

(1965) 01 OHC CK 0011
In the Orissa High Court
Case No : Second Appeal No. 321 of 1963

Daitari Mohapatra

APPELLANT

Vs

Uchhab Sahu and Others

RESPONDENT

Date of Decision : 13-01-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 11 , 92

Citation : (1966) 32 CLT 133

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : B.K. Pal, D.P. Mohapatra and G.B. Patnaik, for the Appellant;
Madbabananda Das, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—This is a Plaintiff's appeal against the concurrent decisions of the Courts below arising out of a suit for declaration of title, confirmation of possession or in the alternative for recovery of the same and for injunction.

2. Plot number 92 comprising an area of 27 decimals in Khata No. 329 in the town of Cuttack stood recorded in the name of Anthua Gopal Thakur with one Aparti Das 808 Marfatdar. The landlords of the aforesaid property executed a permanent patta by a registered document (ext. I) on 9-2-1932 in favour of Manik Dei, wife of the present Plaintiff. Manik filed Title Suit No. 6739, in the court of the second Munsif for declaration of her title to the said property adding the present Defendants 1 to 6, as Defendants 1 to 6 in that suit and the deity Anthua opal Defendant No. 7 represented by the Marfatdar Aparti Das was also Defendant No. 7 and the landlords figured as proforma Defendants 8 to 10 in the suit. When that suit came up for hearing, a compromise petition (ext. 3) was filed on 28-2-1940 by the parties wherein the Plaintiff gave up her claim to four decimals out of the suit property including a Dolamandap and be Defendants. acknowledged the Plaintiff as having title to the rest of 23 decimals and in terms of the said compromise a decree (ext. 6) was passed between the Plaintiff and

Defendants 1 to 6, the deity, Defendant No. 7 having been set down ex-parte. In pursuance of the said decree delivery of possession was given on 2-9-1941, by the writ of delivery of possession (ext. 7).

3. The present Plaintiff is the husband of Manik. According to him his wife Manik and after her death he had been in possession of the above 23 decimals of land in pursuance of the compromise decree, ext. 6, but Defendants 1 to 6 and some others are again disturbing their possession and trespassing into the suit land with the intention to build a house thereon. The Plaintiff has therefore filed the present suit against Defendants 1 to 6 and others in their personal capacity as also representing their co-villagers and the deity (Defendant no 7), in respect of the 23 decimals and for the reliefs aforesaid:

4. After filing of the present suit, Defendants 8 and 9 made applications to be added as Defendants to represent the body of villagers. The defence case is that the suit-property is absolute debottar of the deity, Defendant No. 7, and from time immemorial it is being used as a festival round of the deity and also as a public place by the people of Thoria Sahi, who have acquired a title to it by prescription. The Marfatdar Aparti Das was appointed by the people of the locality to perform the seba puja of the deity and he was recorded as such in the current settlement records. The said Aparti Das having left the village for about thirty years, the villagers themselves are now acting as Marfatdars doing seba puja of the deity and Defendants 1 to 6 were never the Marfatdars. The Plaintiff collided with Defendant No. 6 and managed to get a compromise decree and the compromise petition was signed by Defendant 1 and 3 alone without knowing its contents, and as such, the said decree was a fraudulent one not binding either on the deity (Defendant No. 7) or the villagers of Thoriasahi. Ext. 7, the writ of delivery of possession was a mere paper transaction and the Plaintiff never obtained any possession which remained all along with the Defendants.

5. The trial court found that the deity (Defendant No. 7) though in existence was not duly represented in Title Suit No. 6739. The property all along remained in possession of the deity, the landlords could not convey a valid title either to the Plaintiff or to his wife and therefore none of them had any title to the suit-property and the name of the deity had been correctly recorded in the C.S. record of rights. He further found that the plea of the Defendants is not barred by the rule of res judicata and that the previous suit was filed against the Defendants in their personal capacity and the alleged compromise was fraudulent and not binding on the deity. Lastly he held that the suit is barred as the Plaintiff was not proved to have been in possession within 12 years from the date of the suit. He thus dismissed the Plaintiff's suit.

6. On appeal, the appellate court confirmed all the findings of the trial court. Though he held that the suit is not barred as it was filed within 12 years from 2-9-1941, the date of alleged delivery of possession as per ext. 7, he confirmed the decree of the trial court and dismissed the appeal. It is against this confirming decision of the court below the Plaintiff has filed the present appeal.

