

(2014) 02 CAL CK 0106
In the Calcutta High Court
Case No : S.A. No. 105 of 2000

Md. Akbar and Others

APPELLANT

Vs

Md. Ismail and Others

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Criminal Procedure Code, 1973 (CrPC) — Section 11
Specific Relief Act, 1963 — Section 34

Citation : (2015) 4 CHN 220 : (2015) 1 WBLR 272

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Biswajit Basu, Mr. Sabyasachi Mukherjee, Mr. S. Banik and Ms. Kaushiki Banerjee, for the Appellant; Animesh Goswami and Ms. Joyita Ray, for the Respondent

Judgement

Debangsu Basak, J.—Title dispute with regard to nine plots of land lying and situate in Asansol form the subject matter of this second appeal. It formed subject matter of three suits. Hiralal Dusad was the owner of these nine plots of land. On July 7, 1955, Abdul Hai and Md. Ismail filed Title Suit No. 232 of 1955 against Hiralal Dusad and others. In such Title Suit No. 232 of 1955 Abdul Hai and Md. Ismail sought declaration of title and permanent injunction in respect of the said nine plots of land against Hiralal Dusad and others. On September 29, 1958 Title Suit No. 232 of 1955 was dismissed. An appeal was carried by Abdul Hai and Md. Ismail which was registered as Title Appeal No. 77 of 1958. Such appeal was allowed on July 31, 1959. Title Suit No. 232 of 1955 was remanded for trial in the light of the observation made in the Appellate Court's judgment. After remand Title Suit No. 232 of 1955 was renumbered as Title Suit No. 32 of 1960/Title Suit No. 232 of 1955. Title Suit No. 32 of 1960 was dismissed. An appeal was preferred which was registered as Title Appeal No. 111 of 1963. Such appeal was dismissed. A second appeal was sought to be filed which was not admitted on April 4, 1964. In view of such proceedings Abdul Hai and Md. Ismail

failed to establish their title in respect of the nine plots of land against Hiralal Dusad.

2. Being threatened with dispossession, Hiralal Dusad filed Title Suit No. 32 of 1977. Md. Ismail was one of the defendants in such suit, being defendant no. 5. Title Suit No. 32 of 1977 was decreed on December 23, 1980.

3. Hiralal Dusad sold the suit property by registered deed on February 16, 1985 to the present appellants. The respondent nos. 1 to 4 as plaintiffs filed Title Suit No. 16 of 1995 and sought declaration in respect of the properties and the said plots of land which was subject matter of Title Suit No. 32 of 1960. The present appellants were the defendant nos. 5 to 8 in the said suit. The performa respondents herein were defendant nos. 1 to 4 in such suit. Title Suit No. 16 of 1995 was dismissed on trial. An appeal was carried, being Title Appeal No. 26 of 1998, which was allowed. The Appellate Court decreed the suit. Against such decree the present second appeal was filed. The second appeal was admitted. By an Order dated April 2, 2013, five substantial questions of law were framed.

4. Mr. Biswajit Basu learned Advocate appearing for the appellant contended that, the plaintiffs of Title Suit No. 16 of 1995 were the heirs and legal representatives of the plaintiffs of Title Suit No. 232 of 1955 renumbered as Title Suit No. 32 of 1960 on remand. The plaintiffs in Title Suit No. 232 of 1955 renumbered as Title Suit No. 32 of 1960 could not obtain declaration of title in respect of the self-same nine plots of land which were subject matter of Title Suit No. 16 of 1995. The plaintiff in Title Suit No. 16 of 1995 was claiming title by way of succession from the plaintiffs of Title Suit No. 232 of 1955. The defendant nos. 5 to 8 who were the appellants in the present appeal, claimed title through Hiralal Dusad. The Court refusing to grant relief in Title Suit No. 232 of 1955 was competent to adjudicate such title suit. The issue of title to nine plots of land was in issue in both the two suits. In such circumstances, it was contended that, Title Suit No. 16 of 1995 was barred by the principles of *res judicata*.

