(1867) 04 CAL CK 0001

Calcutta High Court

Case No: Regular Appeals Nos. 158 and 226 of 1866

Kanhya Lall and Others		APPELLANT
	Vs	
Radha Churn and Others		RESPONDENT

Date of Decision: April 6, 1867

Judgement

Sir Barnes Peacock, Kt., C.J.
The case has been fully argued before us, and we are of opinion that the judgment was not a judgment in rem, and that it was not admissible in evidence against the plaintiff. The petition of the plaintiff in the suit brought by Radha Churn having been rejected, the plaintiff was no party to that suit.

2. The general rule was clearly laid down by Chief Justice De Grey in the Duchess of Kingston''s case 2 Sm. L.C. 6th edit., 679 in answer to certain questions put to the Judges by the House of Lords. He said-- "It is certainly true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine" (and he might have added to cross-examine) "witnesses, or to appeal from a judgment he might think erroneous; and, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of a jury" (or in this country of a Court) "finding the fact, and the judgment of the Court upon the facts found, although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice of strangers. There are some exceptions to this general rule founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

3. "From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter, directly in question in another Court" (or he might have added in another action between the same parties in the same Court); "secondly, that the judgment of a Court of

exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

4. The principle that a judgment is not to be used to the prejudice of strangers was adopted from the Civil law, of which the following were maxims that res inter alios judicata nullum inter alios prejudicium facit, or res inter alios acta, alteri nocere non debet. That principle was not applicable to judgments in actions in rem. The exception of judgments in rem in the Civil law was no doubt the foundation of the exception in the English law.

5. The question as to what is a judgment in rem was fully considered by Holloway, J., in Yarakalamma v. Anakala Narama 2 Mad. H.C. Rep., 276. Although I cannot concur in the whole of Holloway, J.''s reasoning, I consider that the full investigation which the subject received at his hands in that case has been of great benefit in removing many erroneous impressions which previously existed. I concur with him entirely in the conclusion at which he arrived, viz., that a decision by a competent Court that a Hindoo family was joint and undivided, or upon a question of legitimacy, adoption, portability of property, rule of descent, in a particular family, or upon any other question of the same nature in a suit inter partes, or, more correctly speaking, in an action in personam, is not a judgment in rem, or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies; I would go further and say that a decree in such a case is not, and ought not to be, admissible at all as evidence against strangers. I do not think that Mr. Smith''s definition of a judgment in rem is accurate. But Holloway, J., has not, I think, attached sufficient importance to the words used by Mr. Smith-- "which very declaration operates upon the status of the thing adjudicated upon, and, ipso facto, renders it such as it is thereby declared to be." This would not be the effect of a finding upon a question of status in a suit in personam, though it might have been so under the Civil law in a suit in rem, not for the purpose of asserting a right against a particular person, but for the purpose of adjudicating upon the status. I do not agree with Holloway, J., in his remark at page 281 of his judgment, "that the effect of a decree of every competent Court is to render the person or thing that which it declares him or it to be." A decree, according to the nature of it, may prevent particular persons, or the subjects to a particular Government, or, it may be, the whole world, from averring to the contrary. According to the Civil law a suit in which a claim of ownership was made against all other persons was an action in rem, and the judgment pronounced in such action was a judgment in rem, and binding upon all persons whom the Court was competent to bind; but if the claim was made against a particular person or persons, it was an action in personam, and the decree was a decree in personam, and binding only upon the particular person

or persons against whom the claim was preferred, or persons who were privies to them. This will be made more clear by referring to the note of Mr. Sandars upon s. 1, Book 4, Tit. 6, of the Institutes of Justinian, a section which is quoted by Holloway, J., in his judgment above referred to. He says:--

