

(2004) 12 AHC CK 0051
In the Allahabad High Court
Case No : Second Appeal No. 644 of 1980

Ram Agya (D.) through L.R. and Others	APPELLANT
Vs	
Bhagwati Prasad (D.) through L.R. and Others	RESPONDENT

Date of Decision : 07-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 100, 11

Citation : (2005) 2 AWC 1850

Hon'ble Judges : N.K. Mehrotra, J

Bench : Single Bench

Advocate : O.P. Dwivedi, for the Appellant; A.S. Chaudhary and Sharad Dwivedi, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Mehrotra, J.—This second appeal u/s 100 of CPC against the judgment and decree dated 13.5.1980 passed by IInd Addl. District and Sessions Judge, Faizabad in Civil Appeal No. 364 of 1977 Ram Agya v. Bhagwati Prasad and Ors., dismissing the appellants' appeal and upholding the judgment and decree dated 22.6.1977 passed by Munsif, Akbarpur in Regular Suit No. 277 of 1969, Bhagwati Prasad and Ors. v. Ram Agra and Ors..

2. I have heard Shri Sharad Dwivedi holding brief of Shri D.P. Dwivedi for the appellants and Shri A.S. Chaudhari for the respondents.

Plaintiffs' case

3. The plaintiffs filed the suit for permanent injunction against the defendants-appellants and respondents Nos. 4 to 6 with the allegations that Bhikari was the owner in possession of ahata No. 21 and 22 situated in Village Kodara. Bhikari had also his residential house there. Bhikari died issueless leaving his widow Smt. Anarkali. Plaintiff No. 1 Bhagwati and his two sons plaintiffs Nos. 2 and 3 used to look after Bhikari and his wife Smt. Anarkali during their life time. During his lifetime, Bhikari executed a gift deed on 3.9.1954 in respect to the whole of

his property including the disputed land in favour of the plaintiffs Nos. 2 and 3 and his wife Smt. Anarkali. The donees accepted the gift and came into the possession of the property covered by the gift after the death of Bhikari. The disputed land falling in ahata No. 21 and 22 and to the west of the house was in the shape of ghera. It was appurtenant to the house of Bhikari who became its absolute owner after the enforcement of U. P. Zamindari Abolition and Land Reforms Act, 1950. The disputed land used to be utilised for tethering cattle, keeping paddy straw, manure heap and other purposes connected with agriculture. A neem tree was also planted therein. A bamboo clump was also planted by the plaintiffs which stood on the disputed land. After the death of Bhikari plaintiff No. 1 also inherited the property being the mother's brother's son of Bhikari who died issueless. Plaintiffs also asserted their continuous possession over the disputed land falling in ahata No. 21 and 22 and shown by letters ABCDEFGHI in the site plan attached with the plaint. It has also been contended that the respondent No. 4 Gauri Shanker and father of respondent No. 5 Ram Murti and respondent No. 6 Ram Surat tried to interfere with the possession of Bhikari who had filed a Regular Suit No. 176 of 1946 in the Court of Additional Munsif against Gauri Shanker defendant No. 2, Ram Murat defendant No. 3 and Ram Surat defendant No. 4 for possession after the demolition of unauthorised structures. At that time, the defendant No. 1 Ram Agya was a minor under the guardianship of Gauri Shanker and father of Ram Murat and Ram Surat. He used to live with them. Mahadev father of defendants Nos. 5 and 6 was the karta of joint Hindu Family of which the defendant-appellant Ram Agya was a member. It was pleaded that the decree passed in Original Suit No. 176 of 1946 against the defendant No. 2 Gauri Shanker and father of defendant No. 3 and 4 is also binding upon the defendant No. 1 Ram Agya (defendant-appellant). The plaintiffs further stated that in the meantime of Kartik, 1963, the defendant started interfering with the possession of the plaintiffs over the land in suit by fixing pegs, keeping manure heap, fixing of a hand-pipe and also planted a neem tree and thereafter unlawfully occupied one biswan and five biswansi area of land of the ghera of the plaintiffs shown by letters ABCDEFGHI in the plaint map. The defendants also threatened to cut away the bamboo clumps from the disputed land. Therefore, the present suit for permanent injunction for getting the defendants restrained from interfering with the title and possession of the plaintiffs over the land in suit and for direction to remove the unauthorised fixtures was filed.

