
(1973) 11 BOM CK 0017
In the Bombay High Court
Case No : Second Appeal No. 835 of 1968

Abdul Karim Khan

APPELLANT

Vs

Lalman Lachmanji

RESPONDENT

Date of Decision : 07-11-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 9
Constitution of India, 1950 — Article 226, 227

Citation : (1975) MhLj 423

Hon'ble Judges : N.B. Naik, J

Bench : Single Bench

Advocate : R.W. Adik with S.M. Hussein and R.G. Deo, for the Appellant; H.G. Vaishnav, for the Respondent

Final Decision : Allowed

Judgement

N.B. Naik, J.—The question raised in this appeal is as to whether the decision u/s 44 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (which shall be hereinafter referred to as "the Act"), operates as res judicata for the suit filed by the plaintiff.

2. The question arises thus: The plaintiff-appellant is the owner of survey No. 22, measuring 21 acres, situated at Sattara village in taluka and district Aurangabad. In March 1969, the plaintiff filed an application in the Court of the Naib-Tahsildar and Land Reforms, Aurangabad for recovering possession of the land from the different respondents, u/s 44 read with section 32 (2) of the Act. That application was resisted by the defendant by contending, inter alia, that he had ceased to be a tenant of the plaintiff by reason of the fact that under an Isarpavti dated July 17, 1953 the plaintiff had agreed to sell the land to him for Rs. 12,001 and that he had already paid a major part of the consideration under the said agreement. The plaintiff denied of his having executed the agreement in question. But it appears that in support of his contention the defendant filed not only the agreement on which his contention was founded but also an affidavit of the

plaintiff dated December 9, 1953 which was attested by the Deputy Collector. Aurangabad, admitting inter alia that he had sold the land to the defendant. Having regard to that fact the Naib-Tahsildar held that the relation between the plaintiff and defendant as landlord and tenant had come to an end and he, therefore, dismissed that application.

3. Aggrieved by that order the plaintiff took an appeal to the Collector. The appeal was heard by the Additional Collector, Aurangabad, and having regard to the fact that what was-alleged to be executed by the plaintiff in favour of the defendant, was only an agreement of sale and that in fact even thereafter the plaintiff had successively filed suits against the defendant for arrears of rent, the Additional Collector held that the Plaintiff had proved the existence of relationship of landlord and tenant. However, he remanded the matter to the lower Court with a direction to find out whether the Isarpavti was executed and the affidavit to that effect had been produced in the Court of the Assistant Collector and whether the sale certificate had been issued and whether there was validation of the sale.

4. Aggrieved by that order the plaintiff moved the Revenue Tribunal by way of revision. The Revenue Tribunal on an interpretation of the Isarpavti held that the relationship of landlord and tenant continued to exist and that since there was no registered sale deed as such, it was wholly unnecessary to send back the matter for ascertaining the question of the execution of the affidavit or the issue of sale certificate or validation as was directed by the Additional Collector. The revision was, therefore, allowed and the matter was sent back for disposing of the matter u/s 44 read with section 32 (2) of the Act.

5. Aggrieved by that order the plaintiff filed Special Civil Application No. 1015 of 1962 under Article 227 of the Constitution of India, in the High Court. Patel J., after construing the Isarpavti held that having regard to the terms of the Isarpavti there can be no doubt that the petitioner held the land on his own account and not as a tenant of the opponent and that, therefore, the Revenue Tribunal was in error in holding that the petitioner was a tenant of the land and that the respondent was entitled to resume the land.

6. It is against that background that the plaintiff filed the suit giving rise to this appeal for a declaration that the alleged Isarpavti being null and void he continues to be the owner of the land and for possession as owner. The main allegation on which the relief was founded was that the alleged Isarpavti dated July 17, 1953 relied upon by the defendant was never executed by the plaintiff in favour of the defendant and it is a forged and fabricated document.

7. The suit was resisted by the defendant on several grounds, and one of those grounds was that the present suit is barred by res judicata by reason of the decision in Special Civil Application No. 1015 of 1962 decided on February 18, 1965.

8. Although the trial Court raised the issues in the light of the contentions, it

proceeded to try issue No. 4 on the question of res judicata as a preliminary issue and found that issue in favour of the defendant and, therefore, the suit was dismissed. An appeal, appeal No. 835 of 1968, being filed by the plaintiff, the learned District Judge agreed with the finding of the trial Court to the effect that the decision in Special Civil Application No. 1015 of 1962 having operated as res judicata, the suit is incompetent. He, therefore, dismissed the appeal. Aggrieved by that judgment and decree, the original plaintiff has filed this second appeal.

