NAGPUR HIGH COURT

Manohar Vinayak

Vs

Laxman Anandrao Deshmukh

(Grille C.J. and Padhye J.)

31.01.1947

JUDGMENT

Grille C.J.

1. This is a Letters Patent appeal against the decision of Bose J., dismissing Second Appeal No. 1 01 of 1940 on 7-10-
1943. The preliminary objection of the respondents against the competency of Civil Appeal No. 20A of 1939 on the ground of res judicata resulted in the dismissal of that appeal by the lower ap pellate Court and the dismissal was upheld in second appeal. In order to comprehend the exact na ture and effect of the respondents' objection it is necessary to state a few facts chronologically.

2. The genealogical table of the appellants family is as below:

3. The present respondents 1 to 3 were plaintiffs in civil Suit NO. l of 1928 instituted against Ma nohar, Wasudeo and their uncle Pralhad (now deceased). A money decree was passed against thre e defendants on 28-2-1928.

4. In execution of that decree, the decree-
holders attached 5/6th share of Survey No. 31 of Sultanpur granted as jagir to the family of the ju dgment-debtors by the Bhonsla Raja in 1799.

5. During the subsistence of attachment, Ramchandra one of the sons of Wasudeo, instituted civil Suit No. 171 of 1931 for a declaration that Survey No. 31 was not liable to attachment and sale b y virtue of the tenure granted by the Bhonsla Raja. He failed in the original Court and also in the First Appellate Court but succeeded in obtaining the declaration in second Appeal No. 180B of l 933 decided on 11-1-1934.

6. While the first appeal was pending, the 5/6th share in the field was put to auction and was purc hased by one of the decree-holders and he transferred it by private sale on 11-1-
1934 to Pralhad Kale who is now respondent 4.

7. Pralhad Kale instituted civil Suit No. 266 A of 1937 on 19-11-
1937 for partition of 5/6th share in field No. 31 which was purchased by him from the auction pu

rchaser.

8. On the other hand, Ramchandra and other members of his family instituted Civil Suit No. 39A of 1938 for possession of the entire field against Pralhad Kale and others on 1-2-1938.

9. Both these suits were pending in the same Court, i.e., the Court of Sub-Judge, Second Class, Mehkar. Civil Suit No. 39A of 1938, though instituted subsequently, had proceeded beyond the stage of issues when the other suit, civil Suit No. 266A of 1937, was yet in its initial stage.

10. The parties in both the suits prayed that the suits be consolidated and tried together. The trial Judge passed on 21-7-1938 the following order in Civil Suit No. 266A of 1937:-

> The parties to this suit, and' Civil Suit No. 39A of 1938 are common, except that they occupy reversed positions, plaintiffs in that suit being defendants in this suit. The subject-matter of the suit, and the contentions are the same. Both parties pray that the two suits be tried together. Hence, the two suits are ordered to be consolidated and tried together. Since Civil Suit No. 39A of 1938 has already proceeded beyond the stage of issues to the stage of argument, this suit will follow that case, and the proceedings and orders in that case will govern this case, and the documents in that case will also be read in this case.

11. The main question involved in the suits was the legal effect of the decision in Second Appeal No. 180B of 1933. While Pralhad Kale (the purchaser) admitted that as a result of that decision the attachment and sale of l/48th share of Ramchandra was void, Ramchandra and other members of his family contended that the attachment and sale of the entire 5/6th share was void. This and other common questions in the two suits formed the subject matter of Issues Nos. 1, 4, 5 and 6 in the two suits and these were taken up by the trial Court for decision as preliminary issues. The findings on these issues were recorded by the learned Judge on 29-8-1938 in Civil Suit No. 39A of 1938. The learned Judge held that field No. 31 was, by virtue of the grant, not liable to attachment and sale but that the suit except for the share of Ramchandra was barred by Section 47, Civil Procedure Code This finding was to be read as a finding on both the suits and the result thereof in the two suits was as under:

> (a) The plaintiffs in Civil Suit No. 266A of 1937 were entitled to a partition of their 39/48th share in Survey No. 31 and the claim to the extent of l/48th share of Ramchandra was liable to be dismissed. This was the judgment and decree passed in that suit on 21-10-1938.
> (b) In Civil Suit No. 39A of 1938 a decree for possession was to be passed in respect of l/48th share of Ramchandra and it was actually passed on 13-1-1939 The delay was perhaps due to the fact that in addition to the possession of l/48th share, mesne profits relating to that share amounting to ₹ 1-15-6 were also decreed.

