

(1921) 02 BOM CK 0017

In the Bombay High Court

Case No : Second Appeal No. 68 of 1920

Sitaram Sakharam Mangle

APPELLANT

Vs

Laxman Vishnu Ketkar

RESPONDENT

Date of Decision : 21-02-1921

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 216, 216(b), 217

Citation : AIR 1921 Bom 87(1) : (1921) 23 BOMLR 749

Hon'ble Judges : Shah, J;Norman Macleod, J;Fawcett, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Norman Macleod, Kt., C.J.—The plaintiff filed this suit to recover Rs. 229-15-6 being the value of the Mamul Inam dues in kind as set forth in the plaint for the years 1915-16" and 1916-17. He alleged that he and some Bhaubands of his had come to acquire a moiety of the village of Kasar Kolwan from the original Inamdars who were entitled to rent in specie and kind from the body of Khots of the village, that plaintiff had a four annas share in the Inam, that the defendant was managing Khot of eight annas for the first year mentioned and four annas for the second year and so was liable to pay the rent, which had consistently been paid from Mamul times.

2. The defendant pleaded that plaintiff was an Inamdar of the royal share of the revenue and was therefore only entitled to the survey assessment as the survey settlement had been introduced into the village. It was found in the Trial Court?

(1) that the contention of the defendant that plaintiff could only recover survey assessment and not Mamul rent in kind or its money value was barred by res jtiicaia by virtue of the decision in a previous Suit No. 160 of 1892 ;

(2) that the introduction of the survey settlement did not affect the plaintiff's right to get the Mamul dues and it was introduced without the Inamdar's consent; and

(3) that plaintiff was Inamdar of the soil.

3. Plaintiff's suit was accordingly decreed.

4. In appeal the decision of the Trial Court was confirmed. When the case came before my brother Fawcett and myself in Second Appeal we thought it advisable that notice should be given to Government and that the appeal should be argued before three Judges.

5. The suit village is one which is known as a Sharakati village, being divided between Government and the Inamdar, but not by metes and bounds. The survey settlement was introduced in 1885-86 and it is the policy of Government that the total assessment should be divided between Government and the Inamdar. The assessment is collected by the Khots who are in the position of occupants. They pay half the assessment to Government, but the Inamdars have been hitherto exacting payment of the Mamul dues instead of taking their half, which results to their benefit. We have had the advantage of hearing the Government Pleader from whom we gathered that in such a village as this Government consider that the Inamdar is only entitled to his share of the assessment. The difficulty in deciding whether that is the correct view on the facts of this case arises from the obscure wording of 8, 210 of the Bombay Land Revenue Code.

6. The learned Trial Judge thought that the fate of the case mainly depended on whether the plaintiff was Inamdar of the soil or of only the share of the revenue.

7. The original Sanad is not produced but from the extract from the Barnishi of the Sanad (Exhibit 41) it would certainly appear to have contained words which have been construed by this Court as constituting a grant of the soil.

8. Exhibit 18 is an extract from the register of Inam land situated at Kasar Kolwan for the year 1898-99. It is mentioned that Government has a half share. After deducting Judi, rate and assessment the remaining net Inam was entered as Rs. 82-12-11.

9. No report of the Inam Commissioners or any result of the Inam Settlement has been produced, but undoubtedly the village was surveyed with other Khalsa villages, as not being excepted from Chapters VIII to X of the Bombay Land Revenue Code by Section 216 and Exhibit 16 shows that it was considered that the Inamdars were only entitled to a half share of the revenue. The Sanad only grants one-third and there is no trace of the increase to one-half.

10. Taking all these circumstances into consideration I should say that whatever may have been the nature of the original grant in Inam, the present Inamdars are grantees of only half the share of the revenue. Clearly they have never asserted their right to a definite area of the village and obviously a suit would not lie against Government for partition.

11. Apart altogether from the merits of the plaintiff's case it would be a most

undesirable state of affairs that the occupant, in this case the body of Khots, after paying the survey assessment should have to pay an additional amount to the Inamdar of an undivided share of the village whether he may be considered a grantee of the soil or of the revenue only. If the consent of the Inamdar in a Sharakati village is required before he can be bound by a survey settlement, then without his consent his interests cannot be affected. Both Courts have held that the Inamdars' consent in this village was required, and was not obtained.

