
(1964) 09 GUJ CK 0014
In the Gujarat High Court

Mehta Jivanlal Vasantji

APPELLANT

Vs

The Trustees of Gayatri Mandir

RESPONDENT

Date of Decision : 16-09-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 11, 115
Limitation Act, 1963 — Section 5

Citation : (1965) 6 GLR 194

Hon'ble Judges : B.J. Divan, J

Bench : Single Bench

Judgement

B.J. Divan, J.—The petitioner in this Civil Revision Application is the original defendant and he was working as the "Pujari" of a temple ca Hed " Gayatri Mandir" at Rajkot. The plaintiffs, who are the opponents in this Civil Revision Application are the trustees of the "Gayatri Mandir". In 1958 the trustees filed a suit being Suit No. 705 of 1958 and that suit is pending in the Court of the 5th Joint Civil Judge Junior Division Rajkot. In this suit the plaintiffs-trustees sought removal of the Pujari on various grounds viz. (a) old age of the Pujari and (b) the alleged breaches and violations of the rules of the Trust. The defendant in his written statement contended that the trust was not valid. He also challenged the validity of the appointments of the plaintiffs as the Trustees of Gayatri Mandir. He also challenged the validity of the rules with the breach or violation of which he was charged and he further challenged the competence of the trustees to remove the Pujari from his post.

2. It appears that there was some previous litigation between the parties. In 1954 the Trustees had filed a suit being Suit No. 608 of 1954 against the Pujari and in that suit the same contentions were taken by the rival sides as have been taken in the present suit viz. Suit No. 705 of 1958 In Suit No. 608 of 1954 the Court of the first instance passed a decree in favour of the trustees and against the Pujari. Thereafter there was an appeal and that appeal being Regular Civil Appeal No. 36 of 1957 was dismissed by the first appellate Court. There was a Second Appeal to the High Court and that Second Appeal No. 153 of 1957 was

decided by Vyas J. at Rajkot on January 9 1958 That appeal necessarily was by the Pujari as he had lost in that earlier litigation in the two subordinate Courts. Vyas J. allowed the appeal of the Pujari as he held that the notice served by the trustees on the Pujari violated the principles of natural justice. He therefore set aside the decrees of the two subordinate Courts and dismissed the suit filed by the trustees. After this judgment of the High Court on January 9 1958 a fresh notice appears to have been served upon the Pujari and thereafter Suit No. 705 of 1958 i.e. the present suit was filed in the Court of the first instance. In that suit it was contended that the findings of the High Court in the earlier litigation operated as *res judicata* in the present suit. It appears that while allowing the appeal of the Pujari Vyas J. had observed that the Trust was legal that the appointment of the trustees was legal that the rules framed by the trustees were legal and that the defendant Pujari was appointed by the trustees who could remove him by giving him a valid notice. Now as regards the contentions which I have set out above as raised by the Pujari in the present litigation issue No. 3 was raised as follows:

Is it proved that the Honble High Court of Bombay has held in Civil Appeal No. 153 of 1957 between the parties that the trust is legal that the appointment of trustees is legal that the rules proved by the trustees are legal that the defendant Pujari is appointed by the plaintiffs-trustees who can remove him by giving a valid notice? If so are the contentions of the defendant raised in the written statement not barred by the principles of *res judicata*?

In the present suit the defendant Pujari was also contending that he was entitled to perform Puja till his life and that the office of the Pujari was hereditary and that the Trust was illegal; and regarding these contentions issue No. 4 was framed in this manner:

Is the defendant entitled to raise the contentions that he is entitled to perform Puja till his life that the office of the Pujari is hereditary and that the trust is illegal as alleged in Paras 28 29 30 of the Written Statement in view of the decision of the high Court in Civil Appeal No. 153 of 1957?

3. The learned Civil Judge Junior Division Rajkot tried issues Nos. 3 and 4 as preliminary issues and he held that all the points referred to in issue No. 3 were barred by *res judicata*. He also held that since the points raised in issue No. 4 had not been decided by the High Court except the point of hereditary post out of issue No. 4 the question whether the right to perform the Puja was a hereditary right or not was not barred by *res judicata* but the part relating to the legality of the Trust was barred by *res judicata*.

4. With respect to the learned trial Judge it must be pointed out that the learned trial Judge has completely overlooked one important aspect of the law relating to *res judicata*. It is well settled law and it is also provided in Section 11 of the CPC that before any issue or any subsequent suit can be barred by *res judicata* the earlier matter must have been heard and finally disposed of by the Court in the

earlier suit. Now in the earlier suit at the stage of the Second Appeal before the High Court which was disposed of by Vyas J. in 1958 the Pujari who is the defendant in the present suit had succeeded. Therefore the Pujari could not have appealed to the Supreme Court or by way of Letters Patent Appeal against the findings of Vyas J. regarding the legality of the Trust or the validity of the appointment of the trustees or the validity of the rules framed by them which points were decided by Vyas J. on merits in Second Appeal No. 153 of 1957 on January 9 1958 Therefore it could not be said that on those points there was any final disposal by the High Court in the earlier litigation. In the commentaries of Sir Dinshah Mulla on the CPC 12 Ed. It has been observed as follows:

If the plaintiffs suit is wholly dismissed no issue decided against the defendant can operate as *res judicata* against him in a subsequent suit for the defendant cannot appeal from a finding on any such issue the decree being wholly in his favour.