12. The main decision in the two suits was the finding recorded by the trial Court on 29-8-1938. The trial Judge no doubt wrote separate judgments and passed separate decrees, but except for the question of mesne profits, the two judgments merely incorporated the result of the findings recorded on 29-8-1938.

13. The present appellant filed an appeal (Civil Appeal No. 20-
A of 1939) against the decree passed by the trial Court in civil Suit No. 39-
A of 1938 but no appeal was filed against the decree passed in civil Suit No. 266-
A of 1937. In the appeal preferred, the correctness of the finding recorded by the trial Court on 2
9-8-
1938 was attacked and the prayer was that the possession of the entire 5/6th share and not of only
l/48th share should have been decreed. The defendant Laxman Kale claimed to be in possession
of only 5/6th share and did not claim any interest in the remaining l/6th share. The finding of the
lower Court regarding mesne profits was not challenged in appeal.

14. A preliminary objection regarding the competency of the appeal was raised by the respondent
s and he contended that the decision in Civil Suit No. 266-
A of 1937 against which no appeal was filed operated as res judicata and rendered the appeal pref
erred against the decree passed in Civil Suit No. 39-
A of 1938 incompetent. This objection prevailed in the first appellate Court and that Court dismis
sed the appeal on this preliminary objection. The appellants came up in second appeal and Bose J
., heard the appeal and dismissed it maintaining the decision of the first appellate Court on prelim
inary objection. The learned Judge took the view that there was no true consolidation of the two s
uits and there was no intention to consolidate them as appears from the order-
sheets in the two suits and from the separate judgments and decrees passed on different dates. Th
e learned Judge observed in the order dated 21-7-
1938 that the word 'consolidation, was used in a wrong sense and held that in the absence of a tru
e consolidation the two decrees passed have not the effect of a composite decree and therefore th
e decree passed in civil Suit No. 266-
A of 1937 which had a separate existence operated as res judicata.

15. The appellants have preferred a Letters Patent appeal and they urge that in view of the consoli
dation of the two suits and of a common finding on the strength of which the two suits are, in the
main, decided it was unnecessary to file a separate appeal against the decree in Civil Suit No. 26
6-A of 1937 and that that decree did not operate as res judicata.

16. In our opinion, the contention of the appellants is correct. There is no specific provision of la
w in the Civil Procedure Code for consolidation of two suits such as is contained in Order 49 of t
he Rules of Supreme Court requiring one trial and lone judgment in consolidated actions. It is un
der the inherent powers of the Court under Section 151, Civil Procedure Code that the suits are c
onsolidated. The legal effect of a de facto consolidation is usually achieved by two suits being tri
ed together by consent of parties and with the approval of the Court. In such cases, the legal posit
ion is however the same as in the case of a true consolidation permitted by law and no party who
has by his own acts and conduct brought about a virtual if not an actual consolidation of two suits
can be permitted to turn round and invoke the rule of res judicata with a view to prevent the hear
ing of the appeal against the real judgment delivered in the consolidated suits: vide *Mt. Lachhmi
v. Mt. Bhulli1*

17. Though the principles of res judicata were codified by the Indian Legislature in 1859, the doc
trine is of universal application and was known to Hindu, Mohammedan and Roman jurists from
very ancient times. In Hindu Jurisprudence, it was known as 'Prang Nyaya' (former decision) and

is referred to in the Mitakshara and in other works dealing with law and jurisprudence. The doctr ine is based on a well-
known maxim 'nemo debet his vexari si constat curia guod sit pro une et eadem causa (no man o ught to be twice put to trouble, if it appears to the Court that it is for one and the same cause). Se ction 11, Civil Procedure Code though largely modified land improved, is still not exhaustive of t he law on the subject and the principles of res judicata apply to matters to which the section does not in terms apply: vide *G.N. Hook v. Administrator General of Bengal2*

18. It may also be noted that Section 11 of the Code in terms does not apply to appeals. Though t he word 'suit' is often used as including an appeal it cannot be so interpreted in Section 11 of the Code as the section would thereby be inconsistent with Expln. 2 which was introduced into the se ction as late as 1908. As Section 11 of the Code does not in terms apply to appeals it is necessary to go beyond Section 11 to find out if there is anything in the general principles of res judicata w hich debar the appellate Court from hearing and deciding the appeal. As the matter is to be consi dered in the light of general principles it is necessary to look to the substance and not be influenc ed by technical considerations of form. Their Lordships of the Privy Council pointed out in *Sheo parson Singh v. Ramnandan Prasad Narayan Singh3* and still later in a case reported in *Oudh Co mmercial Bank, Ltd. Fyzabad v. Bind Basni Kuer4,* that substance should always prevail over for m. It is the spirit of the law and not its letter which should be the governing factor.