12. Both Courts have also held that the question whether the Inamdar is entitled to recover Mamul dues in *res judicata* by virtue of the judgment in Suit No. 100 of 1892 in which the Inamdars sued the present defendants for the Inam Mamul dues on the ground that they were not bound by the Jamabandi which had been settled by Government without their consent. The defendants replied that they had offered the dues according to the Jamabandi and the plaintiffs were not entitled to the Mamul rate. The Judge held that it was not necessary to determine whether the survey was introduced with the consent of the plaintiffs or not, because the plaintiffs were otherwise entitled to claim the Mamul rate as they had produced a certified copy of a decree in Suit 367 of 1887 filed by them against the managing Khota to recover the dues for 1885-86 in which they were granted the Mamul rate. We had to adjourn the hearing of the appeal in order to obtain a copy of the judgment in that suit and when it was obtained we found that it was admitted by the defendant's pleader that the survey was not introduced in the suit years. Therefore the question now in issue had not been decided in that suit and the Trial Judge in Suit No. 100 of 1892 was in error in thinking it had. An interesting question might then have arisen whether a decision given not on the merits but under an erroneous impression that the question in issue was *res judicata* could itself be *res judicata*, but for the fact that there was produced before as the judgment in the appeal from the decision of the trial Court in Suit No. 100 of 1892 from which it appeared that reference was made to the decision of this Court in *Ganyadhar v. Morbhat* (1894) ILR 18 Bom. 525 so that this question was decided on its merits in appeal though not in the trial Court.

13. But it is contended that a question of law can never be *res judicata* and certainly in *Ghamanlal v. Bapubhai* (1897) ILR 22 Bom. 669 Parsons J. went so far as to lay down this rule without any qualification. But I think that the dictum can only be considered with reference to the facts of the case then before the Court. There the question was whether the period prescribed by the Indian Limitation Act for a particular kind of relief was three years or twelve years, and it might be said that in cases of recurring liability such as for maintenance or rent, a Court would not be bound by a previous decision on a question of limitation, as the relief asked for would be for a different period and the Court would be entitled to decide for itself whether the suit was barred by the Limitation Act or not. The real test appears to me to be not whether the cause of action in the same, as obviously a part of the cause of action in recurring suits for maintenance or rent would be different, but whether the title on which the

plaintiff sued in the later suit had been substantially and directly in issue in the previous suit. Obviously if a plaintiff sued for rent on the basis of a particular lease and succeeded, the tenant would be barred from disputing the plaintiff's title in a later suit for rent 1931 for a different period.

14. But when there has been a decision on an abstract question of law, as in this case, namely, what was the proper construction to be placed on Section 216 of the Bombay Land Revenue Code and not a concrete question such as the construction of a document entered into between the parties to a suit, it is no longer a question of *res judicata* as a Court, at any rate a Full Bench, can form its own opinion as to what the law is, but a question whether the principle of *stare decisis* should be invoked. If in 1892 the Court allowed the plaintiff to charge Mamul dues, considering itself bound by the decision in *Gangadhar v. Morbhat*, I do not think that would bar the defendant for good and all from disputing that decision, and asking the Court to hold that the law was not as it was decided to be in the previous suit.

15. Still it must be remembered that the defendants have been paying Mamul dues ever since the decision of Suit No. 100 of 1892 until they disputed the plaintiff's right in this suit. If the decision in *Gangadhar v. Morbhat* had been in the meantime overruled I think the defendants would have been entitled to rely on that fact and I do think that sitting as a Full Bench we are not bound by that decision. Obviously in a similar suit brought by a different plaintiff we would not be bound by it.

16. This makes it all the more clear that the real question is whether we should apply the principle of *stare decisis*. We need not do so if in our opinion an absolutely wrong construction has been placed on particular words of the Legislature, but generally speaking it is desirable that a previous construction should be adhered to, because it is always open to the Legislature if it thinks the Courts have put a wrong construction on the words of an Act to make its meaning clear by amendment.

17. For myself I have considerable doubts whether Section 216 of the Bombay Land Revenue Code was rightly construed in *Gangadhar v. Morbhat*, for, although the Legislature may have intended to preserve the Inamdars' right in villages of which a definite share had been alienated, it expressly excepted such villages, and not only the unalienated share, from the provisions of the section. Still, although Government must have been aware of the decision of this Court, the section has not been amended, so that it may very well be that Government at the time agreed with the construction placed upon it by this Court, although from what the Government Pleader has told us, they do not agree with it now. I think, therefore, the attention of Government might be drawn to the fact that Section 216 is giving constant ground for argument as to what its proper construction is, and that it stands badly in need of being redrafted, and speaking for myself I do not think this Court would be bound to follow the Principle of *stare decisis* if the question arose again between different parties.

18. In the course of the argument before us it was ascertained that there had been a revision settlement on this village and that one of the suit years was after that settlement, but I do not think that fact makes any difference to the application of the above principle.

19. I think, therefore, the appeal should be dismissed with costs.

Shah, J.

20. Two questions of law have been argued in this appeal: one relates to *res judicata*, and the other to the construction of Section 216 of the Bombay Land Revenue Code.