Case of the defendants

4. The defendant No. 1 (appellant) contested the suit. He denied the title and possession of Bhikari as well as the plaintiffs over the disputed land. It is contended that the gift deed at all if it was executed, it was illegal. The correctness of the site plan attached to the plaint was also disputed. It is alleged that the disputed land was appurtenant to his house since the time of his forefathers. He claimed his possession over it. It is alleged that he used to utilise the disputed land for tethering his cattle keeping the ghoor and for other

agricultural purposes. He claimed his possession over the disputed land for more than 18 years. It is also alleged that whereabouts of Anarkali were not known for the last five years before the filing of the written statement. It was contended that the fact of death of Anarkali seven years prior to the filing of the suit is not correct. It was also pleaded that the suit was barred u/s 10 of the C.P.C. because the earlier suit was pending on the date of the filing of the present suit No. 277 of 1969. It is also alleged that the suit was barred by limitation.

Issues framed in the trial court

5. The trial court framed the followings issues :

- (1) Whether the suit is undervalued and court fee paid is insufficient?
- (2) Whether the plaintiffs are the owners of the disputed land?
- (3) Whether the defendants are the owner of the disputed land?
- (4) Whether the defendants have perfected their title by adverse possession?
- (5) Whether the disputed land is situated in ahata No. 21 and 22?
- (6) Whether Smt. Anarkali wife of Bhikari has died or is still alive?
- (7) To what relief the plaintiffs are entitled?
- (8) Whether the decision of the Suit No. 176 of 1946 operates as res judicata between the parties for the purpose of the present suit?

Findings of the trial court

6. The disputed land falls in ahata No. 21 and 22. The plaintiffs were owners in possession of the disputed land. The defendants had nothing to do with the title and possession of the land in suit. The defendants have not perfected their title by adverse possession. Smt. Anarkali met with her civil death on the date of the suit. The judgment and decree passed in Suit No. 176 of 1946, Bhikari v. Mahadev and Ors., operates as res judicata against the defendant-appellant. With these findings, the suit for perpetual injunction was decreed.

7. The defendants preferred first appeal and the appeal has been dismissed.

Findings of the first appellate court

8. The disputed land falls in ahata No. 21 and 22. Defendant appellant Ram Agya was not a party to the Suit No. 176 of 1946 but he being a minor was residing under the guardianship of Mahadev who was the karta of the joint Hindu Family and as such the decree passed in said Suit No. 176 of 1946 is binding on the defendant-appellants and it operates as res judicata. Smt. Anarkali was not heard of for more than seven years prior to the filing of the instant suit and as such the trial court was justified in presuming that she met with her civil death on or prior to the date of filing of the suit. On the date of filing of the suit, neither Bhikari nor Smt. Anarkali was alive. Plaintiffs alone were the owner in

possession of the disputed land falling in ahata No. 21 and 22 which was part of the ghera of the house of the Bhikari. The defendant-appellant has absolutely nothing to do with the title of the land in suit nor can it be held to be part of sahan. The possession of the defendant-appellant in view of the matter was not for more than 12 years on the date of the institution of the suit in the year 1969 for the purpose of perfecting their title by adverse possession. With these findings, the appeal was dismissed.

9. The defendant-appellant Ram Agya filed this second appeal impleading the other defendants as proforma respondents.

Substantial question of law

10. Following substantial question of law were formulated :

(1) Whether the judgment and decree passed in Suit No. 176 of 1945 in which the appellant was not the party, will operate res judicata against him?

(2) Whether the alleged gift deed will create any right and title over the land in suit under the circumstances as the said document does not have mentioned the land in suit and at the same time the respondent Nos. 2 and 3 had not accepted the said alleged gift? .

(3) Whether the present suit ought to have been stayed u/s 10 of the Code of Civil Procedure?

(4) Whether the Suit No. 277 of 1969, Bhagwati Prasad v. Ram Agya and Ors., in the matter of which this second appeal has been filed was barred under Order IX, Rule 9. C.P.C. because of the earlier suit between the same parties for the same properties being dismissed under Order IX, Rules 8 and 9, C.P.C.?