19. It is remarked by the learned author Caspersz in his book on Estoppel, para. 575, the decree it self is not the test of what is and what is not res judicata. It is the verdict of the Judge on a particu lar issue, which creates estoppel or operates as res judicata. The fact that this verdict is embodied in two decrees instead of one is wholly immaterial. What is of the essence is whether the material issue arising in two suits was decided by the Court once or twice. If it was decided once only, the n it could not operate as res judicata as the same was challenged as soon as it could in law be chal lenged in appeal. A decision on an issue can operate as res judicata only if left unchallenged by w ay of appeal within the period prescribed by law by filing an appeal.

20. As held by the Pull Bench of this Court in *Baliram v. Manohar5* no appeal could be filed agai nst a finding unless a decree was passed embodying the result of that finding. It was unnecessary to file two appeals simply because two suits were disposed of between the same parties as a resul t of that finding. It was held by the Full Bench of the Nagpur Judicial Commissioner's Court in *S heoram v. Hiraman* that where in cross appeals decided by the appellate Court two decrees were passed as a

1A.I.R. 1927 Lah. 289 3 A.I.R. 1916 P.O. 78 5 A.I.R. 1943 Nag. 204
2 A.I.R. 1921 P.C. 11 4 AIR 1938 PC 80 : 1938-47-LW 227

result of one decision, one appeal was quite competent to challenge both the decrees. It was also pointed out that in such cases it is advisable to pass only one composite decree embodying the re sult of both appeals. This direction is often lost sight of with the result that the litigants are tempte d to raise technical objections to the maintainability of one appeal. It would, however, be correct and proper to treat the two decrees as part of one composite decree and again a mere form should not be allowed to prevail over substance. Where two suits having a common issue are, by consen t of parties or by order of the Court, tried together and decided on one finding, there is in substan ce one judgment and one decree though in form the Court may have written two formal judgmen ts and drawn up two decrees.

21. In suits which are consolidated for trial, there is usually one main judgment disposing of the t wo suits and it incorporates the decision of the learned Judge on common issue or issues. Even, where a finding is separately recorded, it is to be treated as having been incorporated in that judg ment. No judgment and decree in the other i.e., in the consolidated suit need be passed, and even if passed, it is of a formal nature depending solely on the main judgment and decree. In the prese nt case, civil Suit No. 39-
A of 1938, which had progressed beyond the stage of issues, was treated as the main suit and the findings were recorded in that suit. The judgment passed in that suit was thus the main judgment while the judgment and decree passed in Civil Suit No. 266-
A of 1937 were subsidiary, depending on the main judgment. The judgment and decree in Civil S uit No. 266-
A of 1937 were passed possibly only to complete the record and not as an independent decision o f the common issue involved in the two suits. An appeal was duly filed against the main judgmen t and decree and the mere non-
filing of a separate appeal against the subsidiary judgment and decree passed in the other suit, did not render the appeal incompetent. Even if two appeals were filed there would, in substance, be one verdict by the appellate Court. In our opinion, the mere passing of two judgments and decree s does not affect the real position that there was in substance one judgment and one decree and th at was appealed against.

22. In Pothier's Law of Obligations, vol. 1, page 534, it was stated that 'judgments liable to appea l stand for purpose of res judicata on the same footing as those under appeals." This was quoted with approval in *Gurraju v. Venkateshwara Rao6* and in *Balkishan v. Kishan Lal7* It was observe d in *Gurraju v. Venkateshwara Rao8* that the subsidiary judgment is a judgment by legal fiction a nd not a decision on merits. Viewed technically, it may be said that there is a judgment and a decr ee, however, formal it may be, which would remain unchallenged and this may lead to anomalou s and embarrassing situation. This plea can have however no force if attention is concentrated not upon the fact that there is an outstanding decree but upon the question whether there is an indepe ndent decision upon which the decree was based.

