

(1929) 03 AHC CK 0033
In the Allahabad High Court

Muhammad Abdul Karim Khan and Others	APPELLANT
Vs	
Bishan Sahai and Others	RESPONDENT

Date of Decision : 22-03-1929

Acts Referred:

Citation : AIR 1930 All 9 : 121 Ind. Cas. 387

Final Decision : Disposed Of

Judgement

1. First Appeals Nos. 256, 257 and 258 of 1924 are all connected and arise out of suits brought by reversioners and their transferees for possession of property to which the former succeeded on the death of a Hindu widow.
2. Bhawani Sahai was admittedly possessed of considerable property and owned about 26 or 27 villages. He died on 8th August 1870 leaving two widows known as Mt. Rani Chunno Kunwar and Rani Maharani. He left no issue. During their lifetime these widows made various transfers in consequence of which the bulk of the estate has come into the possession of the numerous transferees who are impleaded as defendants in the suit. Rani Chunno Kunwar died about 1903 or 1904 and Rani Maharani died on 16th February 1915.
3. Salig Ram and Dwarka Prasad claimed to be the immediate reversioners to whom the succession opened on the death of Rani Maharani. They have transferred part of their property to the other plaintiffs and a joint suit has been instituted on behalf of them all. The defendants are, as we have remarked above, the representatives of the various transferees. We shall deal with each of their cases separately.
4. The suits were instituted on 20th December 1921 and 10th January 1922.
5. The plaintiffs allege that the ladies were possessed of sufficient income and there was no necessity whatsoever for them to raise money either by mortgage or sale and that accordingly all the transfers were without legal necessity and are not binding on the plaintiffs.

6. The pleas in defence were (1) res judicata, estoppel and (3) existence of legal necessity. There was also a denial of the pedigree set up by the plaintiff's.

7. The learned Subordinate Judge has found that the plaintiffs' pedigree is proved and that there was legal necessity for some of the transfers and that there was no legal necessity for the others. But he has found in favour of the defendants as regards the pleas of res judicata and estoppel and has dismissed both the suits in toto. Three appeals have been preferred out of the three suits. The finding of the Court below that the plaintiffs' pedigree is established has not been challenged before us. We propose to dispose of the legal pleas of res judicata and estoppel in the first instance.

8. It appears that in 1877 Suit No. 65 of that year was filed by four persons who were on the pedigree the immediate reversioners to the estate namely by Sheo Ghulam, Mihin Lal the father of the present plaintiff Dwarka, Chunni Lal father of the present plaintiff Salig Ram and Dudha Lal (or Binda Lal). The plaint is embodied in the decree which is printed at p. 69 (F.A. 258). The plaintiffs to that suit had alleged that the widows were possessed of property assessed to Government revenue of Rs. 9,179-6-0 and that they had without any valid necessity borrowed about Rs. 13,000 from one Chaturi Lal Sahukar. The plaintiff's challenged the right of the widows to fritter away the property by transfers and claimed two specific reliefs:

By right of inheritance according to the pedigree and the evidence of the witnesses the right of the plaintiffs may be established and declared.

and

the defendants may be prohibited from making a transfer of the property detailed in the plaint.

9. Then followed a list of 23 items of property showing the Government revenue against the shares in the villages specified. This suit was filed on 13th December 1877. On 19th February 1878, Chaturi Lal defendant filed a written statement (p. 9 of the Supplemental Record to F.A. 256), in which he alleged that under the mortgage of 1873 money had been lent by him for payment of Government revenue and that subsequently another deed was executed and the money borrowed by the ladies for the construction of Thakurdwara, temple, tank and chatra. After which another mortgage deed for Rs. 11,000 was executed and later they took further sums for the payment of Government revenue. Thus in all Rs. 13,000 had been advanced by him in good faith for lawful and necessary expenses. The ladies also filed a joint written statement (p. 11 of the same Supplemental Record). They alleged that all the acts done by them had been done in good faith and lawfully for the benefit of their husband in the next world and for the protection of the property. They further asserted in para. 6 that most of the villages yielded a very small amount of income and damages had to be paid in respect of certain others, and no expenses over and above the expenses incurred in the lifetime of their husband had been incurred. They reiterated the

statement that the jama (revenue) was considerable and the amount of the income was small. Of course these pleadings are not in themselves legal proof of the fact recited therein. They show the position taken up by the parties to that suit at that time. On 9th March 1878, (p. 89 of F.A. No. 256), Sheo Ghulam applied to withdraw the suit, the reason given by him in the application was that he had no hopes that he would remain alive and survive the ladies and prayed that he be exempted from the costs of the suit. On p. 91 is a copy of the application dated 12th March 1878 filed by another plaintiff, Mihin Lal (or Mithan Lal), who also withdrew his claim stating that he had no concern with the claim as he was not a member of the family of Bhawani Sahai and also disputed the correctness of the genealogical table which had been filed in the case.

