
(1964) 07 AHC CK 0016
In the Allahabad High Court
Case No : S.A. No. 2897 of 1962

Niyaz Ali

APPELLANT

Vs

Shri Kammo

RESPONDENT

Date of Decision : 08-07-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 332B(v)

Citation : (1965) 35 AWR 22

Hon'ble Judges : S.S. Dhavan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.S. Dhavan, J.—This is a Plaintiff's second appeal from the decree of the II Civil Judge Meerut dismissing a suit for a declaration of his tenancy rights and for a permanent injunction to restrain the Defendant-Respondent from interfering with his possession. The Plaintiff alleged in his plaint that prior to the abolition of zamindari system in this State he had been a cultivator of the plots of land in dispute; that the Respondent Kammo filed a suit for his ejectment u/s 180 of the U.P. Tenancy Act which was decreed in 1952-the decree being ultimately confirmed by the Board of Revenue in 1954; that in spite of the decree the Plaintiff continued in possession of the land and was also recorded as in possession In the Khasra and Khatauni of 1356F; that on the date of vesting he became an adhvasi and subsequently sirdar; that hence he was not liable to be ejected in the execution of the decree for ejectment; that the Defendant was attempting and threatening to dispossess the Plaintiff; hence the suit.

2. The Defendant resisted the suit and denied that the Plaintiff had acquired any adhvasi rights in the land. He further pleaded that the plea of adhvasi had been taken by the Plaintiff before the Board of Revenue in his appeal from the decree for ejectment and was rejected by the Board, therefore, it could not be raised again in the present suit being barred by the principle of res-judicata and Section

11 of the CPC Code. A number of other pleas were taken in defence which need not be considered as neither the Appellant nor the Respondent has referred to them in this appeal. The question whether the Plaintiff had become an adhvasi of the land in dispute on the date of vesting was referred to the revenue court which found that the Plaintiff had not become an adhvasi on the material date. Accepting this finding the learned Munsif held that the Plaintiff had not become an adhvasi of the plots.

3. On the question of res-judicata, the learned Munsif held that the present suit was not barred u/s 11 CPC. The reasons for this finding are detailed in the judgment of the learned Munsif and need not be repeated here. But the learned Munsif held, in view of the finding of the revenue court, that the Plaintiff had not become an adhvasi of the land, and dismissed the suit with costs. On appeal by the Plaintiff the learned Civil judge held-in act, this point was conceded on behalf of the Defendant Respondent-that the -Plaintiff having been recorded as an occupant in the record of 1356F should be held to be an adhvasi and sirdar, but as the learned Judge disagreed with the trial court on the question of res judicata he held that the Plaintiff's claim to be regarded as an adhvasi having been urged before the Board of Revenue in second appeal and rejected by that court, the plea could not be raised again in the present suit because of the bar of Section 11 CPC. In the result the learned Judge, for reasons of his own, confirmed the decree of the trial court. The Plaintiff has come to this Court in second appeal.

4. Mr. Asif Ansari urged the following points in support of this appeal. First, the finding of the lower appellate court that the Plaintiff Appellant had acquired adhvasi rights in the land entitled him to a decree for a declaration of his rights; secondly the question of adhvasi was not barred u/s 11 CPC and the learned Judge has misapplied the law on this point.

5. Two questions arise in this case. The first is whether the Plaintiff acquired any adhvasi rights in the land and the second whether he is prevented from raising this question because of the bar of Section 11 CPC. On the first question the trial court held against the Plaintiff but the lower appellate court in his favour. In fact the Plaintiff's argument based on the entry in the record of 1356 Fasli; was not seriously contested before the learned Judge by the Respondent who staked his entire case on the bar of Section 11CPC. Therefore I am not inclined to permit him to raise this question again. I have only to decide the second question-the first having been conceded in the Plaintiff's favour in the court below.

