

(1957) 02 OHC CK 0003

In the Orissa High Court

Case No : Second Appeal No. 2-B/320 of 1953

Mst. Urbasi Dharuani and Others

APPELLANT

Vs

Chandra Dharua and Others

RESPONDENT

Date of Decision : 08-02-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, 11

Citation : AIR 1957 Ori 201 : (1957) 23 CLT 380

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : G.K. Misra, for the Appellant; R.N. Sinha, for the Respondent

Final Decision : Allowed

Judgement

Das, J.—This is an appeal by defendants 1 to 3 against the reversing judgment of the learned Subordinate Judge of Bolangir. The plaintiffs, who are respondents 1 and 2 in this appeal, filed a suit for declaration of title and recovery of possession in respect of 37.46 acres of land. The disputed properties admittedly belonged to one Bahya Dharua. Plaintiffs 1 and 2 are the sons of his daughter, Mst. Kangla who was arrayed as defendant 4 in the suit. Defendant 1 was one Mst. Urbashi the widow of Iswar who is alleged to have been adopted by Bahya.

Iswar admittedly was the other son of Mst. Kangla. The plaintiffs alleged that Iswar was not the adopted son of Bahya and hence the sale effected by his widow, defendant 1, in favour of defendants 2 and 3 on 15-6-50 by a registered deed of sale is not binding upon them. Their further prayer was that the decree of the learned Subordinate Judge, Bolangir, passed in T. S. No. 17-32 of 1951-50 is similarly not binding on them.

2. When the suit was taken up for hearing before any evidence was recorded both the plaintiffs and the defendants requested the trial Judge to determine one of the issues in the suit, that is. whether the present suit is barred by the principle of res judicata. The trial Judge by his order dated 16-1-53 came to the

conclusion that the suit as laid, is definitely not maintainable in its present form, and the decision in the previous suit would operate as *res judicata* against the plaintiffs in the present suit.

The plaintiffs carried an appeal against the said judgment, and the learned Subordinate Judge by his order dated 11-8-53 was pleased to set aside the judgment of the trial Court holding that the present suit is not barred by *res judicata*. It is against this decision that the defendants have preferred this second appeal.

3. Before dealing with the question of *res judicata* I would like to "state briefly the facts regarding the previous litigation. The previous suit was numbered as T. S. No. 17/32 of 1951-50. This suit was filed by Mst, Kangla, defendant 4 in the present suit, against Mst. Urbashi, defendant 1, and her transferees defendants 2 and 3. The selfsame lands were then the subject-matter of that suit. The plaintiffs stated in paragraph 10 of their plaint that the above suit was filed in the Court of the Subordinate Judge, Bolangir, mainly to set aside the illegal and unauthorised alienation by Mst. Urbashi.

In paragraph 11 of the plaint, it was further stated that Mst. Urbashi claimed the suit-lands on the ground that her husband Iswar was the adopted son of Bahya and her claim was accepted and Mst. Kangla's suit was dismissed. Then in paragraph 12; the plaintiffs averred that the said title suit was not properly contested and that the plaintiffs whose interest was vitally affected were not made parties thereto, and accordingly, they were not bound by the decision in the said suit which is liable to be set aside. Issues 1 and 2 in the previous suit were :

1. Did the plaintiff (defendant 4 in the present suit) succeed to the suit-land after the death of her father Bahya Dharua ?

2. Was the husband of defendant 1 entitled to the suit-lands as the adopted son of Bahya or not. These two issues were gone into at some length and the learned Subordinate Judge after a detailed discussion of the evidence, came to the finding that Iswar was the adopted son of Bahya, and as such the plaintiff (defendant 4) did not succeed, and accordingly he dismissed the suit.

4. The undoubted position in law is that if Iswar was not the adopted son of Bahya, then his widow would have no title whatsoever to the lands left by Bahya and after his death, it is his daughter Mst. Kangla who would succeed, though to the limited interest, and after her death her sons, plaintiffs 1 and 2, would succeed as reversioners to Bahya Dharua. The only question, therefore, of any importance was whether or not Iswar was the adopted son of Bahya the last male-holder.

5. Mr. G. K. Misra, learned counsel appearing on behalf of the appellants, contended that the present suit is clearly barred under Explanation VI to Section 11, Civil p. C., and therefore the judgment of the learned Subordinate Judge

ought to be set aside. Mr. Misra, in support of his contention, relied upon a decision of the Judicial Committee of the Privy Council reported in *Chau-dhuri Risal Singh v. Balwant Singh* AIR 1918 PC 87 (A), wherein Sir John Edge held that where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is in the absence of fraud or collusion binding on the reversionary heir.

Although Section 11 does not strictly apply, the, principle of *res judicata* is applicable so as to bind reversioners by decision in litigation, fairly and honestly conducted, given for or against Hindu females who represented the estates. a Hindu lady, otherwise qualified to represent an estate in litigation does not cease to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits are, tried and the trial is fair and honest.

It was further held that when in a previous suit between the widow and her adopted son the adoption was declared to be valid as a question of fact apart from the estoppel arising against the widow from her prior admissions as the validity of adoption, the widow notwithstanding the personal estoppel under which she laboured did represent the estate and the decision as to the validity of adoption would be binding on the reversioner in subsequent litigation. The principles underlying this decision of the Privy Council has also been reiterated in a subsequent decision by the Board reported in AIR 1927 56 (Privy Council) .

