

(1997) 08 GAU CK 0039

In the Gauhati High Court

Case No : Second Appeal No. 62 of 1990

Sadananda Keot and Others

APPELLANT

Vs

Jona Ram Saikia and Others

RESPONDENT

Date of Decision : 28-08-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1998 Guw 109

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : B.K. Goswami and P.K. Kalita, for the Appellant; B.M. Goswami, P. Khataniar and K. Devi, for the Respondent

Final Decision : Dismissed

Judgement

J.N. Sarma, J.—This is the second round of litigation. This litigation is continuing for a period of more than 31 years. It started in the year 1966 and today we are in the fag end of 1997. The decree obtained in the year 1972 has been stalled by resorting to this second round of litigation. Earlier two suits were filed being TS 44 and 45 of 1966 and that was filed by Ghinaram and Jomaram -- defendants in the present suit and that was filed against the following persons :

(i) Bhogram, (ii) Ratneswar, (iii) Gopal, (iv) Joyram, (v) Bipin, (vi) Hemchandra, (vii) Kinaram.

2. These defendants are the sons and grandsons of one Dehiram. Those two suit being 44 and 45 of 1966 was filed by Ghinaram and Jamaram on the ground that originally the land belonged to Muhiram and Muhiram had no issue and as such Ghinaram and Jamaram being the brothers of Muhiram inherited that land and they were in occupation of that land and these defendants dispossessed them from the land and as such, the suits were filed for declaration of right, title and for recovery of khas possession. Both the suits were dismissed by the learned Munsiff. There were two Title Appeals and appeals were allowed and the suits

were decreed. Thereafter, Second Appeals Nos. 157/69 and 159/69 were preferred by the defendants. The decree of the appellate Court was affirmed. The defence taken up by the defendants in the suits was that Dehiram purchased the land from Muhiram and as such he became the owner of the land and the plaintiffs were not entitled to get a decree. That plea of purchase was discarded by appellate Court and the suits were decreed. Thereafter, second round of litigation started in the year 1972. Dehiram had a son named Kushram, but he died before 1966 i.e. before the filing of the earlier two suits. He had the wife named Golapi and one son Joyram. Joyram was a defendant in the earlier suit and one of the Joyram's son Kinaram was also defendant in the earlier suit, but another son Sadananda son of Gopal (defdt. No. 2) was left out and now second round was started by Golapi and son Sadananda, the son of Gopal who was a defendant in the earlier suit and the plea taken up by them for filing this suit to avoid the earlier decree was that they were not made party in the suit and as such that decree was not binding on them. Their further plea was that they have right, title and interest over the land inasmuch as Dehiram purchased the land from Muhiram and in evidence there was an attempt for a further improvement that Dehiram gifted this land to Golapi. Further the decree are not enforceable as they are fraudulent. The learned Munsiff decreed the suit i.e. TS 36/72. On appeal, the learned ADJ allowed the appeal and dismissed the suits. Hence, this second Appeal. The only substantial question of law in this case is as follows :

"Whether the District Judge was justified in reversing the judgment of the trial Court in dismissing the suit filed by the present appellant for declaration that the decrees passed in Title Suit Nos. 44 and 45 of 1966 were not binding on the plaintiffs on the ground that they were not parties to the said suits."

3. I have heard Mr. B.K. Goswami, learned counsel for the appellants and Mr. B.M. Goswami, learned counsel for respondents.

4. Mr. B.K. Goswami, learned counsel for appellants strenuously contends that as these plaintiffs were not made parties in the earlier suits, that decree will not binding on them. He does not argue regarding the fraudulent nature of the decree as the plea of fraud was not specifically taken up in the point. But when he was confronted with Explanation 6 to Section 11 of the CPC, he submits that Explanation 6 will not apply in his case. Explanation 6 of Section 11 of CPC is quoted below :

"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."