6. After hearing learned Counsel for both sides I am of the opinion that the finding of the lower appellate court that the Plaintiff was prevented from raising the plea of adhvasi is erroneous. It is necessary to state a few facts and mention a few dates. The Respondent's suit for ejectment u/s 180 of the U.P. Tenancy Act was filed on 10th of October, 1949. It was decreed on 19.3.1952. The Plaintiff Appellant filed an appeal from the decree though the date of its filing is not available from the record of this case. However as the learned Counsel for the

Appellant pointed out, it must have been filed within the prescribed period of 30 days from the date of the decree, and it may reasonably be presumed that it was filed before the first of July 1952-the date of vesting. This appeal was dismissed by the Additional Commissioner on 1st September 1953 and the Plaintiff's second appeal was also rejected by the Board of Revenue on 15th October 1954. The Plaintiff in second appeal tried to raise the plea of adhivasi before the Board but he was not permitted to do so on the ground that he could have raised it before the Additional Commissioner but did not do so. The question before me is whether on these facts the Plaintiff is prevented from raising this plea in the present suit on account of the bar of Explanation IV in Section 11 CPC. In my opinion he is not.

7. It is conceded by the learned Counsel for the Defendant Respondent that the Plaintiff could not have raised this plea in defence in the suit as the Zamindari Abolition and Land Reforms Act came into effect three years after the filing of the suit and three months after the passing of the decree in that suit. It is also conceded that, assuming that the appeal from the decree was filed before the date of vesting, the Plaintiff Appellant could not have taken this plea in the grounds of appeal filed before the Additional Commissioner. It is true that subsequently he could have applied for a decision of the appeal on the basis of the changed circumstances brought about by Zamindari Abolition and Land Reforms Act, but did not do so. He tried to make good this omission by raising it in second appeal as a point of law, but the Board of Revenue prevented him from doing so. In these circumstances I cannot see how the bar of Section 11 CPC will prevail against him in this suit and prevent him from raising this plea.

8. Section 11 runs thus: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally decided by such Court.""

Explanation IV in this Section runs thus:

Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

9. Reading the Section and the Explanation together they provide in effect that a matter which was directly and substantially in issue in a former suit between the same parties or which could have been put in issue" by being made a ground of defence or attack in the former suit shall not be permitted to be raised in any subsequent suit between the same parties. (I have omitted the portions of the Section and Explanation which are not relevant to the facts of this case). Therefore, the essential condition for the application of Explanation IV is that the matter in question should or could have been in issue in the previous suit

between the same parties. But if the party against whom the bar of Section 11 or Explanation IV is sought to be applied can show that he could not have raised this matter in the earlier suit the bar shall not apply against him.

10. Therefore the controversy is reduced to a very simple question- namely whether the Plaintiff could have raised the question of his adhivasi right in the suit filed by the Respondent in 1949 for his ejectment u/s 180 of the U.P. Tenancy Act. Learned Counsel for the Respondent, while conceding that it could not have been raised at any stage of the suit, contended that it could have been raised in appeal and therefore Explanation IV would apply against the Plaintiff. He pointed out that an appeal is a continuation of a suit and argued that Explanation IV extends to all stages of the proceedings commencing with the suit and ending with the final decision by the last appellate court. I cannot agree. Explanation IV provides that "any matter which might or ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." A plea cannot be taken in attack by the Plaintiff if the cause of action on which it is based has not arisen, nor in defence by the Defendant if the right on which it is based has not accrued. As pleas in attack or defence must be taken at the time of pleadings in the suit, the word "suit" in Explanation IV does not include appeal.

11. Moreover, the words "which might or ought to have been made ground of defence or attack refer to a matter which the party concerned could raise as a matter of right, and not one which he could raise only with the permission of the court. If the Plaintiff Appellant could have raised the plea of adhivasi in his written statement, it might have been urged that this was a plea which might and ought to have been made a ground of defence, and as it was not, Explanation IV. would apply. But it has been conceded that the question of his acquiring adhivasi rights did not arise before the trial court at all and very likely not when he filed his appeal from the decree. In these circumstances Explanation IV cannot apply.