9. Mr. Adik, learned advocate for the plaintiff-appellant, argues that since the special Court under the Act had no jurisdiction to decide or deal with the question as to whether an agreement is fabricated or fraudulent, or to deal with the question of title, the decision in the Special Civil Application would not operate as res judicata. Mr. Vaishnav, the learned advocate for the defendant-respondent, on the other hand, argues that since the decision in the tenancy proceedings was based on an interpretation of Isarpavti itself, it is no longer open to the plaintiff to reagitate about the legality or otherwise of the Isarpavti and that, therefore, the Courts below were right in holding that the suit is barred by res judicata by reason of the decision in Special Civil Application No. 1015 of 1962.

10. It appears to me that Mr. Adik's contention is right and has got to be accepted. Section 9 of the CPC provides that

"the Courts shall (subject to the provisions contained in that Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

11. Turning to the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950, there are only two sections which confer exclusive jurisdiction on the Courts constituted under that Act. They are sections 8 and 99. Section 8 is to this effect:

"If any question arises whether any person is or was at any time in the past a tenant, the Tahsildar shall after holding an inquiry, decide such question."

Section 99 is to this effect:

"(1) Save as provided in this Act, no Civil Court shall have jurisdiction to settle, decide or deal with any question including a question whether a person is or was at any time in the past a tenant or protected tenant and whether any such tenant or protected tenant is or should be deemed to be the full owner of the lands which is by or Under this Act required to be settled, decided or dealt with by the Tahsildar, Tribunal or Collector or by the Commissioner or Government.

(2) No order of the Tahsildar, Tribunal or Collector or of the Commissioner or Government made under this Act, shall be questioned in any Civil or Criminal Court."

12. It would, therefore, appear that exclusive jurisdiction is conferred on the

Courts under the Act only in respect of the matters mentioned in sections 8 and 99 of the Act. There is absolutely no provision empowering the special Courts under the Act to decide questions of title or the question as to whether the plaintiff's title to the property was lost by reason of the Isarpavti. In fact while dealing with the provisions of the Bombay Tenancy and Agricultural Lands Act, which lays down detailed powers of the Mamlatdar u/s 70 of that Act and section 85 which provides that special Courts under that Act shall have exclusive jurisdiction to decide or deal with the matters mentioned therein, a Division Bench of this Court has observed in *Rajesaheb Keshavrao Patil v. Dhondiram Bhau Darade* (1960) Special Civil Application No. 469 of 1960, decided by Chainani C. J. and Tarkunde J., on August 18, 1960 (Unrep.), as under:

"....The questions whether the tease had been brought about by fraud or in collusion between the petitioner's mother and the opponent, and whether the petitioner can consequently avoid it are questions which a tenancy Court cannot properly decide. A Tenancy Court has no power to set aside a lease or to decide that it is not binding upon the person, who was a party to it."

Once again, in *Savalaram Krishnaji Khalkar v. Mukund Keshav Gaikwad* (1962) Special Civil Application No. 1366 of 1961, decided by Chainani C, J. and K. K. Desai J., on September 6, 1962 (Unrep.) relying on the decision in *Rajesaheb Keshavrao Patil v. Dhondiram Bhau Darade*, a Division Bench of this Court while dealing with the question whether the special Courts under the Bombay Tenancy and Agricultural Lands Act had jurisdiction to deal with the question as to whether the lease executed by the father is binding on his undivided sons, has observed as under:

"...Following this decision, (Special Civil Application No. 469 of 1960) we must hold that the Revenue Tribunal was right in its view that the question whether the lease granted by opponent No 4 to the petitioner and opponent No. 5 was binding on opponents Nos. 1 to 3 can only be decided by the Civil Court."

It would thus appear that it was not the function of the special Court under the Act to decide the question as to whether the agreement of safe is fraudulent or fabricated and much less to decide the question of title. That being the position it would appear that the Courts below were in error in holding that the decision in Special Civil Application No. 1015 of 1962 operates as *res judicata*.

13. Both the Courts below have relied upon the decision in *Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat)*, in support of the view that the suit is barred by *res judicata*.