On the finding recorded by him that the notice given by the trustees to the Pujari violated the principles of natural justice Vyas J. held that the suit of the plaintiffs should be wholly dismissed. That being the case whatever observations were made regarding the merits of the case viz. regarding the validity of the Trust or the appointment of the trustees or validity of the rules or the competence of the trustees to remove the Pujari cannot operate as *res judicata* on any of these points. In illustration No. (1) based on a decision of the Calcutta High Court at page 92 of Sir Dinshah Mulla's Book on C.P.C. it has been stated as follows:

In a suit by A against B for ejectment B contends (1) that no notice to quit was given and (2) that the land being *majhes* land he is not liable to be evicted at all. The suit is dismissed on a finding that no notice to quit was given. The Court however also finds that the land is not *majhes* land. A afterwards sues B to evict him from the land after giving notice to B. B contends that the land is *majhes* land and that he is not liable to be evicted. The finding in the first suit that the land was not *majhes* land does not operate as *res judicata* so as to preclude B from raising the same contention in the subsequent suit the reason being that as the suit having been dismissed B could not have appealed from the finding that the land was not *majhes* land. The Court having found in the first suit that A had not given notice to quit it was not necessary for the determination of the suit to decide whether the land was *majhes* land or not. The first suit was dismissed in spite of the finding in A's favour that the land was not *majhes* land.

This principle in connection with the rule of *res judicata* is so well known that it is not necessary for me to cite any authorities or any further rulings in this connection. It is therefore clear that the learned trial Judge was in error when he held that the points referred to in issues Nos. 3 and 4 to the extent that he so held were barred by *res judicata*. Under these circumstances it is clear that the decision that points referred to in issue No. 3 and the question of legality of the Trust referred to in issue No. 4 were barred by *res judicata* was clearly contrary

to legal principles.

5. Mr. Shah appearing on behalf of the opponents the trustees of the Gayatri Mandir contends that even if the trial Court arrived at a wrong decision on interpretation of the principles laid down in Section 11 of the CPC the High Court cannot interfere with that finding in view of the provisions of Section 115 of the Code of Civil Procedure. In that connection Mr. Shah relied upon the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* ILR 11 Cal 6. The Privy Council in that case laid down that a Court that has decided a suit over which it had jurisdiction cannot only on the ground that it has arrived at a wrong decision be said to have exercised its jurisdiction illegally or with material irregularity within the meaning of Section 622 of Act X of 1877 as amended by Section 22 of Act XII of 1878. Section 115 of our present CPC is equivalent to Section 622 of the earlier Code with which the Privy Council was concerned. Their Lordships of the Privy Council observed in that case as follows:

The question then is did the Judges of the lower Courts in this case in the exercise of their jurisdiction act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly they did not exercise their jurisdiction illegally or with material irregularity.

The passage which I have quoted above from the decision of the Privy Council *Amir Hassans* case clearly shows that in that case their Lordships of the Privy Council concerned themselves with Clause (c) of Section 115 of the CPC as it stands at present.

6. Mr. Shah also relied upon the decision of the High Court of Bombay in the case of *Hari Bhikhaji v. Naro Vishvanath* ILR 1909 Bom. 432. There what happened was that the first appellate Court had held that the suit was not barred by res judicata and it had modified the decree of the subordinate Court and there was an application for revision u/s 622 of the Code of Civil Procedure. The Division Bench of the Bombay High Court consisting of Nanabhai Haridas and Sir W. Wedderburn JJ. held as follows:

Assuming in favour of the defendant that his (Assistant Judges) decision on the question of res judicata is wrong we are still unable u/s 622 CPC to interfere with it. It was a question which as stated above he had jurisdiction and was bound to try. In doing so therefore it cannot be said that he exercised a jurisdiction not vested in him by law; and even if his decision be wrong in law-which is all that is or can be said in this case-we cannot on that ground alone interfere.

This decision in ILR Bom. 432 was followed by a Division Bench of the Bombay High Court in the case of *Amritrav Krishna Deshpande v. Balkrishna Ganesh Amrapurkar* ILR Bom. 488. There a Division Bench consisting of West and Birdwood JJ. following the decision in ILR Bom. 432 held that the decision of the lower court even though wrong on a question of res judicata was not a failure or a cause of failure to exercise jurisdiction and did not warrant the interference of

the High Court u/s 622 of the Civil Procedure Code, 1822.