12. I am supported in my view by the following observation of Sri Dinshaw Mulla in his Commentary on the Code of Civil Procedure, 12th Edition, at page 42: "whether a matter was directly and substantially in issue in a former suit is to be determined by a reference to the plaint, the written statement, the issues, and judgment." Therefore the maxim that an appeal is a continuation of a suit cannot be invoked for the purpose of applying the doctrine of res judicata, against a party if it did not raise a plea in appeal which it could not have taken in the suit. The doctrine is based on the fundamental principle that a matter which has been finally decided between the parties by a competent court should not be permitted to be raised again and again. It has been extended constructively to matters which the parties could have raised but did not raise. But to extend the principle of constructive res-judicata to cases where the parties could not have raised the issue at any stage of the suit, and not even in appeal except with the permission of the court is to convert a sound principle into an engine of injustice. The object

of constructive res judicata is to compel the parties to take all the pleas they can and penalise them in future suits if they do not. The principle becomes oppressive if a party is penalised for not taking a plea which it could not take as of right.

13. For these reasons the finding of the lower appellate court that the Plaintiff could not raise a plea of adhivasi in the present suit cannot stand.

14. Lastly learned Counsel for the Respondent argued that the present appeal was not properly filed. He relied on the omission of the Appellant to file a finding of the Revenue Court on the question of adhivasi. He pointed out that Section 332B, Sub-section (v) of the ZA and LR Act provide that "the finding of the Collector or subordinate Revenue Court on the issue referred to it shall, for the purpose of appeal be deemed to be part of the finding of the Civil Court." He also relied on Rule 1 of Order XLII of the CPC as amended by this Court which provides inter alia that every memorandum of appeal from an appellate decree shall be accompanied by a copy of a decree appealed from and unless the court wishes it to be dispensed with any or all of them (1) a copy of the judgment on which the said decree is founded (2) a copy of the judgment of the court of first instance and (3) a copy of the finding of the Civil or Revenue Court, as the case may be where an issue was remitted to such court for decision. Mr. Ansari argued in reply that Rule 1 of Order XLII must be deemed to have been superseded by Rule 8 of Chapter IX of the Rules of this Court which does not include the finding of the Revenue Court in the list of documents which must be filed with the memorandum of appeal. Counsel pointed out that the rules of this Court were made in 1952 in the exercise of powers conferred on the Court under Article 225 of the Constitution and must prevail against Rule 1 of Order XLII which was made in 1948. I am inclined to accept this argument which is supported by Section 122 of the CPC which runs thus: "High Court (not being the court of a Judicial Commissioner) may, from time to time after previous publication make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule." Thus the every Code which provides for the rules governing the procedure for final appeals also empowers the High Court to make its own procedure for the filing of such appeals and further enjoins that the procedure adopted by the High Court shall supersede that prescribed by the rules. Rule 8 of Chapter IX of the rules of this Court does not require the filing of a copy of the finding of the Revenue Court.

15. Learned Counsel however relied on Section 331B of the ZA and LR Act, quoted above, and contended that Sub-section (v) of that section made the finding of the Revenue Court on an issue remitted to it a part of the judgment of the trial court and therefore even under Rule 8 of Chapter IX of the rules of this Court a copy of this finding must be filed, as that rule requires that the judgment of the trial court must be filed along with the Memorandum of appeal. There is a short answer to this argument. Section 332B which made the finding of the

Revenue Court a part of the judgment of the trial court, had been repealed at the time when the Revenue Court gave its finding in the present suit. Therefore this finding could not be regarded as a part of the judgment of the trial court.

16. At any rate the omission to file any of the documents except the decree appealed from is not fatal to the proper presentation of appeal. It is a defect which relates to form only. It is open to the court at the time of the filing of the appeal to insist upon any particular document being filed or to dispense with it. No objection was raised on behalf of this Court when the memorandum of appeal was filed in open court. It would not be fair in these circumstances to penalise the Appellant for an omission of which the Court did not take notice at the proper time. The Appellant is entitled to argue in such a case that the Court must be deemed to have dispensed with the filing of the document. This view receives some support from the observations of a Division Bench of the Calcutta High Court in Brojendra Lal Saha and Others Vs. Jana Mondal and Others, . The position would have been different if the decree appealed from had not been filed, because this Court does not appear to have any discretion to dispense with a copy of the decree.

17. For reasons detailed above, I allow this appeal, set aside the decree of the lower appellate Court and decree the Plaintiff-Appellant's suit with costs throughout.