The facts of that case are clearly distinguishable. In that case the plaintiff in the subsequent suit had earlier filed a writ petition under Article 226 of the Constitution of India, for the self-same reliefs on the self-same grounds and had failed. In para. 23 of the report on p. 1159, it is observed:

"..The reliefs sought in the plaint are the same and are sought on the same

grounds, The High Court had to determine in the writ petition whether the appellant's liability as surety stood discharged in view of what he had alleged. The same point has to be directly and substantially decided in the suit also. The orders to be passed if the appellants contention is upheld would be the same as that which would have been passed if his contention had been accepted in the writ petition. In both cases, on both occasions, the Court had first to hold that his liability as a surety stood discharged, and that as a consequence of such a finding, it had, in the writ proceedings, to issue a writ of mandamus and a writ of prohibition as prayed for in the writ petition, directing the State of Bombay not to enforce any liability which the appellant had undertaken under the agreement executed as a surety and not to proceed with the realisation of any amount the State alleged to be due from him and in the suit to pass a decree prohibiting the defendants by a permanent injunction for all time from attaching his property, selling or causing it to be sold and also a permanent injunction to the State of Bombay restraining them from attaching and selling any property of the appellant unless a proper decree is obtained from the Court in the manner provided for the recovery of land revenue"

14. The short question which their Lordships had to consider is whether the decision in the earlier writ petition for similar relief on identical grounds would operate as res judicata for the subsequent suit which was filed by the plaintiff. Having regard to the fact that the reliefs in both the earlier writ petition and in the subsequent suit were identical and the grounds on which the relief was sought were also identical, their Lordships held that since the provisions of section 11 of the CPC are not exhaustive the earlier decision would operate as res judicata on the general principle of res judicata, The relevant observations in para. 60 of the report are (p. 1167):

"As a result of the above discussion, we are of opinion that the provisions of section 11. Civil Procedure Code, are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial."

15. It is important to note that in the case before their Lordships there was undoubtedly no dispute about the jurisdiction of the High Court to decide the writ petition under Article 226 of the Constitution. Therefore, the question of that decision being without jurisdiction did not arise. The subsequent observations about competency of the Court to decide the subsequent suit, have reference to the contention that in order that the decision of the High Court in the writ

petition should be res judicata, that Court should have had coextensive jurisdiction to entertain the subsequent suit. In fact that argument is dealt with by their Lordships to this effect in the earlier para. No. 58 (p. 1167);

"...it is true that the jurisdiction of the civil Court and the High Court or this Court cannot be said to be co-extensive, but it is plain that the civil Court, in the exercise of its jurisdiction, is subject to the appellate or revisional jurisdiction of the High Court and this Court. We do not consider the reasons for holding that a decision in a writ petition cannot operate as res judicata in a subsequent regular suit to be sound...."

16. It would, therefore, appear that the observations in this case would have no application to a decision of the Tenancy Courts on a question of title inasmuch as they have no jurisdiction to decide that question. It is only the decision of a Court which has exclusive jurisdiction to decide the matter that could operate as res judicata on general principles in a subsequent suit.

17. Mr. Vaishnav has also drawn my attention to the subsequent decision of the Supreme Court reported in Union of India (UOI) Vs. Nanak Singh, . In that case the facts were these: Nanak Singh a Field Inspector being dismissed from Service by one Kane, Additional Settlement Commissioner, filed a writ petition for quashing that order of dismissal and for a declaration that he continues to be Field Inspector. That petition was founded on two grounds, namely (1) that the order terminating the employment amounted to imposing punishment and could not be made without affording opportunity to the employee to show cause against the action proposed to be taken in regard to him; and (2) that Mr. Kane was not competent under rule 5 of the Central Civil Services (temporary-service) Rules, 1949 to terminate his employment. Both these grounds were upheld by Gurdev Singh J., and he granted the petition. The High Court of Punjab on appeal reversed that order and directed the petition to be dismissed, The High Court after an elaborate discussion came to the conclusion that the order did not amount to punishment and while dealing with the ground about the authority of Mr. Kane, the High Court observed (p. 1371):

" "In the second place it was urged that the Officer who had passed the order of dismissal was not competent to do so. The second point is not before us because arguments have been advanced mainly on the first point and on a decision of this point the appeal can be disposed of." "

18. Evidently thinking that the question of reagitating his dismissal on the ground of want of authority in Kane to terminate his service, was kept reserved for him, Nanak Singh filed a suit for the self-same reliefs which were sought in the earlier writ petition. It was contended by the State that the earlier decision in the writ petition operated as res Judicata. On the other hand, it was contended for Nanak Singh that having regard to the order of the High Court in the writ petition on the second ground of the competency of Mr, Kane, it must be presumed that his right to reagitate the question of dismissal on that ground by

separate suit was reserved. Their Lordships rejected that contention. Their Lordships took the view that out of the two grounds which were taken by Nanak Singh in his writ petition for challenging the order of his dismissal any one ground was sufficient to support the order in his favour. Now, since the High Court dismissed the writ petition only after discussing one ground on which the relief was founded, the result was thereby the High Court must be deemed to have rejected both the grounds on which the petition was founded. Their Lordships observed as under at p. 1371:

"...The second plea about the authority of Mr. Kane also must be deemed to have been negatived by the High Court, for the High Court could not, without reversing the judgment of Gurdev Singh, J., have dismissed the petition. It is true that in the judgment of the Court of Appeal some obscure statement has been made, and it is difficult to appreciate the true purport thereof. But what operates as *res judicata* is the decision and not the reasons given by the Court in support of the decision. We are unable to agree with counsel for Nanak Singh, that the High Court reserved to Nanak Singh the right to agitate the question about the authority of Mr. Kane in a separate suit. There is no such express reservation, and it cannot be implied, for such an implication is plainly inconsistent with the final order passed by the High Court. Even assuming that the High Court was in error in holding that the appeal could be decided only on the first point, the order dismissing the petition must still operate as *res judicata* in respect of both the points on which the petition was founded."

Their Lordships thereafter referred to the observations in para. 60 in the case of *Gulabchand v. State of Gujarat*, and proceeded to observe as under in para. 6 (p. 1372):

"...But in our view the judgment in the previous case operates by express decision as *res judicata*. It is true that in order that the previous adjudication between the parties may operate as *res judicata*, the question must have been heard and decided or that the parties must have an opportunity of raising their contentions thereon. In the present case, Gurdev Singh, J., dealt with the question in some detail and held that Mr. Kane had no authority to terminate the employment of Nanak Singh. The High Court in appeal thought that the appeal could be disposed of only on the first ground and they recorded no express finding on the second ground. But once the appeal was allowed and the petition was dismissed, the dismissal of the petition operated as a rejection of both the grounds on which it was founded."

19. It would, therefore, appear that this decision also would not help the defendant to raise the plea of *res judicata* inasmuch as the High Court had undoubtedly the jurisdiction to decide the earlier writ petition. None of these two rulings, therefore, could be said to be an authority for holding that the decision of a Court which has no jurisdiction, would operate as *res judicata* to a subsequent suit.

20. Such a question had arisen directly in a Madras case reported in Pollapalli Venkatarama Rao and Others Vs. Musunuru Venkayya and Others, . The Full Bench had to consider a similar question arising under the Madras Estates Land Act, 1908. There certain tenants filed a petition u/s 40 of the Madras Estates Land Act, 1908 in the revenue Court for commutation of rent, against the landholders. The landholders raised a plea that the village in which the petitioners' lands were situated was not an estate and, therefore, the petition was not maintainable in the revenue Court. The Revenue Divisional Officer held that it was not an estate and on that footing dismissed the petition. The matter was taken up in appeal to the District Court and thereafter to the High Court without success. Subsequently, the landholders filed a suit in the civil Court against the tenants for an injunction restraining them from removing the paddy crops standing on the suit lands until the rent was paid to them. The landholders raised a plea that the decision of the revenue Court holding that the village was not an estate was binding on the civil Court. The Full Bench of the Madras High Court held that the said finding was not binding on the civil Court. Adverting to section 189 (3) of the Madras Estates Land Act, which corresponds to section 99 of the Hyderabad Tenancy and Agricultural Lands Act, the learned Judges observed thus in para. 8, at p. 790:

"...Therefore, it is clear that it is only in respect of such disputes or matters as are covered by the suits or applications specified in section 189 (1) that the revenue Court can be said to have exclusive jurisdiction, that is, jurisdiction to the exclusion of a civil Court. Sub-section (3) of section 189 provides that the decision of a revenue Court on a matter falling within such exclusive jurisdiction of the revenue Court shall be binding on the parties and their representatives in any suit or proceeding in civil Court.

If a particular matter is one which does not fall within the exclusive jurisdiction of the revenue Court, then a decision of a revenue Court on such a matter, which might be incidentally given by the revenue Court, cannot be binding on the parties in a civil Court. One practical test would be to determine if that particular matter would not be a matter in respect of which the civil Court would have jurisdiction. To give an obvious instance, suppose in a suit u/s 55 for the grant of a patta instituted by a person claiming to be the adopted son of the ryot who was a Pattadar, the landlord raises a plea that he is not entitled to the patta because his adoption is not valid. It may be that the revenue Court would have to summarily go into the question whether the person suing is or is not the validly adopted son of the previous ryot. Can it possibly be said that the finding of the revenue Court on the issue of adoption is binding on the parties in a subsequent suit in a civil Court in which the validity of the adoption might fall to be decided? There can be no doubt about the answer.