7. Learned Counsel for the Appellant contended that though Defendants 1 to 6 were not impleaded in the previous suit in their representative capacity in the pleadings of the Plaintiff, yet they in fact represented the deity and though the compromise decree was known to the Defendants, they did not challenge, the same either on the ground of fraud or otherwise and there is nothing to show that Defendants 1 to 6 acted against the interest of the deity when they gave up claim in respect of 23 decimals decreed in the previous suit. According to him Defendants 1 to 6 represented the villagers and the deity (Defendant No. 7) in the previous suit and they in that capacity, having entered into compromise with the Plaintiff, are estopped from challenging the same and their plea is hit by Explanation 6 to Section 11 of the CPC Code.

8. Before proceeding to examine the merit of these contentions, it is necessary to state a few more facts relevant for the purpose. No doubt, in the previous suit the deity figured as Defendant No. 7 with Aparti Das as its Marfatdar. It however appears that in that case the plea of the Plaintiff was that there was no such deity in existence as Anthua Gopal, but since this name was found recorded in the record of rights, he was made a party to the suit. It was also said that Aparti was untraced for about thirty years and that he had gone away with the deity. In other words the Plaintiff did not admit the existence of the deity or the presence of its Marfatdar, Aparti, in the village, but there he had contended that Aparti had gone away with the deity. If in fact, the Plaintiff knew at the time of the previous suit that Aparti had already left the village and was untraced, it is not understood how he added him as Marfatdar to represent the deity. Further Defendants 1 to 3 were added in their individual capacity as causing damage and trespass upon the such property and not as representing the deity. If Aparti was not available, the villagers including the present Defendants could have been sued in their representative capacity. Therefore so far as the previous suit is concerned, the deity remained wholly unrepresented and in consideration of these facts, the courts below rightly held that the compromise the ex-parte decree cannot bind the interests of the deity at all.

9. It was urged on behalf of the Appellant that the Defendants 1 to 6 represented the entire body of villagers in the previous suit and for this emphasis was laid on the fact that in the compromise petition (ext. 3) it was mentioned that the deity shall be the owner of the rectangular plot of four decimals stated above and that Defendants 1 to 6 represent the villagers as Marfatdars of the deity. But before we appreciate this point, we have to look to the nature and scope of the previous suit. Admittedly that was not a suit filed either under Order 1, Rule 8 or Section 92 of the CPC Code. The plaint (ext. A2) in that suit does not show that the Defendants were sued on behalf of all the villagers or the deity Defendant No. 7. As stated above, in that suit even the existence of the deity was denied and it was said that the Marfatdar Aparti had gone away with the deity. If the Defendants were sued in their representative capacity and as representing the deity, there was no occasion for passing an ex-parte decree against the deity. The deity being minor has to be represented through some body and it was open

to the Plaintiff in that suit to frame the suit in the manner as has been done in this case and that not having been done, the decree against the deity must be taken to be void. Defendants 1 to 6 had no right in the previous suit to part with the 23 decimals which is the subject matter of the present suit and which admittedly belong to the deity, as they did not represent the villagers or as trustees of the deity as is clear from the circumstances stated above.

10. Next we shall examine whether the plea of the Defendants is constructively barred by the rule of res judicata as embodied in Explanation VI to Section 11 CPC Code. On this question some authorities were cited on behalf of the Respondents. In a decision of the Supreme Court in *Ahmad Adam Sai and Ors. v. M.E. Makhari and Ors.* AIR 1964 S.C. 107 their Lordships held that where a representative suit is brought u/s 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the Plaintiffs and therefore, are constructively barred by res judicata from reagitating the matter directly in issue in the said suit. A similar result follows if a suit is either brought or defended under Order 1, Rule 8. In that case, persons either suing or defending an action are doing so in a representative character, and so, the decree passed in such a suit binds all those whose interests were represented either by the Plaintiffs or by the Defendants. Thus, it is clear that in determining the question about the effect of a decree passed in a representative suit, it is essential to enquire which interests were represented by the Plaintiffs or the Defendants. If the decree was passed in a suit u/s 92 it will become necessary to examine the plaint in order to decide in what character the Plaintiffs had sued and what interests they claimed. If a suit is brought under Order 1, Rule 8, the same process will have to be adopted and if a suit is defended under Order I, Rule 8, the plea taken by the Defendants will have to be examined with a view to decide which interests the Defendants purported to defend in common with others. We have already seen that the plaint in previous suit (ext. A2) was not one wherein the Defendants were brought on record in their representative capacity, but were sued only in their personal capacity for damages and for threatening to dispossess the Plaintiff. They were not treated as the Marfatdars of the deity. The present suit, however, is entirely different in nature where the Defendants figure as representing the entire body of villagers and also the deity.

