

(2011) 11 MP CK 0025
In the Madhya Pradesh High Court
Case No : S.A. No. 21 of 1999

Ditya (deleted) through L.Rs. and Anrs.	APPELLANT
Vs	
Kidi and Others	RESPONDENT

Date of Decision : 25-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Hindu Succession Act, 1956 — Section 2(2)

Citation : (2012) 1 MPJR 37

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : S.N. Joshi, for the Appellant; M.L. Agrawal with Mr. Ravi Shukla, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Shrivastava, J.—This appeal has been filed by the plaintiff's against the judgment of reversal. A suit for declaration of Bhumiswami right, restoration of possession and cancellation of decree passed in Civil Suit No. 16-A 1981 (Kidi vs. Bucha) dated 25.9.1982 by Civil Judge, Class-II, Jobat (hereinafter referred to as "the former suit") was filed by the plaintiff's long back on 4.9.1986 (more than 25 years ago) on the averments that they are the heirs of Bucha who was owing the disputed land, the description whereof has been mentioned in the plaint and which is the subject matter of the suit. According to the plaintiff's, Kidi (defendant No. 2) filed a former suit against their predecessor Bucha arraying him as defendant in that suit on the averments that she is the owner of the suit property. In the aforesaid suit, the plaintiffs were not the parties and therefore, the decision passed in former suit is not binding upon them. As soon as they came to know about the passing of the aforesaid judgment they have filed the present suit. The plaintiffs have further pleaded that suit property was owned by Bucha in which second defendant Kidi was not having any right, title and interest and therefore, by decreeing the suit, the decree passed in former suit be set aside and by declaring the plaintiffs to be the Bhumiswami of the suit property,

the possession be also restored to them.

2. The second defendant Kidi filed written statement while other defendants filed their separate written statement. However, in both the written-statements the averments made in the plaint were denied and, inter alia, a plea of res judicata was also raised. The defendants prayed that the suit be dismissed.

3. Learned Trial Court framed necessary issues and after recording the evidence of the parties decreed the suit of plaintiffs. However, in appeal filed by the defendants the judgment and decree passed by learned Trial Court was set aside and suit of plaintiffs was dismissed by the impugned judgment and decree.

4. In this manner this second appeal has been filed by the appellants (plaintiffs) in this Court which was admitted by this Court on 26.11.1999 on the following substantial question of law:

Whether the courts below erred in not considering while deciding the dispute that the appellant and the respondent belong to Bheel Society and the daughter has her legal right or not for her share in father's property considering the legal weight of the evidence on record?

5. Vehemently it has been put forth by Shri S.N. Joshi, learned counsel for the appellants that since the plaintiffs were not the parties in the earlier suit which was filed by second defendant Kidi against the predecessor of plaintiffs and further the said judgment was decreed in ex parte, therefore, when the plaintiffs came to know about the passing of the former judgment immediately the present suit has been filed by them. Learned counsel further submits that because the plaintiffs are the member of Scheduled Tribe community, therefore, provisions of the Hindu Succession Act, 1956 are not applicable on them and hence, Kidi (defendant No. 2) who is the daughter of Bheema is not having any right, title and interest in the disputed property which was owned by her father Bheema and indeed, the plaintiffs' predecessor Bucha being the son of Bheema became the absolute owner of the suit property after the death of Bheema, and therefore, the judgment and decree passed in the former suit is ex facie erroneous and not in accordance with law. On these premised submissions it has been put forth by learned counsel that by allowing this appeal the impugned judgment be set aside and that of learned Trial Court be restored.

