

(1966) 12 AHC CK 0013
In the Allahabad High Court
Case No : Second Appeal No. 299 of 1955

Smt. Dhana Kuer

APPELLANT

Vs

Kashi Nath Chaubey and Others

RESPONDENT

Date of Decision : 07-12-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1967) 37 AWR 290

Hon'ble Judges : S.N. Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.N. Singh, J.—This is a Plaintiff's appeal in a suit for declaration that one Jadunandan Chaubey died as a separated member of the family and that a decree obtained in suit No. 335 of 1940 against Smt. Asharfa widow of Jadunandan Chaubey did not bind the Plaintiff. In order to appreciate the facts of this case it is necessary to give the following pedigree:

2. It appears that Jadunandan died in the year 1928 and on his death the name of his widow Smt. Asharfa Kuer was mutated in revenue papers. In the year 1940 Kashi Nath, Vindhayachal and Bindeshwari shown in the pedigree instituted a suit against Smt. Asharfa Kuer for a declaration that her husband Jadunandan died as a member of the joint Hindu family along with these three persons and that Smt. Asharfa Kuer had no interest in the property in suit except the right of maintenance. This suit of Kashi Nath and others was dismissed by the trial court, but on appeal the first appellate court accepted their contention and decreed the suit. A second appeal was filed by Smt. Asharfa Kuer which was summarily dismissed by this Court by its order dated 29th November 1944. Thereafter the present suit was instituted by Smt. Dhana Kuer the Plaintiff for declaration already mentioned above.

3. The defence to the case was that Jadunandan died as a member of a joint

family along with the Defendants Kashi Nath, Vindhayachal and Bindeshwari as such Smt. Asharfa Kuer nor any body claiming through Jadunandan could get any interest in the property. It was further alleged that the decision in suit No. 335 of 1940 was binding on the Plaintiff and operated as res judicata. Plaintiff's being the daughter of Smt. Asharfa Kuer and Jadunandan was also denied. It was further alleged that the suit was not maintainable.

4. The trial court accepted all the defence contentions and dismissed the suit.

5. On appeal the lower appellate court accepted the Plaintiff Smt. Dhana Kuer to be the daughter of Jadunandan and Smt. Asharfa Kuer but finding that the decision in suit No. 335 of 1940 operated as res judicata between the parties and that the suit was not maintainable consequently maintained the order of the trial court.

6. The Plaintiff Smt. Dhana Kuer has preferred the present appeal in this Court. The learned Advocate General appearing on behalf of the Plaintiff Appellant has submitted that the two courts below have erred in coming to the conclusion that the previous decision in suit No. 335 of 1940 operated as res judicata in this case. His contention is that if really Smt. Asharfa Kuer represented the estate of Jadunandan deceased and a decision had been given accepting this fact that Smt. Asharfa Kuer did represent the estate of the deceased the decision would have been binding between the parties. For in that case Smt. Asharfa Kuer would have represented the estate of the deceased Jadunandan, but since in this case the decision of the Court was that Smt. Asharfa Kuer was only a maintenance-holder and had no interest in the property as such it could not be said that Smt. Asharfa Kuer represented the estate of the deceased and any decision given in the case could not bind the Plaintiff who was claiming an independent right for herself. It was submitted that Smt. Dhana Kuer was not claiming through Smt. Asharfa Kuer. The learned Advocate General referred to Ramsumran Prasad and Anr. v. Mt. Shyama Kumari and Ors. AIR 1922 P.C. 356 and also paragraph 199 of the Mulla's Hindu Law 1966 edition p. 231 and also to Mayne on Hindu Law Article 671 and emphasised that before a decision obtained against a Hindu widow is held to be binding the widow must have been held in that case to be representing the estate of the deceased.

7. I have considered the submission of the learned Advocate General as well as looked into the authority and the text books cited by him, but I am unable to accept the contention put forth in this case. In my opinion the two courts below have rightly held that the suit was barred by Section 11 Code of Civil Procedure. In such cases Section 11 explanation 6 of the CPC is clearly applicable. The contention of the learned Advocate General that in order to determine the applicability of Section 11 CPC it was first to be seen whether the decree granted the representative character to the widow or not does not appear to be correct. If we see Section 11 and explanation 6 CPC which is as follows:

Section 11--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 finally decided by such court.

Explanation VI--Where persons litigate bonafide 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 it clearly shows that if there is a litigation in respect of a private right claimed in common for one-self and others then all persons interested in such right, shall for the purposes of Section 11 be deemed claiming under the person so litigating. The necessary test is the claim put forth by the person in the litigation as a Plaintiff or a Defendant and is not dependent on the decision." If he Was litigating for himself and for others and it was a bona fide litigation, in my opinion the ingredients necessary for the applicability of Section 11 explanation VI CPC would be present. Smt. Asharfa Kuer asserted in the previous suit that Jadunandan died as a separated member and this is exactly what the present Plaintiff seeks to establish in this case. The case of Smt. Asharfa Kuer that Jadunandan died as a separated member was for her benefit as also for the benefit of the Plaintiff of the present suit. Both the courts have held that litigation between Smt. Asharfa Kuer and Defendants Kashi Nath and others was not a collusive litigation but was fought by Smt. Asharfa Kuer in the bona fide way to get her right declared in the property in suit. The argument of the learned Advocate General assumes the existence of a separate estate of the deceased Jadunandan. This is a case wherein Smt. Asharfa Kuer tried to establish that her husband Jadunandan had an estate and succeeded in the first court but ultimately failed. The Plaintiff again is trying to establish the same separate estate of Jadunandan deceased which cannot be allowed in view of Section 11 explanation VI Code of Civil Procedure. The previous decision in such a case will bind the present Plaintiff Smt. Dhana Kuer. Learned Counsel for the Respondents is right when he submits that a decision of an issue also operates as res judicata and an issue in the previous case and the present case is the same, that is, whether Jadunandan died as a separated member or he died as a member of that joint Hindu family consisting of himself and the Defendants Respondents Kashi Nath and others. No direct authority has been cited by any of the learned Counsels to show one way or the other but on reading Section 11 explanation VI Code of Civil Procedure, I am clearly of opinion that the decision in suit No. 335 of 1940 is binding on the present Plaintiff and she can not reagitate the same matter again.

8. I am further of opinion that the claim of the Plaintiff in view of the subsequent legislation cannot be granted. Even if the case of the Plaintiff is accepted that Jadunandan died as a separated member on the death of Jadunandan the property would have been inherited by Smt. Asharfa Kuer and on the passing of the UP Zamindari Abolition and Land Reforms Act Smt. Asharfa Kuer who is still

alive would have become tenureholder of the property in dispute. Since, the Defendants Respondents have continued in possession during the life time of Smt. Asharfa Kuer her right as a tenureholder came to an end after a lapse of three years if not earlier after the passing of the UP Zamindari Abolition and Land Reforms Act. Since the tenureholder's right of Smt. Asharfa Kuer came to an end there is nothing for which any declaration can be granted. Courts are loath to grant infructuous declarations. This is another reason for non-suiting the Plaintiff.

9. For the reasons given above this appeal fails and is hereby dismissed. In the circumstances of this case I make no order as to costs.