The same question arose in a Patna case. Mr. Justice Khwaja Mahammad Noor in a decision reported in *Dinanath Jha Vs. Sabuj Lal Chaudhuri and Others*, , held that a decree obtained against the widow in her capacity as the holder of the estate of her husband in a suit fairly obtained is binding upon the succeeding heir. Hence, where in a suit by a widow, a finding of fact as to whether certain adoption was valid or not is fairly and honestly fought out and so far as the question of adoption was concerned the widow was representing the estate as otherwise she had no capacity whatsoever to challenge the adoption, a subsequent suit by a rever-sioner on the death of the widow is barred by the rule of *res .judicata*.

Mr. Misra also referred me to two decisions, reported in *Venkoba Row v. Nataraja Chettiar* AIR 1915 Mad 637 (D) and *Shib Deo Misra and Others Vs. Ram Prasad and Others*, . I would, however, rest content with a decision of this Court reported in *Dava Mahakur v. Khedu Mahakur* 21 Cut LT 566 (F). Although the Privy Council decision reported in AIR 1918 PC 87 (A), has not been noticed in that case, the same wholesome principle appears to have been decided therein. I would do no better than to quote the following passage from the judgment of my learned brother Maha-patra J. :

"In the first suit, the plaintiff brought the claim as the next reversioner of Chaitan. The suit was therefore in a representative character on behalf of all the reversioners. The position is made further clear by reference to the second suit where Brunda"s widow challenged the adoption of the plaintiff. The widow indeed

represented the estate of Brunda and as defendant 4 in that suit was represented through the widow of Brunda, the appellant is not entitled to challenge the adoption of the plaintiff in the present suit provided the previous suits were conducted fairly and honestly."

At this place, it would be pertinent to mention that there is no finding arrived at by the learned Subordinate Judge that the suit was not fairly and properly conducted by Mst. Kangla.

6. Mr. R. N. Sinha, learned counsel appearing on behalf of the respondent, however, contended with some force that the previous suit being a suit between two limited owners should not act as *res judicata* in the subsequent suit. His further contention was that Explanation VI to Section 11, Civil P. C., would not apply to the facts of this case. In support of this first contention, he relied upon a decision reported in *Prem Jagat Kuer v. Harihar Bakhsh Singh* AIR 1946 Oudh 163 (G).

That was, no doubt, a suit between two rival limited owners. Their Lordships in that case adopted the principle as enunciated in *Kutama Natchiar v. Raja of Shivagunga*, 9 Moo Ind App 539 (PC) (H) and reiterated in AIR 1918 PC 87 (A) : but on the peculiar facts of the case, one of them claiming as the full owner, they held that

"where in a suit brought by the next presumptive reversioner for cancellation of a deed executed by the limited owner under the terms of which she acknowledged her daughter-in-law as the owner of the estate, the limited owner pleads that she is the full owner of the estate, it cannot be said that the limited owner represents the estate and any decision obtained in such suit would not operate as *res judicata* between two rival reversioners who claim to be entitled to the estate."

The principle underlying this decision was that the limited owner having claimed full-ownership acted against the interest of the reversioners. The facts of that case are thus clearly distinguishable and the decision would not apply to the present case. In the present case, defendant 4, Mst. Kangla, was, according to the principles as laid down by the Privy Council, representing the en-tire body of reversioners including the plaintiffs.

7. Mr. Sinha then contended that it was unfair on the part of the trial Judge to decide the suit on a preliminary issue without going into the evidence. Therefore in the interest of justice, the case should be sent back to the trial Judge for recording evidence and to come to a proper finding. Reading the two judgments, it is obvious that both the plaintiffs and the defendants had proceeded upon certain admitted basis ; that is, the averments in plaint paragraphs 10, 11 and 12 and the averments in the written statement in paragraph 6 (a), (b) and paragraph 10.

The defendants filed into Court certified copies of the judgment and the decree of

the previous suit. The plaintiff even did not challenge at that stage that the findings arrived at by the subordinate judge in a previous suit were contrary to the pleadings in that suit. But as straightway they proceeded to argue the question whether the suit is barred by principles of res judicata or not On the pleadings as they then stood. Therefore, the plaintiffs not having raised the slightest objection, it is too late now for them to contend that the suit should go back to the trial judge for a further finding after recording evidence.

Mr. Sinha then contended that the trial Court had not considered the plaintiff's challenge that the suit was not "properly contested". It was of course then open to the plaintiffs to have offered evidence at the trial stage in order to assist the Court to come to a finding that the previous suit was not properly contested, They did nothing. The trial Court rightly observes that the plaintiffs do not allege any fraud for setting aside the previous decree. Their only contention is that they are the heirs of Bhaya and as such, the defendant No. 1 has no interest in the suit-lands. Further, in my opinion "properly" would not also include "fairly". Hence, I am unable to accept the contentions as raised by Mr. Sinha.

8. Accordingly, I set aside the order of the learned Subordinate Judge and restore that of the learned Munsiff. The appeal is, therefore, allowed, but in the circumstances of the case, there would be no order for costs of this Court. The pauper court-fee on the memorandum of appeal presented in the Court below, however, shall be realised from the plaintiffs.