5. This Explanation which has come up for consideration before the Apex Court in Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu (Dead) by L. Rs., the Court in paras 19, 20 and 21 laid down the law as follows:

"19. The only other point which we need consider is whether the fact that the

money suit was only between the defendant-appellant and one of his brothers, who was also a respondent in the partition suit, makes any difference to the applicability of the principle of res judicata in this case. Learned counsel for the appellant submits that the defendant-appellant could not come within the ambit of explanation VI of Section 11, CPC which provides as follows :

"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."

On the other hand, learned counsel for the respondent submits that the case of the respondents is fully covered by this explanation and relies on AIR 1933 183 (Privy Council) where it was held :

"Explanation 6 is not confined to cases covered by Order 1, Rule 8 but extends to include any litigation in which, apart from the Rule altogether, parties are entitled to represent interested persons other than themselves."

20. We think that the submission made by the learned counsel for the respondents is sound. In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided we do not see any others making the same claim cannot be held to be claiming a right "in common for themselves and others". Each of them can be deemed by reason of explanation VI, to represent all those the nature of whose claims and interests are common or identical. If we were to hold otherwise, it would necessarily mean that there would be two inconsistent decrees. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. We think this will be the case here.

21. We need not deal with other case of this Court cited, including Sheodan Singh Vs. Smt. Daryao Kunwar, which supports the respondents' submissions, and Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others, which is not directly applicable inasmuch as that was a case in which the general principles of res judicata, and not Section 11, CPC were applied. The preliminary, objection in the case before us is fully supported, for the reasons given above, by Section 11, CPC read in the light of the explanations mentioned above. Consequently, the preliminary objection must prevail."

6. The Apex Court pointed out that explanation VI will apply also to a private right and what is required is that they should claim the right common for themselves and others. As indicated above, the plea taken up in the present suit was the plea in the earlier suit and that was negatived in earlier suit and it is not understood how same plea can be taken up in the subsequent suit. If the same plea is allowed to be taken up in the subsequent suit and if that is accepted that will bring two inconsistent decrees which will create an anomalous situation and

it is to avoid that, this explanation VI was added. Another authority for this proposition is *Sulochana Amma Vs. Narayanan Nair*, where the Apex Court in paras 4 and 7 after discussing different judgments held as follows :

"Section 11 of C.P.C. embodies the rule of conclusiveness as evidence or bars as a plea of an issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a competent Court to try such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit would operate as *res judicata*. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies, decided and became final, so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the Court is saved. It is based on public policy, as well as private justice. They would apply, therefore, to all judicial proceedings whether civil or otherwise. It equally applies to quasi-judicial proceedings of the tribunals other than the Civil Courts.

7. It is settled law that explanation to a section is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the section or clarify certain ambiguities or clear them up. It becomes a part and parcel of the enactment. Its meaning must depend upon its terms. Sometimes, it would be added to include something within it or to exclude from the ambit of the main provision or condition or some words occurring in it. Therefore, the explanation normally should be so read as to harmonise with and to clear up any ambiguity in the same section."

7. Mr. B.K. Goswami, learned counsel for appellants relies on the following decisions :

(i) *Jujjuvarapu Kotamma Vs. Pappala Simhachalam and Others*,

(ii) (1988) 2 GLR 393 (*Azgor Ali v. Reazuddin Miah alias Reasuddin Master*).

8. In view of the decision of the Apex Court as indicated above, it is not necessary to discuss these cases. Regarding the scope of second appeal in a recent decision the Apex Court in *Panchugopal Barua and others Vs. Umesh Chandra Goswami and others*, has pointed out as follows (at page. 1044 of AIR):

"A bare look at Section 100, C.P.C. shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the section shows that nothing shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the Court is satisfied that the

case involves such a question. The proviso presupposes that the Court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a "substantial question of law" is thus, the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100, C.P.C."

9. As indicated above, in this particular case, there is no substantial question of law and the question of interference of the appellate Court's judgment does not arise. The appeal is dismissed with costs all throughout. Stay order passed earlier stands vacated.