Finding on substantial question No. 1

11. Both the courts below have recorded the finding that the decision in Suit No. 176 of 1946 operates as res Judicata against the defendant (appellant) of the instant Suit No. 277 of 1969. The case of the defendant-appellant is that he was not a party to the Suit No. 176 of 1946, Bhikari v. Mahadev and Ors., in any capacity and therefore, its judgment and decree cannot operate as res judicata as against him in the present suit. It is argued that the two courts below erred in holding that the defendant-appellant was minor in the year 1946 when the said Suit No. 176 of 1946 was filed when as per the plaint in the present suit itself the age of the defendant-appellant comes to 24 years at the relevant time. It is also contended that the two courts below have committed error in holding that the appellant was the member of the Hindu Joint Family of Mahadev and he was living with him. It is admitted case that defendant-appellant Ram Agya was not a party to Suit No. 176 of 1946. I find that in the plaint, there is a specific case of the plaintiff that Bhikari had filed Suit No. 176 of 1946, against the defendant No. 2 and Mahadev, father of defendants Nos. 3 and 4 and defendant No. 1 being minor was residing with defendant No. 2 and father of the defendants Nos. 3 and

4 and Mahadev father of the defendant Nos. 3 and 4 was karta of family of the defendants. In the written statement filed by the defendant No. 1 there is a vague denial of this averment. In paragraph 10 of the written statement, there is no specific denial to the facts stated in paragraph 10 of the plaint about the defendant No. 1 being minor at the time of filing of the Suit No. 176 of 1946 and Mahadev being karta of the family of which the defendant-appellant was the member. Parties have led evidence on this point also and the two courts below have recorded the findings that the earlier suit was with regard to the same cause of auction over the same properties and Mahadev one of the defendants of the earlier still suit was the karta of the family of which the defendant-appellant was a member. These are the findings of facts which cannot be interfered with in second appeal.

12. Section 11 of the CPC is as follows :

"Res Judicata.--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 issue has been subsequently raised, and has been heard and finality decided by such Court.

Explanation I. -- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.--For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.--Any matter above referred must 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.

Explanation V.--Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI. -- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII. -- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the

execution of the defence, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.--An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.)"

13. In Section 11 cited above, this is required that the former suit must be either between the same parties or between the parties under whom they or any of them claimed, litigating under the same title. The finding recorded by the two courts below is supported by the judgment of the Supreme Court in *Amritsagar Gupta and Others Vs. Sudesh Beharilal and Others*, , in which it was held that in order to operate as *res judicata* pleading need not say that the person is suing or being sued as a manager. It is sufficient if person is suing or being sued in the capacity as manager. In view of the finding of facts recorded by courts below and law laid down by the Apex Court, there is no scope for interference in the findings recorded by the two courts below on this substantial question of law raised by the defendant-appellant.

Findings on substantial question No. 2

14. The contention of the learned counsel for the defendant-appellant is that both the courts below have erred in holding that the land in suit stood transferred to the respondents Nos. 2 and 3 and one Smt. Anarkali through a gift deed executed by Bhikari in their favour as the said document neither contains the boundary of the land in suit nor it was accepted by the respondents Nos. 2 and 3. The question whether the gift deed pertains to the disputed property and whether the gift deed executed or not by the donee are the questions of facts. I may refer here the finding of the first appellate court which are as follows :

"Now we come to the question of the properties being derived by the plaintiffs Nos. 2 and 3 through a gift deed (Paper No. 57A) executed by Bhikari on 3.9.1954 in favour of his widow Smt. Anarkali and plaintiffs Nos. 2 and 3. Now in the said gift deed the boundaries of the house of Bhikari alone have been given as the property gifted to them though it is mentioned that the house with ghera (makan mai ghera) was gifted to the donees besides the other agricultural plots specified therein. It appears that the boundaries of the ghera attached to his house were inadvertently left out and only the boundaries of the house were mentioned but the rule of interpretation of a document is that it should be read as a whole in its letter as well as in spirit. We cannot dislocate one sentence from the other while interpreting the document. The intention of the executant of the document should be gathered from the whole reading of the document. A plain reading of the gift deed Exhibit-14 will reveal that Bhikari was gifting away his entire property including his agricultural plots, house and its ghera. There was, therefore, no sense that Bhikari would have executed the ghera and would have

gifted only the house of his widow and plaintiffs Nos. 2 and 3. If he really intended by mentioning the boundaries of house in the gift deed as the subject-matter of the gift, he would not have got inserted the words "Ek kita makaan kham mai ghera basb chauhaddi Jail" instead he would have mentioned "ek kita makaan kham Basb Chauhaddi Jail" and would have not mentioned the words "mai ghera". It therefore, follows that the doner wanted to gift away not only a house but also his ghera....It is therefore, proved that the houses together with ghera of Bhikari was gifted to his widow and plaintiffs Nos. 2 and 3 on 3.9.1954."