10. The judgment, described as rubkar, is to be found on p. 15 of the Supplemental Record to F.A. No. 256. It is dated 13th March 1878. The learned Judge noted that two of the plaintiffs had by their application withdrawn the suit and the other two plaintiffs "had not given any proof regarding the second point." He, therefore, ordered that the claim of two of the plaintiffs be dismissed because they relinquished their claim "and that of the other plaintiffs be dismissed in default of proof." The dismissal of the suit of the other two plaintiffs was, therefore, not one on account of want of prosecution but was on account of absence of proof on the second point. The judgment does not make it clear what the second point in the case was. That is left entirely to conjecture, but having regard to the reliefs claimed in the plaint embodied in the decree quoted by us, it seems clear to us that the second point was the question of the alleged waste being committed by the widows for which an injunction to restrain them had been asked for. This being our interpretation of the judgment it is clear that the suit was dismissed for want of proof that any waste had been committed by the ladies. We may further note that in the plaint no transfer had been specified by date and no relief had been claimed for a declaration that any such transfer had not been made for legal necessity. So far as the relief for the establishment of the plaintiffs' right to the estate by inheritance was concerned that was a relief claimed personally by the then plaintiffs which of course could not be granted, as it was impossible to hold who would be heirs to the estate so long as the widows were alive. So far as that relief went the claim was misconceived, and in any case it is quite clear that such claim could not be said to have been one brought in a representative capacity on behalf of the entire body of reversioners who may be born afterwards. The learned Subordinate Judge has held that the result of this litigation operates as a bar of *res judicata* against the present plaintiffs. We are wholly unable to accept this finding. No declaration had been sought for avoiding any particular transfer and there was no finding that any specific transfer was or was not without any legal necessity. The mere dismissal of the suit for an injunction cannot be *res judicata* when the plaintiffs are now suing for possession of the estate after the death of the widows. Having regard to the fact that a new cause of action arises in favour of the present plaintiffs after the death of the widows and the relief for the establishment of the then plaintiff's

rights; in 1878 was a personal one, it cannot be said that the result of that suit stands in the way of the present plaintiffs.

11. The learned advocate for the respondents has urged that the dismissal might be assumed to amount to a finding that there was no proof of the pedigree set up by the then plaintiffs. We have already noted that the absence of proof noted by the Judge was as regards the second point and not the first. Accordingly we are unable to accept the finding that that judgment operates as *res judicata*.

12. The finding that the result of that litigation amounts to an estoppel which prevents the present plaintiffs from suing is absolutely untenable. No act or omission committed by the presumptive reversioners at that time can amount to an estoppel against the present plaintiffs who have actually succeeded to the estate. Their conduct may under certain circumstances raise a presumption in favour of the existence of the legal necessity, but can never debar the present plaintiffs from claiming the estate in assertion of their own rights which they do not claim through the former reversioners. We would therefore hold that neither *res judicata* nor estoppel is a bar to the suit.

13. In this connexion we may dispose of another plea of *res judicata* which has been raised for the first time before us and which is based on a judgment dated 25th October 1923 printed on p. 27 of the Supplementary Record to F.A. No. 256. As a result of several advances of loan Chaturi Lal had obtained a decree for money in 1878. In part payment of that decree he took a sale deed in 1891 of three villages. Part of that mortgage decree was paid off by the sale of Sibnagar in favour of the respondents represented by Mr. Pearey Lal Banerji. In a suit brought by the present plaintiffs against Chaturi Lal's representatives to set aside the sale deed of 1891 it was held that that sale was good because it had been taken in order to pay off Chaturi Lal's mortgage decree which had been established in that case to have been in lieu of previous debts which were for legal necessity. Mr. Peary Lal Banerji contends that inasmuch as Chaturi Lal's representatives in that suit set up this mortgage-decree of 1878 and the finding was in their favour and against the present plaintiffs, that finding ought to operate as *res judicata* in favour of his clients even though they were not parties to the former litigation. This argument is based on the ground that under Explan. 6 to Section 11 Chaturi Lal's representatives should be deemed to have been litigating *bona fide* in respect of a private right claimed in common for themselves and the present contesting respondents. We find it impossible to accept this contention. The right which the then respondents were claiming was the right based on their sale deed of 1891 and in order to prove its validity they were relying on a previous mortgage decree of Chunni Lal. The transfer in favour of the contesting respondents is of 1879. The ground which Chaturi Lal's representative might have set up in order to prove the validity of their own sale-deed cannot be a right claimed in common for themselves and the present respondents, who have to substantiate the validity of another sale deed. It is quite clear that in the former litigation Chaturi Lal's representatives were not

claiming any right in common with the present contesting respondents. We are therefore unable to hold that even this judgment operates as *res judicata* and prevents the plaintiffs from challenging other transfers which were not in dispute in the former litigation. In this view of the case, the matter need not be pursued any further.

