

(1969) 03 KAR CK 0001
In the Karnataka High Court
Case No : Appeal No. 127 of 1960

Poovamma and Others

APPELLANT

Vs

Sumathi and Others

RESPONDENT

Date of Decision : 28-03-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Land Acquisition Act, 1894 — Section 30

Citation : AIR 1970 Kar 81 : (1969) 2 MysLJ 17

Hon'ble Judges : M. Sadasivayya, J; D.M. Chandrashekhar, J

Bench : Division Bench

Advocate : Shivashankar, for the Appellant; K.R.D. Karanth, for the Respondent

Judgement

Chandrashekhar, J.—This is an appeal from the judgment and decree in Original Petition (L. A. C.) No. 76 of 1951 on the file of the Subordinate Judge of South Kanara. That petition arose on a reference u/s 30 of the Land Acquisition Act, for apportionment among the claimants of the compensation awarded for acquiring 79 cents of land in T. S. No. 265 in Mangalore Town. The learned Subordinate Judge held that respondents-claimants 11 to 18 were solely entitled to the entire compensation, Feeling aggrieved by that decision, claimants 2, 4 to 7 and 19 have preferred this appeal impleading Claimants 11 to 18 as respondents.

2. At the hearing of the appeal Mr. K. R. D. Karanth, learned counsel for respondents, raised the following two preliminary objections to the appeal:

(i) The appeal is barred by the principle of res judicata, as the appellants did not appeal from the decree in the suit which was decided along with the Original petition by a common judgment; and

(ii) The entire appeal abated on the death of appellant No. 5, Vedavathi, whose legal representatives have not been brought on record. S. Before going into the merits of the appeal, it is necessary to consider these two preliminary objections because, if either of them is upheld, the appeal must fail and it would be

unnecessary to go into the merits of the appeal.

4. Mr. K. Shivashankar Bhat, learned counsel for the appellants, and Mr. Karanth addressed elaborate arguments on these preliminary objections.

5. We shall now consider the first preliminary objection. It is common ground that in the Original Petition and in the Original Suit the parties are common and the main issues are also common. Those issues relate to the title to the suit land which was acquired. The apportionment of the compensation for this land is the subject matter of the Original Petition. Though there was a common judgment in these two proceedings, there were two separate decrees, one in the Original Suit and the other in the Original Petition. The appellants have not preferred any appeal from the decree in the Original Suit, which is against them.

6. Mr. Karanth, argued that the decree in the Original Suit, against which no appeal has been filed, has become final and operates as *res judicata* in regard to the present appeal and hence the present appeal is barred and should be dismissed in limine.

7. As stated by the Supreme Court in *Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others*, the principles underlying Section 11, Civil P. C., are applicable even when the case does not fall within the strict terms of that Section.

8. Where two proceedings involving common issues are disposed of in one judgment and an appeal is filed against the decree in one and not in the other, the question whether the matter decided in the latter proceedings, becomes *res judicata* so that it cannot be reopened in the appeal, is one on which there is no decision of this Court (the High Court of the New State of Mysore). On this question there is a conflict of decisions of different High Courts. Each learned counsel referred to certain observations of the Supreme Court as supporting his respective contention.

9. Mr. Shivashankar Ehat, strongly relied on the observations of the Supreme Court in *Narhari and Others Vs. Shankar and Others*, . There, the plaintiffs claimed 1/3 of certain properties from one set of defendants, i.e., defendants 1 to 4 and another 1/3 from another set of defendants, i.e., defendants 5 to 8. The trial Court decreed the suit. Each set of defendants filed a separate appeal claiming 1/3 of the properties. The first Appellate Court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed in the file of the other connected appeal. The plaintiffs thereafter brought before the High Court two appeals one against the decree in the appeal filed by defendants 1 to 4 and the other, against the decree in the appeal filed by defendants 5 to 8. In the former appeal the plaintiffs had impleaded as respondents all the defendants and had paid the full court-fee necessary for an appeal against the dismissal of the entire suit. The plaintiff's prayer covered both the appeals. The latter appeal was dismissed by the High Court as being filed beyond limitation.

10. At the hearing of the former appeal, it was contended by the respondents therein that it was barred by the principle of res judicata on account of the dismissal of the latter appeal. The High Court upheld that contention and dismissed the former appeal also on the ground that the judgment in the latter appeal operated as "res judicata."

