
(1928) 06 CAL CK 0029
In the Calcutta High Court

Hriday Nath Roy

APPELLANT

Vs

Akhil Chandra Roy and Others

RESPONDENT

Date of Decision : 01-06-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 99

Citation : AIR 1929 Cal 445

Hon'ble Judges : Suhrawardy, J; Jack, J

Bench : Full Bench

Judgement

Suhrawardy, J.—In this case the respondent is the Secretary of a religious association called the Amraguri Navavidhan Brahma Samaj. Some years ago he brought a suit against the defendants as Secretary of the Association for recovery of possession of the land in suit on the allegation that it was owned by the Brahma Samaj. That suit was decreed on 26th November 1909. The defendants appealed; but before the appeal was finally heard the plaintiff took possession through Court on 12th September 1910. He was subsequently dispossessed by the defendants in November 1910 which dispossession gave rise to the present suit. The appeal in the previous case was finally decided by the lower appellate Court on :25th July 1911 and dismissed, the decree in favour of the plaintiff having been maintained. The present suit was instituted on December 1920. Both the Courts below have given a partial decree to the plaintiff.

2. The only point that has been argued before us is that the suit in its present form is not maintainable. It is contended that the association is not a corporation within the meaning of Order 29, Civil P.C. The only provision therefore under which the plaintiff is entitled to maintain the suit is prescribed by Order 1, Rule 8. This question was raised in the Court below and decided against the defendant appellant. ""It should be noted here that the previous suit was brought under Order 1, Rule 8 but the defendants objected that the suit was not maintainable as that rule did not apply in that case the plaintiffs not being "numerous." The

objection in the previous suit was overruled by the trial Court but it was not argued in the lower appellate Court. It was attempted to be raised in second appeal in this Court but the learned Judges refused permission to allow the defendants to raise the point at that stage of the litigation. The trial Court in that suit held that the plaintiff as Secretary of the association was competent to maintain the suit and that it was not necessary "to have recourse to the provision of Order 1, Rule 8. The defendant now turns round and takes the objection that the suit ought to have been brought under that rule. On behalf of the respondent it is argued that the question as to the competency of the plaintiff to maintain the suit was finally settled in the previous litigation and it cannot be re-agitated in this case. The appellant answers that the question raised in the previous suit as well as in this suit is a question of law and under some rulings of this Court the decision in a previous suit on a question of law does not operate as *res judicata*. If it were necessary to go into the question raised in this case, I would have felt great hesitation in accepting the observation made in some of the cases that the decision on a question of law does not operate as *res judicata* in a subsequent suit based on a different cause of action. This to my mind is totally inconsistent with the plain wording of Section 11, Civil P.C. and I am not prepared to express a definite opinion upon this point without further consideration. But on the facts it is not necessary to decide the point relating to *res judicata* raised in the appeal. In the previous suit the question raised by the appellant was that the suit was not maintainable under Order 1, Rule 8, Civil P.C. The Court overruled that objection and held that the plaintiff could maintain the suit even without the aid of that rule. In the present case the appellant contends that Order 1, Rule 8 is a bar to the present suit. The questions in the two suits do not seem to be the same and I do not think that the principle of *res judicata* should so extended as to be made applicable in this case. But there is another ground upon which it is easy to dispose of this matter. The plaintiff has brought the present suit not only as Secretary to the Brahma Samaj, but on the strength of the decree he had obtained in the previous suit which declared that he was entitled to the land in suit and was entitled to recover possession of it from the defendants. That decree is now final between the parties and the defendant should not be allowed to go behind it and attack the right of the plaintiff to maintain the present suit on the strength of the decree.

3. But I agree with my learned brother that this case is governed by the provisions of Section 99, Civil P.C., as the error or irregularity complained of does not in any way affect the merits of the case or the jurisdiction of the Court, though I am not sure that that section applies to the constitution of a suit or the right to maintain a suit as that is not a question which arises in any proceeding in the suit. But as the Judicial Committee have observed in *Indrajit Pratap Sahi v. Amar Singh* AIR 1923 P.C. 128 the procedure laid down by law is intended to further the cause of justice and not retard it. The appeal in my opinion fails and is dismissed with costs.

Jack, J.

4. The only ground of appeal argued is that the appeal is barred under the provisions of Order 1, Rule 8 inasmuch as the Brahma Samaj is not a registered association and, therefore, without complying with the provisions of Order 1, Rule 8, the Secretary could not maintain any suit for the recovery of lands belonging to it.

5. Now there can be no doubt that the circumstances of this case bring it under Order 1, Rule 8. The Secretary of the Brahma Samaj is here suing on behalf of a number of persons having the same interest in the suit and under Order 1, Rule 8, he can only do so with permission of the Court and the

Court shall in such case give at the plaintiff's expense notice of the institution of the suit to all such persons.

6. It is only where the society is a corporation registered under the Indian Companies Act or legally authorized to sue in the name of an officer that a suit can be brought by the Secretary on behalf of the society under Order 29, Rule 1. It is clear, therefore, that in this case the Secretary was not entitled under the law to sue on behalf of the Samaj not having obtained permission of the Court to do so under Order 1, Rule 8.

7. But it is contended in this case, as found by the Court below, that inasmuch as in a previous suit between the same parties it was held that the Secretary was entitled to sue on behalf of the Brahma Samaj he must be held by the principles of *res judicata* equally entitled to sue in this case. In that case the trial Court held that he was so entitled to sue and that though the provisions of Order 1, Rule 8 had been observed in that case their observance was not necessary. This issue was not raised in the first appellate Court and the second appellate Court refused to go into this question inasmuch as it had not been raised in the first appellate Court and in the circumstances of that case. It may, therefore, be taken to have been decided in that suit that the Secretary of this society was entitled to sue the defendants on behalf of the other members of the society in that suit. But in my opinion this is not a case in which the rule of *res judicata* should be applied. In the case of *Aghore Nath v. Kamini Debi* [1909] 11 C.L.J. 461 a number of cases on the point were discussed and it was held (following *Bigelow on Estoppels*) that where, as in this case, the causes of action in the two cases were different:

the estoppels should be limited to matters distinctly put in issue and determined in the prior action and it should further be restricted to questions of fact or mixed questions of fact and law, for if it was extended to pure questions of law, a Court might find itself in the position that in so far as certain parties are concerned, it is irrevocably bound to adhere to a proposition of law erroneously laid down in a previous suit.

8. In the present case the question is a pure question of law and it should further be taken into account that in the previous suit the procedure laid down by law had in fact been followed and it was in such circumstances and because the point

was not raised in the first Court of appeal that the Court of second appeal refused to interfere. I think, therefore, that in this case the finding of the trial Court in the former suit that the Secretary was entitled to sue on behalf of the society independently of the provisions of Order 1, Rule 8 should not be regarded as res judicata in the present suit.

9. It follows, therefore, that in the ordinary course we should have had to find that the suit was barred through non-observance of Order 1, Rule 8. In the circumstances of the present case, however, the objection to the maintenance of the suit by the Secretary is purely technical. From the proceedings of the Executive Committee of the Samaj it is clear that the Secretary was authorized by the Executive Committee to institute the suit and presumably the Executive Committee had authority to so authorize him. Taking this into account and in view of the finding in the previous suit, I think that this is a case in which the provisions of Section 99, Civil P.C., should be applied to prevent a technicality from overcoming the ends of justice, as clearly the irregularity in procedure has not affected the merits of the case or the jurisdiction of the Court. This being the only ground of appeal which was passed, the appeal is dismissed with costs.