23. In view of the order of the consolidation passed by the Court and as the decision of the two s uits between the same parties mainly depended on the finding recorded on common issues, the or iginal Court should have, in our opinion, passed one judgment

6 A.I.R. 1917 Mad. 597 8 A.I.R. 1917 Mad. 597
7(89) 11 All. 148

and embodied it in one decree. The mere fact that the Court unnecessarily passed another judgme nt or drew up another decree should not however prejudice the party. It is the inherent right of a p arty to have a full and final adjudication on his rights which includes the adjudication in appeal o r appeals allowed by law. It is a serious
matter for a party to be told that the appeal be duly filed against the adjudication by which he is a ggrieved is incompetent because he should have challenged that adjudication twice and that the a ppellate Court would not examine the adjudication fey the lower Court because it was challenged only by way of one appeal.

24. Bose J. relying upon his previous decision in *Gangaprasad v. Mt. Banaspati9,* was of the vie w that there was no true consolidation of the two suits though he considered that only one appeal was quite competent in the case of true consolidation. The learned Judge further observed that w

hether two suits were duly consolidated or not depended on an intention to consolidate. In his vie w there was no such intention and the word 'consolidation' was wrongly used. After giving our ca reful thought to the view of the learned Judge, with all respect we are unable to agree with him. I n our opinion, the two suits between the parties were pre-
eminently fit to be consolidated for trial and the parties and also the Judge must have intended a t rue consolidation of those suits. Evidently, the main questions were common, and the evidence, o ral and documentary, was common. The decision of the two suits mainly depended on the legal e ffect of the judgment in Second Appeal No. 180-
B of 1933 decided by Subhedar, Additional Judicial Commissioner on 11-1-
1934. There was no object at all in having two separate trials. The consolidation of the two suits was certainly convenient and advantageous to both parties and there is no reason why they shoul d not have intended to act in a manner convenient and advantageous to them. That they so intend ed is clear to our mind from the order dated 21-7-
1938 and in fact the order of the learned Judge has placed the matter beyond any doubt or ambig uity by using the words, 'Hence the two suits are ordered to be consolidated and tried together.' In our view this was an order of true consolidation if the use of the word 'true' be necessary.

25. As mentioned above, the Civil Procedure Code does not contain a specific provision for cons olidation and it does not prescribe the procedure to be followed after consolidation. The correct p rocedure would be as suggested by Bose J. that after consolidation there is only one case, and the suit consolidated has no independent existence for trial. Both the suits should be Tried in one tria l and should be disposed of by one judgment and decree. The order-
sheets of the lower Court and the fact that two judgments and decrees were passed at best show a n irregularity in following a correct and an ideal procedure, but not an absence of an intention to consolidate the two suits. In any case, as held in a majority view in the Full Bench case in *Mt. La chhmi v. Mt. Bhulli10* with which we respectfully concur, the question of consolidation should no t be looked at too technically and the party should not be deprived of the right to have adjudicatio n in appeal on a narrow and a technical ground.

26. In *Damodhar Narayan v. Narayan Gangaji11* the Divisional Bench of this Court to

9 AIR 1937 Nag 132 11 A.I.R. 1941 Nag. 199

10 A.I.R. 1927 Lah. 289

which Bose J. was himself a party, agreed with the majority view in *Mt. Lachhmi v. Mt. Bhulli A.I .R. 1927 Lah. 289(SUPRA)*. of the order of the Full Bench we find the following observation:-

> Assuming, however, that it is permissible for us to go into the matter, and that
> the Court which simultaneously tried and decided the two suits wrote a full and detailed ju dgment in one suit and a brief one in the other (therein referring to its judgment in the for mer suit), this circumstance ought not to affect, in any way, the decision of the question be fore us, Whether the Court actually gave only one judgment in both suits, or it wrote a full judgment in one suit and in the other merely gave a brief note stating that for the reasons recorded in the judgment of the first suit the second suit was also disposed of in a particul ar way or again, as occasionally happens, a verbatim copy of the judgment in the first suit is attached to the record of the second suit and it is stated that the former judgment should be considered to be a part of the judgment in the second suit--

whichever of these courses is adopted--

there is in my opinion, no difference in substance. The test is whether the Judge has applie d his mind to the decision of the issue involved in the two suits twice or whether there has been in reality but one trial, one finding and one decision.

In view of these observations with which the Divisional Bench agreed in *Damodhar Nara yan v. Narayan Gangaji12* the decision of the preliminary objection to the maintainability of the appeal would not have been otherwise, even if there were, in the suit from which th e appeal arose, two judgments and two decrees instead of one judgment and two decrees.