The first and most important division of actions is that into actions in rem and actions in personam, by the first of which we assert a right over a thing against all the world, by the second we assert a right against a particular person (see Introduction, s. 61). And, accordingly speaking technically, an action was called real when the formula in which it was conceived embodied a claim to a tiling without saying from whom it was claimed, and personal, when the formula stated upon whom a claim was made. If Titius said that a piece of land belonged to him, there was no necessity that the name of the wrongful occupier should appear in the formula; at any rate not in the intentio, the part of the formula always considered characteristic of the actio. "Si paret Titii esse rem;" this was all; the question to be decided was, does the thing belong to Titius. It was only as a consequence of his proprietorship being established, that the wrongful occupier, whose name might appear in the condemnation was condemned to lose the possession. But in an action arising on a contract, the name of a person was necessarily introduced into the intentio. Titius could not merely say that a thing was owed to him; he must add that it was owed by a particular person. There are indeed some cases, as, for instance, a deposit, in which the action may be equally well shaped with or without the insertion of the name of a particular person. There may either be a real action in which the plaintiff claims the thing, or a personal one in which he says that the depositary ought to give it to him. Whenever the action is made to rest on an obligation, it is personal, when on a right of proprietorship it is real.

6. The case is made still more clear in para. 61 of the Introduction. There Mr. Sandars says:-- "His special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim, sanctioned by law, is urged directly the owner, as he is said to be, of the thing publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing can confer. Sometimes the claim is more indirect the claimant insists that there are one or more particular individuals who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damages they have made or caused. Such a claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal, expressed by writers of the middle ages, on the analogy of terms found in the writings of the Roman Jurists, by the phrases jura in re and jura ad rem. A real right, a jus in re, or to use the equivalent phrase preferred by some later commentators, jus in rem, is a right to have a thing to the exclusion of all other men. A personal right, jus ad rem, or to use a much more

correct expression, jus in personam, is a right in which there is a person who is the subject of the right as well as a thing as its object, a right which gives its possessor a power to oblige another person to give, or procure, or do, or not do, something. It is true that in a real right the notion of persons is involved, for no one could claim a thing if there were no other persons against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done, or not done."

7. Besides actions in rem, which related to property, there were certain actions called actiones pre judicialis. Of these it is said in the Institutes, Book 4, Tit. 6, s. 13, that they seem to he actions in rem: such as those by which it is inquired whether a man was born free, or had been made free; whether he was a slave, or whether he was the offspring of his reputed father. These actions no doubt were the origin of the rule laid down as to judgments on actions in which questions relating to status were determined. Mr. Sandars in his note to that section says:-- "The object of a pre judicialis actio was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings. Such actions differ from actions in rem, because in an actio pre judicialis is no one is condemned, only the fact is ascertained; but they ore said in the text to resemble actions in rem because they were not brought on any obligation, and because in the intentio, which indeed composed the whole formula in this case, no mention was made of any particular person. Questions of status, such as those of paternity, filiations, patronage, and the like were most commonly the subjects of actiones pre judicialis, but were by no means the only ones. We hear of others.'"' In Austin on Jurisprudence, Vol. III, p. 165, it is said:-- "In case the child (or ward) be detained from the father (or guardian) the latter can recover him from the stranger by a proceeding in a Court of Justice, which, let it be named as it may, is substantially an action in rem.....In case the slave be detained from his master''s service, the master can recover him in specie from the stranger who wrongfully detains him." It is a mistake. I think, to call such actions action in rem, they are strictly actions in personam. An action by a person alleged to be a slave, claiming to have it declared as against all men that he was a free man, was an actio pre judicialis in which the judgment would have contained a declaration upon the status.

8. Great misunderstanding and error has been caused, as is shown by Holloway, J., from the use of the words "status" and "judgment in rem" in some of our English text-books without any precise definition, and indeed in some cases without any accurate conception of their meaning. For instance, I have seen it stated that judgments declaring personal status or condition, as judgments of adultery, are conclusive upon all the world[(2)]. What a judgment of adultery is, or how adultery can be said to declare a personal status or condition, it is difficult to conceive. Possibly it means a judgment of divorce on account of adultery; but if so, it is not a judgment in rem, or conclusive upon all the world of the fact of adultery.