7. In the case of *Senaji Kapurchand Vs. Pannaji Devichand*, the decision in ILR Bom. 488 was followed and it was held that even if the decision of the lower court on the question of *res judicata* is wrong it cannot be interfered with in revision as it is a question which the lower Court has jurisdiction to try and is bound to try. These decisions in *Senaji Kapurchand Vs. Pannaji Devichand*, are thus both based ultimately on the earlier decision of the Division Bench in ILR IX Bom. 432.

8. Now Their Lordships of the Privy Council have considered the case of ILR Bom. 432 in the case of *Joy Chand Lal v. Kamalaksda Chaudhury* iLr Bom. L.R. 964 967 Sir John Beaumont delivering the opinion of the Privy Council has stated as follows:

There have been a very large number of decisions of Indian High Courts on Section 115 to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate Court does not by itself involve that the subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under Sub-section (c) nevertheless if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested a case for revision arises under Sub-section (a) or Sub-section (b) and Sub-section (c) can be ignored. The cases of *Babu Ram v. Munna Lal* ILR 1949 All. 454 and *Hari Bhikhaji v. Naro Vishvanath* ILR Bom. 432 may be mentioned as cases in which a subordinate Court by its own erroneous decision (erroneous that is in the view of the High Court) in the one case on a point of Limitation and in the other on a question of *res judicata* vested itself with a jurisdiction which in law it did not possess and the High Court held wrongly their Lordships think that it had no power to interfere in revision to prevent such a result.

Thus this passage from the decision in 51 Bom. L.R. 964 makes it clear that according to Their Lordships of the Privy Council the decision in ILR Bom. 432 that the High Court has no power to interfere in revision u/s 115 C.P.C. with a wrong decision on a point of *res judicata* was erroneous; and in view of this decision of the Privy Council the decision in ILR Bom. 432 and following thereupon the decisions in *Senaji Kapurchand Vs. Pannaji Devichand*, must be deemed to have been overruled.

9. It may be pointed out that in the case of *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, . the Supreme Court considered the passage which I have cited above from *Joy Chand Lals* case in 51 Bom.I L.R. 964; and Their Lordships of the Supreme Court explained these remarks as follows:

These remarks are not applicable to the facts of the present case. They apply to cases in which the law definitely ousts the jurisdiction of the Court to try a

certain dispute between the parties and not to cases in which there is no such ouster of jurisdiction under the provisions of any law but where it is left to the Court itself to determine certain matters as a result of which determination the Court has to pass a certain order and may if necessary proceed to decide the dispute between the parties. The distinction between the two classes of cases in this. In one the Court decides a question of law pertaining to jurisdiction. By a wrong decision it clutches at jurisdiction or refuses to exercise jurisdiction. In the other it decides a questions within its jurisdiction.

The Supreme Court has further observed in that case as follows:

Section 3 of the Limitation Act enjoins a Court to dismiss any suit instituted appeal preferred and application made after the period of limitation prescribed therefore by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies the subordinate Court comes to an erroneous decision it is open to the Court in revision to interfere with that conclusion as that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter. Section 5 of the Limitation Act on the other hand empowers the Court to admit an application to which its provisions are made applicable even when presented after the expiry of the specified period of limitation if it is satisfied that the applicant had sufficient cause for not presenting it within time. The Court therefore had jurisdiction to determine whether there was sufficient cause for the appellants not making the application for the setting aside of the abatement of the suit in time and if so satisfied to admit it.

In para 12 of the judgment of the Supreme Court the decision in ILR Bom. 432 has been discussed as follows: The other case referred to (in Joy Chand Lals case supra) viz. Hari Bhikhajis case ILR Bom. 432 was where the trial Court had gone wrong on the question of res judicata. Section 11 of the Code prohibits any Court from trying any suit or issue which would be covered by the various provisions of that section. There is no option in the Court to try such a suit in any circumstances.

10. In view of these observations in Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others, it is clear that if the High Court comes to the conclusion that the decision of the subordinate Court on a point of res judicata is erroneous in law it can interfere in revision with that finding under Clause (a) or Clause (b) of Section 115 of the CPC and Clause (c) need not be referred to at all. In the instant case by holding that the point referred to in issues Nos. 3 and 4 to the extent that he has held them to be barred by res judicata the learned subordinate Judge failed to exercise the jurisdiction vested in him by law because it is obvious from what I have stated earlier that these points can never be held to have been barred by res judicata.

Under these circumstances it is clear that the High Court can interfere with the finding recorded by the learned trial Judge and since that finding is erroneous in law the subordinate Court cannot be permitted to continue in its failure to exercise the jurisdiction vested in it by law. r therefore set aside the finding recorded by the learned trial Judge on preliminary issues Nos. 3 and 4 and hold that none of the points referred to in those two issues can be held to have been barred by res judicata The suit will now proceed further on merits before the learned trial Judge.

In the result this Civil Revision Application is allowed and the rule is made absolute. Theopponents must pay the costs of the petitioner of this Civil Revision Application.