11. In a case AIR 1933 183 (Privy Council), it was held that in a representative suit instituted under Order I, Rule 8, CPC the decision in a former suit does not operate as res judicata by force of Explanation VI to Section 11, unless the former suit was instituted in compliance with the above rule, viz., the permission of the Court was obtained and notice was given to all persons interested in the suit.

12. It is obvious that Explanation VI of Section 11, CPC applies only to cases in which there is some indication that the suit was of a representative character. But here the previous suit was not of such character as has been, stated above. It was contended on behalf of the Appellant that an ex-parte or a consent decree has as much force as a decree passed on merits on contest See *Habibur Rahman*

Vs. Vijay Charan Abhay Charan Dubey and Bros., , L. Basant Lal and Another Vs. Rameshwar Prasad and Others, and Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa, . But that question is not material for the purpose of this appeal and learned Counsel for the Respondent did not rightly dispute that position. The question, however, is whether the previous suit was filed against the Defendants in their representative capacity and whether the deity was duly represented. Reliance was placed on behalf of the Appellant on a decision of the Lahore High Court in AIR 1938 499 (Lahore) . There the Plaintiff in a former suit brought against the trustees of the temple, claimed certain property attached to the temple as belonging to him which was contested by the Defendants saying that the property belongs to the temple and not to the Plaintiff. The suit was finally decreed in favour of the Plaintiff. Subsequently the worshippers of the temple brought a suit against the heirs of the previous Plaintiff claiming the very same property as belonging to the temple, and it was held that the Plaintiffs being the worshippers of the temple were persons interested in it and had the locus standi to sue to protect the properties of the temple from being wrongfully claimed by third persons, and though the Plaintiffs were not the successors of the Defendants in the former suit, the title litigated in both the suits was the same as they both claimed title to the same property of the temple. The Plaintiffs were therefore, litigating under the same title, even though the agency asserting title in the former suit was different from the one in the subsequent suit. It was held that the suit was therefore barred by res judicata. But that decision has no application to the facts of the present case inasmuch as the present Defendants are not litigating under the same title in both the suits. As we have seen, in the former suit they were defending themselves whereas in the present suit they are defending the deity and the right of the villagers, in respect of the deity.

13. Reliance was also placed on a decision of the Calcutta High Court reported in Behari Lall Sen and Others Vs. Gour Chandra Biruni and Others, . That was a case where in the previous commutation proceeding the Plaintiff in the subsequent suit was not described as Sebait of the idol, but it was found that he appeared, but did not set up any interest adverse to that of the idol, but defended the commutation proceeding as Sebait. It was held that there was effective representation of the idol in the commutation proceeding although the suit was nominally brought against the present Plaintiff and as such the proceedings were really directed against the Debottar Estate. On the basis of this decision, it was contended that Defendants 1 to 6 having effectively represented the deity and they having no interest adverse to the deity in the previous litigation, the compromise decree stands and It as such binds the deity, as the Defendants 1 to 6 or the members of the public, so as to be hit by the provisions of Explanation VI to Section 11 of the Code of Civil Procedure. But we have already seen that the Plaintiff in this case went to the length of denying the very existence of the deity and made him a party merely because his name stood recorded in the record of rights. The recorded Marfatdar was admittedly untraced and Defendants 1 to. 6 were sued only in their individual capacity and the deity

who was represented by Aparti Das went ex-parte. Therefore there was no effective representation of the deity by Defendants 1 to 6 in the previous suit. The aforesaid decision is therefore of no help to the Appellant.

In the result, therefore, the decision of the court below is affirmed and the appeal is dismissed with costs.

Appeal dismissed.