21. The plaintiff, who is a four-anna sharer in the Sharakati Inam village of Kasar Kolwan in the Devrukh Taluka, sued to recover Rs. 120-6-0 being the amount due to him by the defendant as the Khot of the village at the Mamul rates for the years 1915-16 and 1916-17.

22. The defendant pleaded that the survey settlement was introduced into the village in 1885-86 and that the plaintiff was entitled to recover according to the survey rates and not the Mamul rates.

23. The plaintiff's answer to the plea was that he was not bound by the survey rates, and that the question was decided in his favour in Suit No. 160 of 1892 between the parties to which the defendant was a party.

24. The trial Court found that the question was *res judicata* and that on the merits the plaintiff was entitled to recover the Mamul rates. In appeal the District Court upheld this view on both the points: and the same questions have been raised in the appeal before us.

25. It has been brought to our notice in the course of the argument that a revision survey settlement has been introduced into the village since 1916-17.

26. Mr. Desai for the appellant has argued that the point decided in the suit of 1892 cannot operate as *res judicata* as the decision was based upon a misapprehension as to what was decided in an earlier suit of 1887, and that the question of the construction of a statutory provision cannot be *res judicata*. It is also argued that the causes of action in the two suits are different, that the periods in respect of which the amounts are claimed are different, and that the doctrine of *res judicata* cannot apply to such a case.

27. It is clear, however, from the judgment in the suit of 1892 that the point that the plaintiff was entitled to recover the Mamul rates was expressly raised and decided : and it appears from the judgment of the appellate Court in that case, which was the case filed in the trial Court, but which was referred to without objection from the other side in the course of the argument before us, that Section 216 of the Bombay Land Revenue Code was considered, and that the plaintiff was held entitled to the Mamul rates in spite of the introduction of the survey settlement and in spite of the provisions of Section 216. It was not suggested then, and it is

not suggested now, that the introduction of the survey settlement was due to any application in writing from the Inamdars as provided by that section

28. It seems to me that the plea of *res judicata* is not dependent upon the merits of the reasons given for a particular conclusion. The conclusion, whether right or wrong, is binding upon the parties. Its binding character does not depend upon the correctness of the reasons for the conclusion. If Mr. Desai's argument were accepted it would strike at the very root of the doctrine of *res judicata*. The words of Section 11 do not lend any support to the suggestion that if an issue is decided under any misapprehension of fact, it could be reagitated in a subsequent suit.

29. It was suggested that at least after the introduction of the revision survey settlement the parties cannot be said to be litigating under the same title as before. I do not think, however, that the argument is sound. The introduction of the revision settlement does not affect in any way the titles of the parties. In the present suit they claim under the same title under which they claimed in the suit of 1892. The provisions of the Land Revenue Code do not lend any support to the suggestion made by Mr. Desai.

30. It is equally clear that the fact of the causes of action being different and of the amount now claimed being in respect of a different period cannot affect the plea of *res judicata* in this case. It is enough to invite the application of the doctrine that the matter in issue was directly and substantially in issue and was heard and finally decided in the previous suit.

31. It is urged that a question of law can never be *res judicata*. The observations in *Chamanlal v. Bapubhai* (1897) ILR 22 Bom. 669 are relied upon in support thereof. The earlier decision in the present case was based upon the construction of Section 216; and it is contended that *Laxmam* such a question is outside the scope of the rule of *res judicata*. In the first place I am not satisfied in this case that the question whether the plaintiff was entitled to recover the *Mamul* rates was a pure question of law. Assuming, however, that it was, I do not see how it could be treated as being outside the scope of s. 11 of the Code of Civil Procedure. The section does not make any such distinction between issues of law and other issues: it refers generally to questions directly and substantially in issue and heard and finally decided: and I do not think that the distinction could be accepted without restricting the scope of the section in a manner not justified by the words of the section. It would involve the reading of words in the section which are not there. The dictum in *Chamanlal v. Baipubhai* relied upon by Mr. Desai must be read in the light of the special facts of the case. The proposition, if taken without reference to the context, appears to me to have been too broadly stated and not wholly justified by the words of Section 13 of the Code of 1882 which was then in force. The decision in *Ghaganlal v. Bai Harkha* (1909) ILR 33 Bom. 479; 11 Bom. L.R. 345 appears to me to be opposed to Mr. Desai's contention.

32. I am, therefore, satisfied that the question was decided between the parties in the suit of 1892, and that it is *res judicata*.