11. Against the decisions of the High Court the plaintiffs then filed two appeals which ultimately came up before the Supreme Court. Reversing the decrees of the High Court this is what the Supreme Court said at page 420 :--

"It is now well settled that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn UD. As has been observed by Tek Chand, J. In his learned Judgment in AIR 1927 Lah 289, mentioned above, the determining factor is not the decree but the matter in controversy.

As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerned the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment cannot remain effective just because it was appealed against with a different number or copy of it was attached to a different appeal. The two decrees in substance are one"

12. Relying on the above observations Mr. Shivashankar Bhat urged that the bar of res judicata is not created by the decree, but by an earlier judgment, and that even where there are two suite, a decision simultaneously cannot be a decision in the former suit, Mr. Shivashankar Bhat also argued that though in the present case there were two decrees, one in the Original Suit, and another, in the Original Petition, the two decrees were in substance only one.

13. The aforesaid observations in Narhari and Others Vs. Shankar and Others, have been explained by the Supreme Court in a later decision, Badri Narayan Singh Vs. Kamdeo Prasad Singh and Another, . The Supreme Court pointed out that in Narhari and Others Vs. Shankar and Others, the first appeal was really a consolidated appeal against the decrees in both the appeals and could have been split up for the purposes of record into two separate appeals, and that it does not mean whenever there be more than one appeal arising out of one suit, only one appeal is competent against the order in any of those appeals irrespective of the fact whether the issues for decision in those appeals were all common or some were common and others raised different points for determination. The Supreme Court also pointed out that the decision in Narhari and Others Vs. Shankar and Others, , does not apply to cases which are governed by the general principles of

res judicata and not by Section 11 C. P. C.

14. We think Narhari and Others Vs. Shankar and Others, is distinguishable on facts from the present case, and the observations in Narhari and Others Vs. Shankar and Others, are applicable only when there is one suit which gives rise to two appeals. But in the present case there were two proceedings, one a suit, and another a reference u/s 30 of the Land Acquisition Act. Since both these proceedings are not suits, what applies is not Section 11, Civil P. C., but the general principles of res judicata.

15. Mr. Shiyashankar Bhat next referred to certain observations in Daryao and Others Vs. The State of U.P. and Others, . Gajendragadkar, J., (he he then was) who spoke for the Court, said that if the petition filed in the High Court under Article 226 of the Constitution is dismissed not on the merits, but because of the laches of the party applying for the writ or because it is held that the Party had an alternative remedy available to him, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32.

16. The above observations were made while considering as to when a decision of the High Court in a petition under Article 226 of the Constitution, may operate as res judicata so as to bar a subsequent petition before the Supreme Court under Article 32. The above observations have no application in regard to the question whether an un appealed decree pursuant to a single judgment in two suits between the same parties, will operate as res judicata in an appeal filed against the other decree (under the same judgment).

17. Mr. Karanth strongly relied on the decision of the Supreme Court in Badri Narayan Singh Vs. Kamdeo Prasad Singh and Another, .

18. There, against the decision of the Election Tribunal two appeals were presented before the High Court by the Election petitioner and the returned candidate respectively. The High Court allowed the appeal of the Election petitioner but dismissed that of the returned candidate. Thereafter the returned candidate appeal- ed before the Supreme Court against the decision of the High Court in his Election Appeal only and not against the decision in the other Election Appeal (filed by the Election petitioner). A preliminary objection was taken before the Supreme Court that the appeal was barred by res judicata as it was not open to the appellant to question the correctness of the decision of the High Court in the other appeal which had become final.

19. Upholding the plea of res judicata, the Supreme Court said that the decision of the High Court though stated in one judgment, really amounted to two decisions and not one decision common to both the appeals, and so long as the decision of the High Court in one of the appeals stood, the appellant could not question before the Supreme Court the finding of the High Court in his appeal before the High Court as the finding in his appeal had to follow the finding in the

other appeal.

20. We think, *Badri Narayan Singh Vs. Kamdeo Prasad Singh and Another*, is distinguishable on facts from the present case. There, there were two decisions though stated in one judgment; but in the present case both in the Original Suit and the Original Petition, there was only one decision, namely, as to which of the parties had the title to the acquired land. We think the decision of the Supreme Court in *Badri Narayan Singh Vs. Kamdeo Prasad Singh and Another*, has no application to the present case.