27. In *Govindayya v. Ramamurthy13* the matter in issue as regards consideration was the same in two suits and the finding recorded in one suit was adopted in the other. The competency of the a ppeal preferred against one of the decrees was challenged on the ground that the finding incorpor ated in the other decree against which no appeal was preferred operated as res judicata. This obje ction was repelled by the learned Judges, relying on the view of the Full Bench in *Panchanada V elan v. Vaithinatha Sastrial14* and on *Ramaswami Chetti v. Karuppan Chetty15* In the Full Bench decision reported partly in I.L.R. (1943) Mad. 235 but more fully in *Pappammal v. Meenammal 16* the Full Bench has dealt with an objection similar to the one that was raised in this litigation. The Full Bench overruled the objection observing that the principle to be applied in such cases w here the object of the appeal is in substance, if not in form, to get rid of the very adjudication whi ch is put forward as 'Constituting res judicata was that the adjudication should not be held to bar t he appeal.

28. In this case, the real adjudication is the finding dated 29-8-
1938 recorded in Civil Suit No. 39-
A of 1938 and those findings are challenged in the appeal preferred against the decree passed in t hat suit. The formal judgment passed in civil Suit No. 266 A of 1937 merely incorporates the resu lt of the finding. In fact it would have been sufficient for the lower Court to say that as a result of the findings recorded separately a decree for partition of 39/48th share is passed, if at all a separat e

12 A.I.R. 1941 Nag. 199 14(06) 29 Mad. 333 16 A.I.R. 1943 Mad. 139
13 A.I.R. 1941 Mad. 524 15 A.I.R. 1916 Mad. 1135

judgment and decree was to be passed, though in our view it was not at all necessary and it woul d have been proper to pass a composite decree in civil suit No. 39-A of 1938.

29. In order that a decision should operate as res judicata it should be quite independent of the pr oceedings to which it is pleaded as a bar. The principle of res
judicata cannot apply in the same proceeding in which the decision is given and by parity of reas oning it cannot apply to the consolidated proceedings. When by consent of parties or by an order of the Court the two suits are consolidated they have no independent existence and nothing decid ed in one of the two consolidated suits can operate as res judicata if that decision was appealed ag ainst. This is because there are no two independent decisions.

30. It was urged that the judgments in Civil Suit No. 266-A of 1937 and Civil Suit No. 39-
A of 1938 were not passed on the same day and that in Civil Suit No. 39-
A of 1938 the question of mesne profits, which did not arise in the other suit, was decided. Here a gain, the argument proceeds more on form than on substance. Except for mesne profits the two ju

dgments decide nothing. They merely rely upon the adjudication in the findings dated 29-8-1938. Similarly, the question of mesne profits except as regards the quantum which is not disputed by the plaintiffs-appellants is subsidiary to the adjudication in the findings. If the findings are upheld in appeal the decision as to mesne profits which is not challenged would stand; it would on the other hand, be set aside automatically and without any adjudication on that point by the appellate Court if the findings are set aside in appeal. The contentions of the respondents have therefore no force.

31. The decision of Bose J. in *Gangaprasad v. Mt. Banaspati17,* is distinguishable on facts. There the two suits were not of the same nature, the main issues were not identical though some of the issues were no doubt common, the rights of the parties at least regarding the right of appeal were not the same. The learned Judge therefore came to the conclusion that there was no intention to consolidate. The learned Judge however observed at page 10:

> There can be no such thing as unconscious consolidation, and in every case the question must be whether the fact of consolidation was present to the mind of the Court, and whether it did consolidate the proceedings even though it omitted to pass a formal order to that effect.

32. In the present case, it is not left to us to gather the intention to consolidate from circumstances or from the conduct of proceedings. The intention of parties and of the Court is clear beyond doubt from the order dated 21-7-1938 and there is nothing to show that the order was passed unconsciously or the words therein were used without understanding their meaning or import. If these is anything on record which is not exactly consistent with consolidation which was intended and effected, it is merely an irregularity.

33. In our view, therefore, the two suits were intended to be consolidated and were actually consolidated. Once that is done, it naturally follows, even according to Bose J., that no question of res judicata can arise.

34. The dismissal of the appeal, Civil Appeal No. 20-A of 1939 by the Additional District Judge on the ground that the judgment in Civil Suit No. 266-A of 1937 operated as res judicata and that it rendered the appeal incompetent was in our view not justified in law. We therefore set aside the judgment and decree passed in Second Appeal No. 101 of 1940. The Letters Patent appeal is allowed with costs. The record will now go back to the Court of the Additional District Judge, Buldana, with directions to hear Civil Appeal No. 20-A of 1939 of that Court and to decide it on merits.

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