33. The other point relates to the merits of the case. It is common ground now that the Inamdars never applied to have the survey settlement or the revision survey settlement extended to this village. The question is whether in virtue of Section 216 the Government have the power to introduce the survey settlement in a *Sharakati* village, a definite share whereof is alienated, but not divided by metes and bounds, so as to invite the consequences referred to in Section 217 of the Bombay Land Revenue Code. This question was decided so far back as 1893 in *Gangadhar v. Morbhat* (1893) ILR 18 Bom. 525 Mr. Desai's argument in effect is that that decision is wrong. Apart from that decision, the meaning of Clause (b), which is applicable to this case, would not be free from difficulty and doubt. But the question was decided after consideration and I am not prepared to hold that the view taken in that case is wrong or that the words used in clause (b) read with reference to the context are not susceptible of the construction put thereon. The rights of the present parties were adjusted in the earlier litigation on the strength of that decision : and it is not an unreasonable inference that the rights of many parties in similar villages must have been adjusted during all these years on the same basis. The Bombay Land Revenue Code has received the attention of the Legislature on more occasions than one after that decision: but the section has not been amended on this particular point. I do not think that any clear case for a reconsideration of the decision in *Gangadhar v. Morbhat* is made out. If that decision does not represent the true intention of the Legislature as suggested in the course of the argument before us, it is open to the Legislature to amend the section with a view to give effect to their true intention.

34. I, therefore, agree that the appeal should be dismissed with costs.

Fawcett, J.

35. I agree that the appeal should be dismissed with costs, and concur generally in the judgment delivered by the learned Chief Justice, with one qualification.

36. I am against laying down absolutely that the decision in the appeal arising out of Suit No. 100 of 1892 is not *res judicata* in the present suit. I feel some doubt whether a distinction can be rightly drawn between a decision on an abstract question of law, such as the proper construction to be put on Section 216 of the Bombay Land Revenue Code, and on a concrete question, such as the construction of a particular document entered into between the parties to a suit. There can, I think, be no doubt that such a distinction cannot be drawn in cases where parties seek to litigate again the very same cause of action as has been decided against them in a prior suit. This is shown by the observations of their Lordships of the Privy Council in *Rajwant Prasad Pande v. Rani Ratan Gir* (1915) ILR All, 485, 494-5; 17 Bom. L.R. 754, p.c. in regard to an attempt of the kind just mentioned. They there say:?

It is said that the Court below decided the objections wrongly and that the

decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction.

37. Also in *Badar Bee v. Habib Merican Noordin* [1909] 11 A.C. 461,623 their Lordships say :?

It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time.

38. But in *Aghore Nath Mukerjee v. Kamini Debi*, (1909) 11 C.L.J. 461, 471 their Lordships hold that, in cases where the dispute relates to matters which have been already in controversy and formed the subject of consideration in the previous suit, but the causes of action in the two suits are distinct, the estoppel ought to be restricted to questions of fact or mixed questions of fact and law. The reason he gives is that, if it is extended to pure questions of law, a Court may find itself in the position that, so far as certain parties are concerned, it is irrevocably bound to adhere to a proposition of law erroneously laid down in a previous suit. At the same time he admits that the effect of this is to substitute in Section 11 of the Code the phrase "cause of action" for "the matter in issue" in so far as his view lays down that where the matter directly and substantially in issue is a matter of law, the decision may not be *res judicata* if the cause of action in the subsequent suit is different from the cause of action in the former suit. And is not this view based on an *argumentum ab inconvenienti*? If so, as is said in *Hardcastle on Statutory Law*, 3rd Ed., p, 101:

The argument...is only admissible in construction where the meaning of the statute is obscure. Where the language is explicit, its consequences are for Parliament, and not for the Courts to consider.

39. It seems to me that there is great force in the reasons given by Napier J. in *Sree Rajah Bommadevara Venkata Nartima Naidu v. Andavolu Venkataratnam* (1913) 32 M.L.J. 63, 66, 70 for holding that, where a decision on a point of law, whether it be on the construction of a document or of a statute or on common law or on customary law, once settles a question that arises directly out of conflicting views as to the rights of the parties it is *res judicata*. Sadaiva Aiyar J. on the other hand in the same case seems to approve of the distinction between a decision on an abstract question of law (say a question of limitation between the parties) and other decisions. It is a difficult question, on which there is considerable difference of judicial opinion and (though I am inclined to the view taken by my brother Shah on the point) I think it is best to leave it open, as this particular case can be decided on other grounds.

40. I do not think the meaning of Section 216(b) of the Bombay Land Revenue Code is so clear as to preclude the application of the principle of *ataredecisis* in the case: and I agree with the learned Chief Justice that the best course is to leave it to the Legislature to alter the language used in that section, if the

construction put on it in Gangadhar v. Morbhat (1893) ILR 18 Bom. 525 is considered to be wrong or undesirable.