That is because the dispute as to the validity of the adoption is not a dispute in respect of which a revenue Court has exclusive jurisdiction. Such a dispute is a matter well within the jurisdiction of a civil Court. Therefore, it cannot be within

the exclusive jurisdiction of the revenue Court, and the decision of such a dispute by a revenue Court cannot be binding in a civil Court."

21. The said observations in the Full Bench decision of the Madras High Court have been approved by their Lordships of the Supreme Court in the case reported in *Bhagwan Dayal Vs. Mst. Reoti Devi*, In that case the facts were these: Reoti Devi had filed a suit against Bhagwan Dayal in the revenue Court u/s 230 of the Agra Tenancy Act, 1926. That suit was filed by her for the share of her profits as a co-sharer. Bhagwan Dayal resisted that suit in the revenue Court by contending inter alia that he had become the sole surviving coparcener and absolute owner of the property and that his sister-in-law Reoti Devi was not a co-sharer. Section 230 of the Agra Tenancy Act created the revenue Court a Court of exclusive jurisdiction in respect of matters specified in the Fourth Schedule. Section 271 of that Act provided for a reference being made to the civil Court, if the defendant pleaded that the plaintiff has not got the proprietary right to institute the suit. It was under this provision that the issue was referred to the District Munsiff. The District Munisif repelled the contention of Bhagwan Dayal and held that Reoti Devi had half share. A decree was made by the revenue Court in terms of that finding. This decree was impeached by an appeal to the District Court and also in the High Court but without success. It was thereafter that Bhagwan Dayal filed a regular civil suit for a declaration of his exclusive title to the suit property and for an injunction restraining Reoti Devi from executing the decree which she had obtained in the revenue Court. That suit was contested, among other grounds, on the ground of *res judicata*. Their Lordships of the Supreme Court found on an examination of the Fourth Schedule of the Act which gives exclusive jurisdiction to the revenue Court, that that Schedule did not include a suit for a declaration of title and for injunction against another person who was trying to interfere with the plaintiff's title. Their Lordships thereafter observed in para. 13 as under (p. 293):

"...If so, u/s 230 of the Act, the Revenue Court has no exclusive jurisdiction to entertain a suit of the nature that is before us. If it is not a suit of that nature, under that section, the civil Court's jurisdiction is not ousted."

in this connection their Lordships quoted with approval the observations of the Full Bench of the Madras High Court reported in *Venkatarama Rao v. Venkayya*, which have been referred to in the earlier part of this judgment.

22. It would, therefore, appear that in the instant case, since the special Court under the Hyderabad Tenancy and Agricultural Lands Act, 1950, had no exclusive jurisdiction to decide the question of title or the question as to whether the agreement is fraudulent or fabricated the earlier decision in the Special Civil Application cannot operate as *res judicata*.

23. It was, however, argued by Mr. Vaishnav that in fact the whole basis of the decision in the special civil application was the existence of the *Isarpavti*. He also argues that since the plaintiff did not raise a dispute in that proceeding that the

Isarpavti was fabricated or fraudulent, in view of Explanation IV to section 11 of the Code of Civil Procedure, it must be held that the earlier decision would operate as res judicata.

24. Now, when we turn to section 11 of the Civil Procedure Code, it lays down in terms that the earlier Court must be competent to try the subsequent suit or the suit in which such issue has been raised subsequently. It could not be said with any stretch of imagination that the special Court under the Act had exclusive jurisdiction to decide the question of the validity of the agreement or the question of title. Surely while deciding the question as to whether the defendant was a tenant or not incidentally it was required to express its opinion about the same. But then, since that Court had no exclusive jurisdiction to decide that question, its decision would not operate as res judicata.

25. I have also referred to the observations of the Full Bench decision of the Madras High Court to the effect that the incidental decision of a matter by the special Court which has no jurisdiction could not be a bar to reagitating the same question in a civil Court. So also in *Musamia Imam Haider Bax Razvi Vs. Rabari Govindbhai Ratnabhai and Others*, , the Supreme Court has observed that:

""the plea of tenancy in the earlier years was not an independent question but was only a subsidiary plea put forward by the defendants as a reason for substantiating their plea of statutory ownership and the jurisdiction of the Civil Court cannot be held barred by virtue of section 70 read with section 85 of the Act."

Since there is nothing in the Act to confer exclusive jurisdiction on the special Court to decide the question of title and the contention now raised by the plaintiff, it would appear that the earlier decision in the Special Civil Application No. 1015 of 1962 could not operate as res judicata.

26. In the result, the appeal succeeds. The decrees passed by the Courts below are set aside and the suit is sent back to the trial Court for disposal according to law after framing proper issues in the light of the pleadings. Costs would be costs in the cause.