clauses (2) and (5) of Section 32 make such statement admissible and relevant. There is not the slightest reason why P. W. 1 would come to depose falsely or the entries in the Jajmanika book would be fabricated by him to support the plaintiffs. The appearance of the book also inspires confidence. There is no doubt that the entries were made in the usual course and in the discharge of the professional or religious duties of P. W. 1 and Ramgati (sic) P. W. 9 deposed that he went to Mathura with Ramgati and he proved the entries made in the Jajmanika book of P. W. 1. This evidence is sufficient to establish beyond any reasonable doubt that Narkhu was the father of Lila Tewari, father of Ramgati Tewari. The defendants traced their relationship to Ramgati through Takia Tewari as grandfather of Ramgati. When that is falsified, the defendants have nothing more to substantiate their claim to the suit properties. It is not very material whether Lila Tewari had an alias name of Chhabila. Even if he had, that would not help the defendants, for the grandfather of Ramgati was not Takia but Narkhu. The alias name was put up by the defendants to gain support from Exts. M and M (1). Those two exhibits are Jama Wasil Baqui Register of Dumraon estate. Ext. M stands in the name of Dukhharan Tewari son of Khedu Tewari, Ramgati son of Chhabila Tewari and Ramrup Tewari son of Kalicharan Tewari. That was in the year 1343 Fasli. Similar was the entry in Ext. M-1. It is interesting to note that the principal name of Ramgati's father, which admittedly was Lila Tewari, was not noted in those two documents. One can understand when both names, proper and alias, are mentioned. From these two documents, the defendants could not establish that Lila Tewari father of Ramgati Tewari, with whom we are concerned in this case, had the alias name of Chhabila Tewari. The trial Court rightly dismissed the defendants' contention that the entry of the name of Ramgati in those two documents along with that of the defendant Dukhharan and another, in respect of a property (khata No. 392 of village Nainijor) proved that they were the agnates (gotias) of the husband of one Mt. Parbatia in whose name that property stood before. Particular relationship by blood of the recorded tenants inter se cannot be inferred from such entries. The oral evidence of defendant No. 1 himself (D. W. 17) was that Mt. Parbatia was the widow of Ganour Tewari, but he (defendant No. 1) did not know what was the relationship between him and Ganour Tewari. There is no other evidence on the record to show how defendant No. 1 or Ramgati Tewari was related to Ganour Tewari. It is strange that, according to defendant No. 1's evidence, Ramgati's father was known as Lila Tewari in village Bachri to which Saudagar Tewari belonged and where Ramgati was taken in his infancy but he was known in village Nainijor as Chhabila. It is difficult to accept a statement like that. In the application where the present defendants applied to be substituted in place of Ramgati. Tewari in the earlier two title suits (Ext. 15 dated the 3rd January, 1953), the name of Ramgati's father was not stated to have the alias name of Chhabila. If he was known in the village Nainijor as Chhabila Tewari and the defendants claimed to be Ramgati Tewari's agnates by their relationship in that village Nainijor, Ramgati's father should have been described by the name Chhabila Tewari alone as he was said to be known by that name in the village. At least both the names should have been given; but the omission : of the alias name Chhabila in the genealogy given. In that application of the defendants is very significant. The alias name was invented for the first time during evidence in that case.

7. Learned Counsel's further comment was that the oral evidence of the plaintiffs' witnesses about

the name of the grand-father of Ramgati Tewari was not admissible under Section 50 of the Evidence Act, because that was not the opinion expressed by conduct as to the existence of the relationship between Ramgati and his grandfather. None of those witnesses had any special means of knowledge on that subject. On a critical analysis of the depositions of the plaintiffs' witnesses, this comment cannot be completely ruled out. The evidence was more or less of hearsay nature ; but in Exhibit 8, a deed of gift executed on the 14th of September, 1950, by Ramgati Tewari to Sarjoo Prasad Hajam, Ramgati stated that he was son of Lila Tewari and was 80 years old and had no issue or no near agnate. There was no reason why he would speak of the absence of an agnatic relation falsely in that document as early as 1950 April when he was giving a gift - an act of piety - to another person out of the property owned by him. Even if there was any agnate, they would not have been any hindrance to the gift. A statement of that nature by Ramgati himself in a solemn document along with the entries made in the Jajmanika book of the Panda at Mathura (P. W. 1) is decisive on the point and in spite of the infirmities in the oral evidence adduced by the plaintiffs, I have no hesitation to confirm the finding that the grandfather and father of Ramgati Tewari were Narkhu Tewari and Lila Tewari respectively, and the defendants are not the agnates of Ramgati Tewari. In that case, whether the properties in Schedules 1 and 2 of the plaint belonged to Ramgati Tewari absolutely or they were in his possession for his life as given by his maternal uncle Saudagar Rai for maintenance, will be immaterial as far as the defendants are concerned. The defendants have no claim to inheritance either from Saudagar or from Ramgati. Their possession of the suit properties was unlawful and the plaintiffs were entitled to recover the same from them.

8. The defendants' contention was that the properties of Schedules 1 and 2 of the plaint were given to Ramgati absolutely. His name was recorded in the remarks column in the Khatian of the cadastral survey. He thus acquired absolute right over those properties. In the Khatian, however, the properties were recorded in the tenant's column in the name of Saudagar; but in the remarks column possession of Ramgati, sister's son of Saudagar was noted. The reference to Saudagar in the remarks column may not be without significance. There is no document of transfer of title from Saudagar to Ramgati; yet till Ramgati died in ripe old age of above 80 years, he was in possession for very many years over this property. Plaintiff No. 1 is entitled to inherit them. If the properties in Schedules 1 and 2 belonged to Saudagar Rai in spite of Ramgati's possession, his widow Mt. Bataso Kuer was entitled to that. She surrendered the deed of gift on the 23rd of August, 1931 (Ext. 4) those properties to her daughter plaintiff No. 1 and her son. After the death of plaintiff No. 1 plaintiff No. 2 is to succeed to that inheritance as Saudagar's heir. Thus, in any view of the matter, the two plaintiffs, as between themselves, have title to all the suit properties and that cannot be defeated at the instance of the defendants who have no semblance of title, whatsoever, to any of those properties, as heirs of Ramgati or Saudagar.

9. There was a cross-objection by the plaintiffs in regard to their claim for mesne profits which the trial Court disallowed. When defendants' possession is found to be unlawful, they will be liable to pay to the plaintiffs mesne profits at least from the date of the suit till delivery of possession by them (defendants). The amount is to be determined in a separate proceeding on plaintiffs taking proper steps.

10. In the result, the judgment and decree passed by the trial Court are modified and the appeal is dismissed with costs. The cross-objection is allowed in part but without any costs.

Tarkeshwar Nath, J.

11. I agree.

Appeal dismissed.

Cases Referred.

¹ AIR 1951 Pat 537

² AIR 1936 All 412

³ AIR 1934 Lah 465

⁴ 25 Mad LJ 279

⁵ ILR 27 Bom 162

⁶ ILR 28 All 109

⁷ AIR 1926 All 439 : ILR 48 All 422

⁸ AIR 1958 All 573