

PATNA HIGH COURT

Arjun Singh

Vs

Tara Das Ghosh

A.F.A.D. Nos. 728 and 736 of 1969

(N.L. Untwalia, C.J., S.N.P. Singh and S.K. Jha, JJ.)

07.09.1973

JUDGMENT

N.L. Untwalia, C.J.

1. When these two second appeals came up for hearing before a learned Single Judge of this Court, they were referred for decision by a Division Bench, The Division Bench thought that apparently there was a conflict between two Bench decisions of this Court in *Ramcharan Mahto v. Custodian of Evacuee Property, Bihar*¹, and *State of Bihar v. Jiwan Das Arya*², on the question as to whether the right to get a notice under Section 80 of the Code of Civil Procedure (hereinafter called the Code) can be waived or deemed to have been waived under certain circumstances. The Division Bench also thought that the vires of Section 80 of the Code had been challenged; it is, therefore, better that the case should be referred to a larger Bench This is how these two second appeals came up for hearing before us.

2. The plaintiffs who are Engineers in the Public Works Department of the Government of Bihar challenged certain decision which is said to have been taken by the Cabinet of the Government of Bihar on the 17th of January, 1968 in regard to the determination of seniority of defendant No. 4 vis-a-vis the plaintiffs and other questions relating, thereto. The said defendant is also an Engineer in the Public Works Department of the Government of Bihar. Various facts were pleaded in the plaint and in the written statement filed by defendant No. 4 as also by the State of Bihar, defendant No. 1, and its officers, defendants 2 and 3. Various issues were tried by the trial Court including the issue as to whether the suit was bad for want of a notice under Section 80 of the Code. The trial Court decided all the issues against the plaintiffs and dismissed the suit. They went up in appeal. The appeal was heard by the Additional District Judge, 3rd Court, Patna and he framed the following points for decision.

- "1. Whether the suit was maintainable and the plaintiffs have got cause of action for suit ?
2. Whether the impugned decision, that is, the decision to appoint defendant No. 4 from 17-11-1951 in B.E.S. Class II on permanent basis is justiciable ?
3. Whether the suit is hit for non-service of notice under Section 80, Civil Procedure Code

?

4. Whether defendant No. 4 was qualified to be appointed as an Assistant Engineer in B.E.S. Class II as a direct recruit in the year 1949 ?
5. Whether the Government of Bihar had kept vacant and continued the vacancy of one of the posts of permanent Assistant Engineer in B.E.S. Class II advertised to be filled up by direct recruitment In the year 1949 ?
6. Whether the impugned decision taken on 17-1-1988 by the Council of Ministers to appoint defendant No. 4 as permanent Assistant Engineer in B.E.S. Class II with effect from 17-11-1951 is legal, valid, reasonable and in accordance with the provisions of the Constitution of India ?
7. Is the suit bad for the defence (sic) of parties ?
8. To what relief or reliefs, if any, the plaintiffs are entitled ?"

Point No. 3 was decided by the learned Additional District Judge against the plaintiffs; that made the suit filed by them not maintainable. The lower appellate Court, however, proceeded to decide other points also. A decision of point No. 2 also was given against the plaintiffs and it was held that the decision taken by the Cabinet was not justiciable and unless an order expressed in the name of the Governor followed, the plaintiffs had no cause of action. It may also be added on the authority of the decision of the Supreme Court in *Bachhittar Singh v. State of Punjab*³, that unless the order was communicated to the parties, it was not effective. Even after the decision of this point against the plaintiffs, the learned Additional District Judge proceeded to decide points 4, 5 and 6 and on those points recorded findings against defendant No. 4. Although in view of its decision on points 2 and 3. the lower appellate Court maintained the dismissal of the suit, defendant No. 4 feeling aggrieved by the decision of the learned Additional District Judge on points 4, 5 and 6 preferred Second Appeal No. 728 of 1969, lest the finding recorded by the Court of appeal below may operate as res judicata in a subsequent suit or in a subsequent proceedings on the same issues. Second Appeal No. 736 of 1969 was preferred by the plaintiffs against the judgment and decree of dismissal passed by the Courts below.

3. Learned Counsel for the plaintiff respondents in Second Appeal No. 728 of 1969 raised a preliminary objection to the maintainability of this appeal on the ground that defendant No. 4 had no right to prefer this appeal because the suit was ultimately dismissed even by the lower appellate Court. During discussion of this preliminary objection raised on behalf of the plaintiff respondents a question arose whether the decision of the lower appellate Court recorded against defendant No. 4 would operate as res judicata in a subsequent suit or proceeding or not. Mr. J.C. Sinha, learned Counsel for defendant No. 4 said that it may be that because of the decision of the Supreme Court in the case of *Gangappa Gurupadappa Gugwad v. Rachawwa*⁴, the decision of the lower appellate Court on points 4, 5 and 6 will operate as res judicata in a subsequent suit or proceeding. We, however, think that the decision of the Supreme Court is clearly distinguishable. Had the dismissal of the plaintiffs' suit been maintained only because of absence of notice under Section 80 of the Code, it may

well be that the decision on the other issues recorded in favor of the plaintiffs would have operated as res judicata. But the vital distinction in the present case is that even on point No. 2 the decision has gone against the plaintiffs. When it was held that the decision taken by the Cabinet was not justiciable, the effect of this decision was that the suit of the plaintiffs was

premature and they had no cause of action to challenge the decision of the Cabinet, even if there was any and, therefore, there was no order in vogue or in effect till the institution of the suit, which could be said to have prejudiced the plaintiffs' right and favoured defendant No. 4. That being so, it is plain that the decision recorded by the lower appellate Court as to the merits of the alleged decision of the Cabinet, in the eye of law, is no decision as it was not necessary to be recorded. The merit of a decision which could not be looked into and which was in vacuum was not necessary to become into and all the findings recorded by the lower appellate Court in that regard must be deemed to be of no effect. In that view of the matter, it is manifest that the decision of the lower appellate Court on those issues, as contended on behalf of the plaintiff respondents in Second Appeal No. 728 of 1969, cannot operate as res judicata in a subsequent suit or proceeding. It is well settled that a party against whom a finding is recorded has no right of appeal even though the ultimate decision may be in his favor if the finding can operate as res judicata. In a subsequent suit or proceeding; if, however, it cannot operate as res judicata then such a party has no right of appeal. Having held that the decision of the lower appellate Court on points 4, 5 and 6 recorded against defendant No. 4 and in favour of the plaintiffs cannot operate as res judicata in a subsequent suit or proceeding, we have got to hold that the appeal filed by defendant No. 4 is not maintainable. Hence, accepting the preliminary objection raised on behalf of the plaintiff respondents, we dismiss Second Appeal No. 728 of 1969 as being not maintainable. In the circumstances there would be no order as to cost.

4. In view of the dismissal of Second Appeal No. 728 of 1969, as mentioned above, plaintiff appellants in Second Appeal 736 of 1969 prayed for permission to withdraw this appeal and did not press it. The prayer is allowed. The appeal is dismissed as withdrawn. There would be no order as to cost in this appeal either.

Appeal dismissed.

Cases Referred.

¹ AIR 1964 Pat 275

² 1970 BLJR 843

³ AIR 1963 SC 395

⁴ AIR 1971 SC 442