15. In view of the aforesaid finding of fact, there is no scope of interference in this fact finding in second appeal.

16. So far as the contention of the defendant-appellant that the gift was not accepted by the donees is concerned, I do not find any such pleadings in the written statement. Therefore, at the stage of second appeal, a new case cannot be agitated. In view of the findings of facts recorded by the first appellate court, there is no scope for interference in the judgment of the court below on the basis of this alleged substantial question of law.

Finding on substantial question of law No. 3

17. The case of defendant-appellant is that the court below ought to have stayed the present suit u/s 10 of the CPC as earlier suit filed on the same cause of action was pending before the same court when the present suit was filed. No doubt a plea was taken in the written statement but this plea was never pressed. No issue was framed on this contention. No application was moved for staying the proceedings of the instant suit u/s 10 of the Code of Civil Procedure.

18. In view of the fact that issue of staying the proceedings u/s 10 of the CPC was not pressed, the plea of staying the proceedings u/s 10 of the CPC cannot be entertained in this second appeal. No doubt the provision of Section 10 of C.P.C. are mandatory and the trial of a subsequently instituted suit is bound to be stayed if any party makes a request before the Court trying that suit while a previously instituted suit is pending determination either in the trial court or the first appellate court or second appeal arising therefrom is pending for decision. But if the trial of the subsequently instituted suit has proceeded without any objection and the same has terminated with the delivery of the judgment and the preparation of the decree of that court then Section 10 of C.P.C. has no relevancy, because it only prohibits the trial of the suit. The same view was taken by the Rajasthan High Court in Munni Lal v. Samar Jeet, AIR 1984 Raj 22. The instant suit from this appeal has arisen was Suit No. 277 of 60. It was filed on 7.7.1969. The earlier Suit No. 240 of 65 was filed on 30.8.1965. Thus the instant suit was filed during the pendency of the earlier Suit No. 240 of 65 which was dismissed in default on 9.2.1971. Now the subsequent suit has already been decided without raising any objection by the defendant-appellant for staying the proceedings u/s 10 of the C.P.C. Therefore, at this stage, the plea that the suit ought to have been stayed u/s 10 of the C.P.C. cannot be taken into

consideration for the purpose of deciding the second appeal.

Finding on substantial question of law No. 4

19. It has been argued by the learned counsel for the defendant-appellant that the earlier Suit No. 240/65 was dismissed on 9.2.1971 under Order IX, Rule 8, C.P.C. The Order IX, Rule 9 is as follows :

"Order IX, Rule 9--Decree against plaintiff by default bars fresh suit--(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

20. The plea of bar of the fresh suit under Order IX, Rule 9, C.P.C. was not taken either during the trial or in the first appeal. This is totally a new plea which has been taken in this second appeal and that too during the course of the argument. This plea was open to the defendant-appellant at the very first opportunity when the subsequent suit was filed. But no such plea was taken. The defendant-appellant participated in the proceedings of the subsequent suit and did not raise this objection upto the stage of first appeal. The earlier Suit No. 240 of 65 was dismissed on 9.2.1971 in default and no finding on merit of any of the issues was recorded and that dismissal order was passed during the pendency of the Suit No. 277 of 1969. The learned counsel for the defendant-appellant has submitted that after the dismissal of the earlier suit, the decision of the earlier suit will operate as res judicata but since no finding on merit was recorded on the question raised in the earlier suit, the decision of the earlier suit which was dismissed in default will not operate as res judicata. The plea of bar under Order IX, Rule 9 appears to have been waived by the defendant-appellant during trial and during first appeal. In *The Commissioner, Hindu Religious and Charitable Endowments, Madras Vs. V. Krishnaswami and Another*, , it has been held by a Division Bench of Madras High Court that the dismissal of proceedings for default of appearance and not on merit does not operate as res judicata in subsequent suit and plea of bar under Order IX, Rule 9 can be waived of by opposite party. The Madras High Court has relied on a Supreme Court decision in *Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others*, , wherein it has been held that before a plea can be held to be barred by res Judicata that plea must have been heard and determined by the Court. Therefore, I hold that the plea of bar under Order IX, Rule 9 has been waived by the defendant-appellant during trial and in the first appeal dismissal of the earlier Suit No. 240/65 in default will not operate as res judicata.

21. In view of the above, this second appeal has no force and is dismissed with costs to the respondents.