21. Mr. Karanth next relied on the decision of the Supreme Court in *Sheodan Singh Vs. Smt. Daryao Kunwar*, . There, the appellant had brought two suits against the respondent, while the respondent had brought two suits against the appellant. As there were common issues in these four suits, they were tried together by consent of parties and were disposed of by a common judgment. Separate decrees were prepared in each suit. The appellant filed four separate appeals against the decrees in these four suits. One of these appeals was dismissed by the High Court as being time barred, while another appeal was dismissed by the High Court on account of the appellant not applying for translation and printing of records. When the remaining two appeals came up for hearing before the High Court, the respondent pleaded that those appeals were barred by the principle of *res judicata* as her title to the suit property had become final on account of the dismissal of two other appeals. The Supreme Court upheld the view of the High Court which held that the decision of the trial Court which became final on account of the dismissal of two of the appeals, operated as *res judicata* even in respect of the remaining two appeals, and in that view those remaining two appeals also should be dismissed.

22. The above case is also distinguishable on facts from the present case inasmuch as an appeal has been filed only from the decree in the Original Petition and no appeal was filed from the decree in the Original Suit. As to whether the decree not appealed from operates as *res judicata* in the appeal preferred from the other decree, the Supreme Court did not express any opinion in *Sheodan Singh Vs. Smt. Daryao Kunwar*, but left it open after noticing the rival views expressed by different High Courts on this point.

23. We shall now briefly advert to the divergent views of High Courts on the question when two proceedings involving common issues are disposed of in one judgment, and an appeal is filed against the decree in one and not in the other, whether the matter decided in the latter becomes *res judicata* so that it cannot be reopened in appeal.

24. The Madras High Court has almost consistently taken the view that there is no bar of *res judicata* in such circumstances. According to the Madras High Court, where the object of the appeal is, in substance, if not in form, to get rid of the very adjudication which is put forward as constituting *res judicata*, that adjudication should not be held to bar the appeal: *Pappammal alias Muthu*

Karuppayyee Ammal Vs. Meenammal and Others, .

25. According to Tek Chand, J., who spoke for the majority of the Full Bench of Lahore High Court in AIR 1927 Lah 289 (FB), the estoppel of res judicata is created by a verdict or a judgment and not by a decree and attention must be concentrated not upon the fact that there is a record of an outstanding decree in favour of a party, but upon the question whether there has been an independent decision upon which the record was based.

26. The most serious objection to the view that an un appealed decree does not bar the hearing of a_n appeal from the other decree, is that if the latter decree is reversed or modified in appeal, there would be two inconsistent decrees on the file of the Court and both those inconsistent decrees may be sought to be executed. Tek Chand, J., sought to solve this difficulty by stating that if two or more conflicting decrees happen to be passed regarding the same property, the later decision shall be taken to have superseded the earlier and thenceforward the only effective adjudication.

27. With all respect to his Lordship, it is difficult to see how a decree which is not appealed from, can be superseded by a decision in an appeal from another decree. We think the correct legal position is, if we may say so with respect, as stated by Stanley, C. J., who spoke for the Full Bench of Allahabad High Court in Zaharia v. Debia ILR (1911) All 51 at p. 60:

"A decree, unless it be a decree which is a nullity by reason of, for example, fraud, cannot be superseded except upon appeal in regular course. This being so if we accede to the argument addressed to us, we should have two inconsistent decrees on the file of the Court. This would be a most serious anomaly, and in execution proceedings would cause complete impasse."

28. In order to avoid such conflicting, confusing and anomalous results, we think the view taken by the Full Bench of the Allahabad High Court in ILR (1911) All 51 and which has been followed by the High Courts of Calcutta, Patna and Orissa, should be preferred to the view taken by the Madras High Court and a few other High Courts.

29. We must hold that the decree in the Original Suit regarding the title to the acquired land, which has not been appealed from, became final and the principle of res judicata bars the appeal from the decree in the Original Petition. In that view, it becomes unnecessary to consider the other preliminary objection whether the present appeal has abated on account of the death of Vedavathi whose legal representatives have not been brought on record.

30. in the result, this appeal is dismissed. But in the circumstances, we direct the parties to bear their own costs in this appeal.

31. Appeal dismissed.