5. When Title Suit No. 16 of 1995 was taken up for trial, five issues were raised. The Trial Judge held that in Title Suit No. 232 of 1955 the Court decided that, Hiralal Dusad had right, title, interest and possession over the suit plots. It further held that, decisions of the Court in Title Suit No. 232 of 1955 was binding on the plaintiffs in Title Suit No. 16 of 1995. Consequently, the Trial Court held that, the plaintiffs in Title Suit No. 16 of 1995 did not have any right, title, interest and possession over the suit plots. It was contended that, the Trial Judge rightly decided the five issues framed by it. The Trial Judge rightly returned the finding that in Title Suit No. 232 of 1955 the right, title, interest and possession over the suit property of Hiralal Dusad were decided. The Trial Judge rightly held that, the decision of the Court in Title Suit No. 232 of 1955 was binding upon the plaintiffs of Title Suit No. 16 of 1995. The ultimate finding of the Trial Judge that, the plaintiffs in Title Suit No. 16 of 1995 did not have any right, title, interest and possession over the suit plots was binding on the parties. Mr. Basu then drew the attention of the Court to the reliefs sought for in Title Suit No. 16 of 1995. The

prayers of the plaint in Title Suit No. 16 of 1995 were as follows:

(a) for declaration that the plaintiff are the legal owner of the suit plots and they have right, title, interest possession over the suit plots and for further declaration that the decree passed by the Learned Court in Title Suit No. 32 of 1977 is nullity against def. no. 5 and his legal heirs and the defendants have no right, title, interest over the suit plot.

(b) For all cost of the suit.

(c) For any other relief or reliefs as the Learned Court may deem and proper.

6. He commented on prayer (a) of the plaint. He submitted that, prayer (a) could be dissected into various parts. He contended that, the relief of declaration as framed in the plaint was not available to the plaintiffs in view of Section 11 of the Code of Civil Procedure, 1908. The plaintiffs could not seek declaration as to ownership of the suit plots nor could any of them have a declaration that they had right, title, interest and possession over the suit plots. So far as the prayer, that the decree passed in Title Suit No. 32 of 1977 was a nullity as against the defendant no. 5 was concerned, he submitted that, when the decree in Title Suit No. 32 of 1977 was passed, the defendant No. 5 was already dead. Therefore, as against the defendant no. 5 and his legal heirs the decree passed in Title Suit No. 32 of 1977 was undoubtedly a nullity. However, merely because the plaintiffs in Title Suit No. 16 of 1955 was entitled to a declaration that the decree passed in Title Suit No. 32 of 1977 was a nullity as against the defendant no. 5 and his legal heirs, the same would not entitle the plaintiffs to have the entirety of the declaration as sought for prayer (a) of the plaintiff nor did the Court have jurisdiction to overturn the decree passed in Title Suit No. 32 of 1977. The defendant no. 5 in Title Suit No. 32 of 1977 was Md. Ismail. The heirs of Md. Ismail were the respondent nos. 1 and 2 in the present appeal. Title Suit No. 32 of 1977 was not maintainable on the principles of *res judicata*. The plaintiffs in Title Suit No. 32 of 1977 were not entitled to any relief on the principles of *res judicata*.

7. According to Mr. Basu, the Trial Court rightly refused to declare the decree passed in Title Suit No. 32 of 1977 as a nullity against the defendant no. 5, since the same would not serve any useful purpose. The plaintiffs could not have a declaration which would not serve any useful purpose in view of the provisions of Section 34 of the Specific Relief Act, 1963. In this regard, he relied on (1970) 2 AER 9 (*Mellstrom v. Garner & Ors.*), *Rajkeshwar Singh and Others Vs. Shyam Bihari Singh and Others*,) *Muhammad Israil Vs. Patna City Municipality*, . In trial of Title Suit No. 16 of 1995 it was contended that, the names of the plaintiffs were mutated in the R.S. Record Of Rights on February 14, 1969. Consequently, the plaintiffs were the owners of the suit plots. In this regard, Mr. Basu submitted that, having the name in the R.S. Record Of Rights did not establish ownership over the suit plots. He relied on 70 CWN page 1066 (*K.M. Hossain v. S. Bandopadhyaya*) for the proposition that name in the revenue record did not

establish title.