14. We now proceed to examine whether the various transfers were or were not supported by legal necessity. Before we take these transfers individually we should like to state a few broad facts which are established by the evidence. We have already referred to the decree in the suit brought by the reversioners in 1877 which gives a list of 23 items of property left by Bhawani Sahai. No doubt as observed by their Lordships of the Privy Council in the case of *Kumar Gopika Raman Roy v. Atal Singh* AIR 1929 P.C. 99 findings of fact or statements of fact in a judgment delivered in one case are not admissible as proof of those facts in another case when the parties are not the same. But even on this record there are khewats of no less than 13 villages, the total Government revenue of which comes to over Rs. 5,000. We also have an official report printed on p. 47 (F.A. No. 258) stating that Bhawani Sahai had been in affluent circumstances and besides the village Nagla Lahori he had 26 or 27 other zemindari villages in that very *pergana*. When the Government revenue of 13 villages amounted to more than Rs. 5,000 it may be taken roughly that the total Government revenue of the entire property would have been about Rs. 10,000. Thus the statement in the decree is borne out by this calculation. There is no direct evidence on the record to show the actual profits, namely the net income of the villages but it may be assumed for the purposes of argument in favour of the plaintiff's that it might have been about equal to the Government revenue. The conclusion therefore is irresistible that the widows were possessed of considerable properties after the death of their husband. At the same time we know that there was a great famine in the years 1876 to 1878 and during that time the condition of the villages in the district of Shahjahanpur was precarious. Even the plaintiffs Salig Ram and Puttu Lal (pp. 35 and 41 F.A. No. 256) admit that Bhawani Sahai had started the building of a temple, a shivalay and a tank in his lifetime and that these constructions had not been completed when he died and had to be completed afterwards by the widows. The defendants' witnesses like Ram Dayal and others of course said that large sums of money were required by the ladies for completing these constructions. That the completion of these works which had been started by Bhawani Sahai in his lifetime would have been a legal necessity has not been disputed before us. Unfortunately, however, we do not know the exact part of the constructions which had been left uncompleted when Bhawani Sahai died. We have already referred to the bare assertions of the ladies themselves that the Government revenue of the villages was very heavy and the income was small.

15. There is no doubt that during their lifetimes these widows from time to time made numerous transfers with the ultimate result that the bulk of the property passed out of their hands. This raises a grave suspicion against the transferees.

16. Although we have held that the proceedings in the suit brought by the presumptive "reversioners" do not amount to res judicata it is impossible to altogether ignore that litigation. The present plaintiffs come to challenge these transactions after a period of 40 to 50 years. At a time when the original transferees and the persons connected with the execution of the various documents are all dead, they call upon the defendants to establish legal necessity for debts which their predecessor-in-title had advanced. A large number of these defendants are not the descendants of the original creditors or vendees but are subsequent transferees from these people. It is therefore very hard on them to be called upon after this long lapse of time to substantiate the ancient transactions by direct proof of legal necessity. We have the further fact that not only the reversioners have waited such a long time before impugning these transfers but the fathers of the two of the present plaintiffs and their uncles did make an attempt in 1878 against the ladies and Chaturi Lal but for some reason or other did not proceed further with the case. That was the occasion when the whole question could have been conveniently threshed out and it could have been established one way or the other whether the legal necessity had existed. Although the present plaintiffs are not bound by the conduct of those reversioners, it is a fact which cannot be lost sight of that at the time when the truth would have been more effectively enquired into, those reversioners did not choose to press the matter. There is the further fact that although there is no proof of legal necessity, yet it is shown that the ladies as well as Chaturi Lal were prepared to substantiate the case that legal necessity had existed and that as early as 1878 it was definitely alleged that the previous transfers had been for lawful purposes.

17. We shall deal with each of the deeds in favour of Chaturi Lal hereafter but at this stage we may mention that by September 1878 Chaturi Lal had succeeded in obtaining a decree from a Court of law in his favour against the widows. Thus the outside world had the fact before it that the reversioners had sued to challenge the previous transfers and had withdrawn their suit or allowed their suit to be dismissed, and that the transferee Chaturi Lal had actually obtained a decree from the Court. It was after these events that the transfers which are now impugned took place.

