
(1929) 07 AHC CK 0013
In the Allahabad High Court

Mt. Dulari

APPELLANT

Vs

Edward Thelwal and Another

RESPONDENT

Date of Decision : 01-07-1929

Acts Referred:

Citation : AIR 1929 All 761(1) : 122 Ind. Cas. 664

Hon'ble Judges : Dalal, J

Bench : Division Bench

Judgement

Dalal, J.—I think that both the Subordinate Courts have gone wrong on the question of res judicata. I have refused to entertain grounds of appeal other than the first because they were abandoned in the Court of first appeal, and whether they be grounds of law or fact, once they are abandoned in the first Court they could not be raised in the Court of second appeal. There were three brothers Edward, Richard and John. Edward is the plaintiff of this suit and John is defendant; Richard is dead, and the defendant Mt. Dulari is his widow. The father of these sons owned 200 bighas of cultivation in a certain village along with other property and bequeathed them to Richard for his life with reversion to Edward.

2. On 8th February 1922, subsequent to the father's death and after the will came into operation Edward executed a deed of release in favour of Richard of this area of land. Richard then considering himself to be the full owner of this land executed a deed of gift thereof bequeathing half and half to John and Mt. Dulari. We need not refer to Richard's will as I have refused to consider grounds of appeal other than the one covering the question of res judicata. After the death of Richard Mt. Dulari sued both John and Edward for partition of the 200 bighas and stated in her plaint that Edward was only nominally a defendant as he had no right to the property in respect of which partition was asked for by her because of his release dated 8th February 1922. Both John and Edward entered into defence, and Edward pleaded that the deed of release was not good at law. The same counsel was appointed to represent both brothers. The issue, therefore, arose between Mt. Dulari and Edward as to whether the deed of

release was valid or not. Two issues were framed, the first and second, with respect to that deed. Before any evidence had been recorded John and Mt. Dulari compromised the suit in terms of the plaint that the land should be divided between them and the actual partition made subsequently by the patwari. The Court granted a decree in the following words:

That a decree be prepared in terms of the compromise. The decree is ex parte in the same terms against the absent defendant (meaning Edward).

3. This decree was passed on 12th October 1925. On 25th August 1926 Edward filed the present suit against John and Mt. Dulari for recovery of the 200 bighas of land on the ground that the deed of release of 8th February 1922 was invalid and not binding on him.

4. The two Subordinate Courts held that the decree of 12th October 1925 did not act by way of res judicata because it was passed by the Court without that Court bringing its mind to bear judicially on the question whether the deed of release of 8th February 1922 was good at law or not. They overlooked the fact that the ex parte decree involved a decision in favour of Mt. Dulari that the release was good at law. An ex parte decree acts by way of res judicata quite as much as a decree passed on proper contest. The learned Judge of the lower appellate Court has gone to the trouble of examining the evidence on which the Court in the previous suit arrived at a decision against Edward. I do not think that he was entitled to inquire into the basis of that decision. When an issue cannot be reopened, the decision thereon must be accepted without inquiry whether the Court which arrived at the decision was wide awake at the time or not and whether it had properly considered all the evidence and the law arising in the matter. All that Section 11 requires is that the issue has been heard and finally decided.

5. It does not prescribe the method of hearing and the character of decision in order to make it binding in a subsequent suit.

6. The ruling of the Calcutta High Court quoted by the learned Judge is not in point. He relies merely on some expression of opinion in that ruling not arising from facts similar to the facts of the present case. Any way there cannot be the slightest doubt that repeatedly since 1897 it has been held in this Court that an ex parte decree, where the Court has not brought its mind to bear properly on the merits of the issue, is as binding by way of res judicata as a decree of any other kind. A Bench of two Judges held in January 1897 in Behari Lal v. Majid Ali [1897] 24 All. 138 that the principle of res judicata does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant-respondent cannot avoid the application of the principle of res judicata by saying that he did not appear at the trial of the suit, and a plaintiff who has got an ex parte decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he had obtained by the fact that the defendant did

not appear in Court to protect his own interest.

7. Another Bench of two Judges arrived at a similar decision in 1902 in *Sheoraj Singh v. Kameshar Nath* [1902] 24 All. 282. Those were execution proceedings. Objection was made to the first application for execution, but the judgment-debtor did not support it, and it was dismissed. In a subsequent application for execution it was held by this Court that the judgment-debtor could not plead limitation when he failed to support that plea when the prior application was filed and his objection had been dismissed in default. In 1910 in *Murli Dhar v. Goma* [1910] 7 A.L.J. 401 a certain order was passed in execution proceedings to sell certain properties in a certain order. It was held that this order was binding in a subsequent proceeding by reason of the principle of *res judicata* though the former order was passed *ex parte*. Similarly in *Oman Prasad v. Durlab Shankar* [1914] 12 A.L.J. 206 a single Judge of this Court held an *ex parte* order in a previous execution proceeding to have the effect of *res judicata* when the same question was raised in a subsequent judicial proceeding. Lastly comes the very important judgment by Sundar Lal, J. in *Ganga Bishan v. Mehar Ilahi Khan* [1914] 12 A.L.J. 1011 where this view of law has been supported by English authorities. He quoted with approval a judgment of Vaughan Williams, J.:

It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.

8. Strangely enough the learned Judge who has referred to English cases and cases of other High Courts made no reference to cases of this Court in which opinion similar to his has been affirmed over and over again. I hold that it is no longer open to the plaintiff Edward to raise the question that the deed of release of 8th February 1922 is bad in law. I set aside the decrees of both the Subordinate Courts and dismiss the plaintiff's suit with costs of all the Courts.