8. He contended that, the Appellate Court erred both in fact and law when it returned a finding that, the predecessors of the plaintiffs were not divested of their title in respect of the suit property. The Appellate Court was wrong in relying upon the R.S. Record Of Rights to find in favour of the plaintiffs. He submitted that, the Appellate Court erred in law and in fact by holding that, the principles of res judicata did not arise in the fact of the case. According to him, the Appellate Court misconstrued the decree passed in the Title Suit No. 32 of 1977. The Appellate Court erred in failing to appreciate that, at best the decree passed in Title Suit No. 32 of 1977 was a nullity against defendant no. 5, namely, Md. Ismail in such suit. Since one of the defendants was dead when the decree passed in such suit the same did not render the entirety of the decree a nullity against all the other parties to the suit. The Appellate Court according to Mr. Bose, erred in passing a decree in the suit.

9. Mr. Animesh Goswami, learned Advocate for the respondents contended that, the principles of res judicata were not attracted in the proceedings. He submitted that, Hiralal Dusad as the plaintiff filed Title Suit No. 32 of 1977. The defendants in Title Suit No. 32 of 1977 were sons of late Abdul Karim namely, Abdul Gani, Abdul Halim, Md. Kasim and Md. Yusuf as also the sons of Md. Hossain, namely, Md. Ismail, Md. Idris and Abdul Karim. Title Suit No. 16 of 1995 was filed by the sons of Md. Ismail and Abdul Hai. So, according to Mr. Goswami, the parties to the two suits were different. Abdul Hai was the real owner of the suit property and was not a party to Title Suit No. 32 of 1977. Although Md. Ismail was a party, he died on December 21, 1997 while the decree passed in Title Suit No. 32 of 1977 was on December 23, 1980 much after the death of Md. Ismail. The decree passed in Title Suit No. 32 of 1977 was, therefore, a nullity against Md. Ismail. The sons of Md. Ismail, therefore, were not bound by the decree passed in Title Suit No. 32 of 1977. By such reasoning, he submitted that, the respondent nos. 1 and 2 who were the sons of Md. Ismail and the plaintiffs in Title Suit No. 16 of 1995 were, therefore, not bound by the decree passed in Title Suit No. 32, 1977. According to him, the parties in the two proceedings not being the same, the provisions of Section 11 of the Code of Criminal Procedure, 1908 were not attracted.

10. He then submitted that, the name of the predecessor-in-interest of the plaintiffs of the Title Suit No. 16 of 1995 stood recorded in the R.S. record of rights on February 14, 1969. By virtue thereof the predecessor-in-interest of the plaintiffs became the owners of the suit property. This event was subsequent to the decree passed in Title Suit No. 232 of 1955 which was dated September 29, 1958. According to him, this subsequent fact should prevail.

11. He then went on to submit that, in the event this Court came to the finding that there were errors in the order under appeal, the proper course would be to make an order of remand. He submitted that, the Trial Court in deciding Title Suit No. 16 of 1995 overlooked the question of nullity of the decree passed in Title

Suit No. 32 of 1977. In any event, according to him, in all these three suits it was the duty of the Court to find out the ownership of the suit property. According to him, the ownership of the suit property was not established by the decree passed in Title Suit No. 232 of 1955. According to him, the decree passed in Title Suit No. 32 of 1977 was a nullity in view of the death of Md. Ismail prior to the decree. Therefore, the question as to ownership of the suit plots was still at large and was rightly set at rest by the judgment and decree under appeal.

12. He did not make any submissions on the authorities cited on behalf of the appellants.

13. I have considered the rival contentions of the parties. Three suits over same plots of land between parties litigating under same title necessarily raised the issue of res judicata in the last of the suits decided. The issue of res judicata was adequately raised at the trial of the Title Suit No. 16 of 1995. The Trial Court answered the question in favour of the defendants. The Appeal Court reversed it.