6. On the other hand, Shri M.L. Agrawal, learned senior counsel for the respondents/defendants argued in support of the impugned judgment and submitted that earlier Kidi, who has been arrayed as second defendant in the present suit, filed the former suit against plaintiffs' predecessor Bucha and in that suit Bucha filed written-statement, but, later on he did not appear, resultantly, an ex parte decree was passed against him and therefore, the present appellants/plaintiffs who are the heirs of Bucha and are claiming title through Bucha are bound by the decision passed in the former suit. Learned senior counsel submits that present suit is hit by the dictum of res judicata as envisaged u/s 11 CPC. Learned senior counsel further submits that if the decision

passed in the former suit was not in accordance with law and was erroneous, even then also it will amount to res judicata in this later suit and in this context he has placed heavy reliance on the decision of Supreme Court State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others,

7. Having heard learned counsel for the parties I am of the view that this appeal deserves to be dismissed.

Regarding Substantial Question of Law framed:

8. Plaintiff No. 4, Reslo is the widow of Bucha while plaintiffs 1 to 3 are the sons of Bucha. Undisputedly, Kidi, second defendant of the present suit, had filed a former suit against her brother Bucha for declaration of the Bhumiswami right and restoration of possession in respect to the same suit property which is the subject matter of the present suit. The plaint of the former suit is Ex. D-2 and the written-statement filed by Bucha in that suit is Ex. D-5. Later on, Bucha did not appear in that suit and eventually the suit was decreed ex parte against him vide judgment delivered on 25.9.1982. Certified copy of the judgment of former suit is Ex. D-3 while the decree passed in that suit is Ex. D-4. The document dated 7.11.1987, Ex. D-6 is the certified copy of the execution proceedings arose from the ex parte judgment passed in the former suit and on bare perusal of the said proceedings this Court finds that the possession of the suit property was delivered to Kidi Bai (defendant No. 2). Ex. D-7 is the Panchnama of the delivery of possession. Undisputedly, the suit property in the present suit is same.

9. I do not find any merit in the contention of the learned counsel for the appellants that because plaintiffs were not the party in the earlier suit and they were not aware of the passing of the judgment of former suit and therefore, the said judgment is not binding upon them. The said contention is in complete derogation to Section 11 CPC wherein the legislature has specifically enacted the law that no Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. According to me, the legislature has deliberately used the words "or between parties under whom they or any of them" in Section 11 CPC so that a person cannot be vexed twice for the same cause of action. If these words would not have been enacted in Section 11 CPC, after passing of a judgment in a civil suit, any of the heir of the party against whom a judgment has been passed may later on institute a second suit and in that situation the litigation would never attain finality. Therefore, it is being said that the principle of res judicata is based upon public policy.

10. It be seen that Section 11 CPC is based partly on the maxim of Roman jurisprudence, "Memo debet bis vexari pro una et eadem causa", which would mean that no man should be vexed twice over the same cause. Hence, I am of

the view that because the plaintiffs are claiming through their predecessor Bucha, the judgment passed in former suit (Ex. D-3) would operate as res judicata.

11. I shall now deal with the second submission put forth by learned counsel for the appellants. Learned counsel vehemently submitted that the judgment passed in the former suit was wrong and was in complete derogation to Section 2(2) of the Hindu Succession Act. Several contentions have been put forth by learned counsel for the appellants in this regard, but, those contentions cannot be accepted for the simple reason that even if the judgment passed in the former suit was erroneous or wrong it cannot be a ground to file a fresh suit or the res judicata would not apply. In this context, rightly the decision of Supreme Court Hemant Kumar (supra) has been placed reliance by learned senior counsel for the respondents. I may further add that undisputedly the learned Court which decided the former suit was competent and having jurisdiction to decide the same. The Court may have wisdom to decide rightly or wrongly and even contrary to law, but, the said erroneous judgment or even a judgment which is contrary to the law can always be challenged in appeal before the superior Court. However, a fresh suit cannot be filed. A landmark decision in this regard of Single Bench of this Court in the case of State of Madhya Pradesh Vs. Mulamchand, may be taken note of which governs the field of this case and the submissions placed reliance by learned counsel for the appellants. According to me, even a wrong decision or the judgment which is contrary to the law is binding upon the party unless and until it is set aside in the appeal or the other remedy provided under the law. Thus, the second contention put forth by learned counsel for the appellants cannot be accepted.

12. The substantial question of law is thus answered that learned First Appellate Court did not err in not considering while deciding the dispute that the appellants and respondents belong to Bheel Society and daughter has her legal right or not for her share in father's property considering the legal weight and evidence on record, because the judgment passed in the former suit operates as res judicata on this point. Resultantly, this appeal fails and is hereby dismissed with costs. Counsel fee according to the schedule, if pre-certified.