18. There is one more circumstance against the plaintiff's which we may now mention. Although we have held that the judgment of the Subordinate Judge dated 25th October 1923 cannot be taken advantage of for the purpose of res judicata, it does not follow that that judgment is wholly inadmissible in evidence. It is true that the contesting defendants who wished to rely upon it were not parties to it but the present plaintiffs were themselves parties and they lost their claim against Chaturi Lal's representatives. Now Chaturi Lal and his representatives were in a better position to establish the validity of the mortgagees in favour of Chaturi Lal than the present defendants who are subsequent transferees. The plaintiffs had the full opportunity to challenge the validity of Chaturi Lal's transactions but failed in their attempt. u/s 13, Evidence

Act, when the question as to the existence of any right arises in a transaction by which that right was claimed, recognized or asserted, any particular instance in which that right was claimed, recognized or exercised is a relevant fact and therefore, admissible. In the present suit Chaturi Lal's right to hold a valid charge on the property on account of the mortgagees in his favour is in dispute. This right was denied by the plaintiffs and was asserted by Chaturi Lal's representatives in the previous suit, and the result of that suit was an instance in which the right claimed was recognized by a Court of law. Although the value of the judgment by itself may not be great inasmuch as evidence may vary from case to case, the fact remains that that judgment is an instance in which the validity of Chaturi Lal's mortgages was not only asserted but recognized by the Court and recognized as against the present plaintiffs.

19. We now come to the transactions in which Chaturi Lal was concerned. All the relevant documents are to be found in the Supplementary Record of F.A. No. 256. On p. 1 is the hypothecation bond dated 31st May 1873 in favour of Ajudhya Prasad and Bishnu Dayal for Rs. 2,000. It recites that the money was required for the payment of Government revenue on account of the instalment of May 1873. The endorsement on the back of this document contains the admission made at the time of the registration and is to the effect that the amount had really been deposited in the Pawayen Tahsil on 30th May preceding and that the said amount was to be credited towards the payment of Government revenue. Now the recitals in documents executed by Hindu ladies are by themselves no proofs of the existence of the legal necessity mentioned. But in cases where there has been a long interval of time and the surrounding circumstances support the inference, the recitals in such (documents would be evidence of the representation having been made to the transferees to that effect. We may in this connexion quote the words of their Lordships of the Privy Council in the case of *Banga Chandra Dhar Biswas v. Jagat Kishore Acharjya* AIR 1916 P.C. 110 at p. 196 of 44 Cal.

The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that the transaction would ultimately be incapable of justification merely owing to the passage of time.

20. As the dispute has arisen after a long interval of time we are of opinion that having regard to the various circumstances which we have referred to above it is only fair that this recital should be accepted as proof of a representation having been made and believed to be correct by the mortgagee, particularly as that assertion was subsequently repeated.

21. On 14th June 1873 another mortgage-deed (p. 3) was executed for Rs. 4,000 in favour of Chaturi Lal. Under this, money due to Ajudhya Prasad and

Janki Prasad was paid off and a further sum was required to pay off the Government revenue instalment. The learned advocate for the respondents has suggested that this Ajudhya Prasad might be a different person from the other Ajudhya Prasad. There is, however, the fact that Ajudhya Prasad mentioned in both the documents was the resident of the same place Pawayan.

22. On 29th April 1875 (p. 5) a possessory mortgage-deed was executed for Rs. 11,000 under which the amount due on the previous deed dated 14th June 1873 was paid off and so were also the three promissory notes paid off and the balance was paid at the time of registration. It is a fact against the defendants that there was in the mortgage-deed of 1875 no express recital of necessity for the amounts due on the promissory notes and the cash paid at the time of registration. On the other hand we have already stated that in 1878 when the reversioners first challenged the debts of Chaturi Lal, he did assert in Court that the money had been required for the payment of Government revenue and for the construction of Thakurdwara temple tank and chhatri (p. 9 of the Supplemental Record of F.A. No. 256) and we also know that the ladies asserted that they had acted in good faith and lawfully. We have already shown that the reversioners' suit was dismissed (p. 15) and it is a fact that Chaturi Lal obtained a decree on the basis of this mortgage-deed on 25th September 1878 (p. 17).

23. The defendants have produced some oral evidence on the need for completing the temple, the Shivalay and the tank and it was admitted by the plaintiffs Pattu Lal and Salig Ram that these constructions had remained incomplete when Bhawani Sahai died. The evidence is no doubt meagre. In an ordinary case it might have been difficult to accept it as conclusively establishing the plea of legal necessity but having regard to the long lapse of time after which the question has been raised, having regard to the failure on the part of the then reversioners to press their claim at a time when the matter might have been thoroughly investigated and having regard to the other circumstances mentioned by us above, we feel that it would not be proper to upset the finding of the Court below on this point and we accordingly hold that Chaturi Lal's decree dated 25th September 1878 may be taken to have been obtained on account of a debt which was binding on the estate. (Their Lordships then discussed the transfers separately and disposed of the appeal).