14. Section 11 of the Code of Civil Procedure, 1908 dealt with res judicata. It provided that, no Court would try any suit or issue in which the matter was directly and substantially in issue, in a former suit between the same parties, or between the parties under whom they or any of them claimed, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue was subsequently raised, and was heard and finally decided by such Court.

15. In the instant case, there were three suits. The plea of res judicata by the appellants here was on the basis of the decision rendered in Title Suit No. 232 of 1955. Admittedly, and when I used the word admittedly, Mr. Animesh Goswami for the plaintiffs did not place any record to the contrary, that the plaintiffs in Title Suit No. 232 of 1955 were the predecessor-in-interest of the plaintiffs of Title Suit No. 16 of 1995. Again the first defendant in Title Suit No. 232 of 1955 was Hiralal Dusad which was the predecessor-in-interest of the defendant nos. 5 to 8 in Title Suit No. 16 of 1995 being the present appellants. So, the criteria of Section 11 of the Code of Civil Procedure, 1908, that there were two proceedings between the same parties or between the parties under whom they or any of them claimed, litigating under the same title, was satisfied. The subject matter of Title Suit No. 232 of 1955, concerned declaration of title relating to the nine plots of land. The subject matter of Title Suit No. 16 of 1995 was also declaration of title in respect of the self-same plots of land. Therefore, the next criteria as to the issue in the two proceedings being directly and substantially in issue was satisfied.

16. It was nobody's case that, the Courts deciding Title Suit No. 232 of 1955 and Title Suit No. 16 of 1995 were not competent to decide the issues raised. Another criteria of Section 11 of the Code of Civil Procedure, 1908 stood satisfied.

17. Mr. Goswami compared Title Suit No. 32 of 1977 with Title Suit No. 16 of 1995 to contend that Section 11 of the Code of Civil Procedure, 1908 was not

attracted. I am afraid, that the plea of res judicata of the defendants in Title Suit No. 16 of 1995 was not founded on the decision rendered in Title Suit No. 32 of 1977 but the decision rendered in Title Suit No. 232 of 1955. No submission was advanced by Mr. Goswami that the decision rendered in Title Suit No. 232 of 1955 was not res judicata for Title Suit No. 16 of 1995.

18. Therefore, all criteria of Section 11 of the Code of Civil Procedure, 1908 for it to apply stood satisfied in the facts of the case.

19. The plaintiff in Title Suit No. 232 of 1955 failed to obtain a declaration of title in respect of the nine plots of land up to the second appeal stage when the second appeal was not admitted. The successor-in-interest of the plaintiffs of Title Suit No. 232 of 1955 could not be allowed to file a new suit 40 years from the date of the first suit for the same declaration against persons claiming to the title to the Title Suit No. 232 of 1955. In view of the result of Title Suit No. 232 of 1955 the successor-in-interest of the plaintiffs therein was not entitled to seek the relief as prayed for in Title Suit No. 16 of 1995 against the successor-in-interest of the defendant in Title Suit No. 232 of 1955.

20. On the issue that, the names of the predecessor-in-interest of the plaintiffs in Title Suit No. 16 of 1995 were entered in the record of rights on February 14, 1969, it must be held that the same was not in accordance with law in view of the decree passed in Title Suit No. 232 of 1955. When the plaintiffs of Title Suit No. 232 of 1955 could not establish in a Court of competent jurisdiction that they have right, title, interest and possession in respect of the suit plots of land, it was improper for such plaintiffs and their successor-in-interest to have their names recorded in the R.S. Record Of Rights. The decision rendered in Title Suit No. 232 of 1955 was binding on the parties to it including the plaintiffs therein and their successor-in-interest. Such persons could not be permitted to take a stand contrary to the decision rendered in Title Suit No. 232 of 1955 subsequently.

21. The parties joined issue as to whether an entry in the R.S. Record Of Rights would be a document of title. I am afraid, I am unable to agree with the contentions of Mr. Goswami in this regard. Record of rights did not confer title as laid down in K.M. Hossain (Supra). In K.M. Hossain (Supra) question arose as to the effect of entry in the record of rights when such record of rights was prepared and finally published after the decision given by a competent Civil Court on the issue of title. It was held that, the settlement authorities were bound by the Civil Court decree. The record of rights could not nullify the effect of a previous decision which would operate as res judicata between the parties.

22. In the instant case, the record of rights entry came into being on February 14, 1969 which was much after the disposal of Title Suit No. 232 of 1955. The issue with regard to right, title, interest and possession between the parties stood settled with the conclusion of Title Suit No. 232 of 1955. The plaintiffs in Title Suit No. 232 of 1955 failed to establish their right, title, interest and

possession in a Civil Suit. They could not, in law, have their name recorded in the R.S. Record of Rights in respect of the same plots of land, after such failure. The plaintiffs in the Title Suit No. 32 of 1960 did not derive any title by virtue of R.S. Record of Rights. The R.S. Record of Rights came into being contrary to the decision rendered in Title Suit No. 232 of 1955. On the strength of the ratio of K.M. Hossain (Supra) the plaintiffs in Title Suit No. 32 of 1977 was not entitled to press the R.S. record of Rights as a title document in Title Suit No. 32 of 1977.

23. In the instant suit, the plaintiff was entitled to a portion of the prayer (a) of the plaint which sought a declaration that the decree passed by the learned Court in Title Suit No. 32 of 1977 was a nullity as against defendant no. 5 of Title Suit No. 32 of 1977. For the sake of convenience it is stated that, the defendant no. 5 of Title Suit No. 32 of 1977 was Md. Ismail. Mr. Biswajit Basu, learned Advocate fairly submitted that, the plaintiff in Title Suit No. 16 of 1995 was entitled to that portion of prayer (a) of their suit. He, however, qualified such submission with the contention that, since such declaration was in the abstract relying upon Section 34 of the Specific Relief Act, Mellstrom (Supra) as well as Rajkeshwar Singh & Ors. (Supra) and Muhammad Israil (Supra), he submitted that such relief could not be granted.

24. In Mellstrom (Supra) the Court of Appeal was concerned with a dispute between two Chartered Accountants and which such dispute revolved around interpretation of a document. The parties to such document were found not to have broken any of the provisions of such document nor proposing to break them. The Court of Appeal held that, to grant declaration was a discretionary relief. It further held that, a declaration would not be made against a person who asserted no right nor formulated any specific claim.

25. In Rajkeshwar Singh & Ors. (Supra) the question arose whether the plaintiff was entitled to a declaration as sought for or not. It was held that, a Court would not make a declaration of an abstract right, exclusive of practical utility, especially when that declaration may not produce of any benefit to the party obtaining the declaration.

26. In Muhammad Israil (Supra) the Patna High Court refused to grant relief in a suit for declaration on the finding that, the injunction as sought for would not be effective and that being so, the Court in its discretion should not make such a declaration.

27. The principles of res judicata played a significant role in the facts of the instant case. Title Suit No. 16 of 1995 was barred by the principles of res judicata. The plaintiffs in Title Suit No. 16 of 1995 were not entitled to any relief in view of the decisions rendered in Title Suit No. 232 of 1955. That being the position, whether the decree passed in Title Suit No. 32 of 1977 was a nullity as against the defendant no. 5 or not paled into insignificance. It is true that, the decree passed in Title Suit No. 32 of 1977 was a nullity so far as it related to the defendant no. 5 of such suit. However, the defendant no. 5 of Title Suit No. 32 of

1977 was bound by the decision of Title Suit No. 232 of 1955. Therefore, the plaintiffs of Title Suit No. 16 of 1995, some of whom were claiming through the defendant no. 5 of Title Suit No. 32 of 1977, were not entitled to maintain Title Suit No. 16 of 1995. Therefore, the declaration as to nullity of the decree in Title Suit No. 32 of 1977 by the persons claiming through the defendant no. 5 was of no effect, even if it was to be granted. The Trial Court, therefore, rightly refused to grant such declaration. This view was supported by Mellstrom (Supra), Rajkeshwar Singh & Ors. (Supra) and Muhammad Israil (Supra).

28. In the premises, the judgment and decree of the Appeal Court is reversed.

29. Title Suit No. 16 of 1995 is dismissed. There will be no order as to costs.