9. It is unnecessary to consider more minutely the civil law upon the subject of judgments in rem or of act tones pre judicialis; it is sufficient to say that they were not in personam, and that the claims in them were advanced generally against every one, and not against particular individuals.

10. From what has been said it will be readily seen there are no suits in this country, with the exception of those in the High Court in the exercise of admiralty and vice-admiralty jurisdiction, which, answer to the action in rem of the civil law, and none corresponding with the actiones prejudicialis. We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is therefore unnecessary to refer to them. We have not as yet any suits here for divorce a vinculo matrimonii, so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suits[3]. Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce, or sets aside a marriage, between Mahomedans or Hindoos, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife. This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit, as Holloway, J., appears to think, for if they had notice they could not intervene or interfere in the suit, but upon the principle that when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons. A valid marriage causes the relationship of husband and wife, not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Mahomedan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world. The record of a decree in a suit For divorce, or of any other decree, is evidence that such a decree was pronounced; see the cases referred to in the notes to the Duchess of Kingston''s case 2 Sm. L.C. 6th edit., 714; and the effect of a decree in a suit for divorce a vinculo matrimonii is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive, nor even prima facie, evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a divorce between. A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even prima facie evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So if a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity, as for instance, in the case of a Mahomedan, that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies

were sisters.

11. It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question; and the Indian Succession Act, No. X of 1859, s. 242, points out expressly the effect which they are to have over property, and the extent to which they are to be conclusive.

12. It is quite clear that there are no judgments in rem in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers, either as conclusive, or even as prima facie, evidence, to prove the truth of any matter directly or indirectly determined by the judgment, or by the finding upon any issue raised in the suit, whether relating to status, property, or any other matter.

13. If a judgment in a suit between A and B, that certain properly for winch the suit was brought belonged to A as the adopted son of C, were a judgment in rem, and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused. For instance, suppose that a Hindoo, one of four brothers, should be entitled to a separate share consisting of a large zamindari yielding an annual profit of two lacs of rupees, and also of a small piece of land in a district zamindari, and that upon his death without issue, and without leaving a widow, the surviving brothers as his heirs should enter into possession and sell the small piece of land, and that, afterwards, a person claiming to be adopted son of the deceased brother should sue the purchaser in the Munsif''s Court to recover the land so sold, upon the ground that he being the heir by adoption, the brothers of the deceased had no title to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant, without any collusion in establishing the alleged adoption, might succeed and recover the land. Moreover the purchaser might not have the menus to enable him to appeal. Now if this judgment were a judgment in rem and conclusive against the brothers as to the status created by the alleged adoption in a suit brought against them for the zamindari, they would have no means of defending their possession, however clearly they might be able to prove that there was no foundation whatever in support of the claim of adoption. Assume that the put chaser in the Munsif''s Court was perfectly honest and bona fide, and that the Munsif''s Court was one of competent jurisdiction, having regard to the situation and value of the property, and hold that the decree was a judgment in rem, and there would be no means of getting rid of the decree of the Munsif''s Court and thus the decree of a Munsif in a suit for land within his competency would finally and conclusively determine the title to the zamindari against persons who might never even have heard of the suit in the Munsif''s Court whilst it was going on. There is no ground upon which it could be held that in such a case it could be admissible, merely as prima facie evidence. It must either be conclusive as a judgment in rem, or fall within the general rule, and

not be admissible at all upon the question of adoption. If it could be admitted even as prima facie evidence, it might work the greatest injustice by throwing the burthen on the defendants and compelling them to prove a negative, viz., that the claimant had not been adopted, and this probably after many years from the time at which the adoption is alleged to have been made. The fact is that the Munsif in such a case would be competent to try the rights of the parties to the land claimed, and incidentally to determine the question of adoption. But he would have no power to entertain a suit merely for the purpose of determining a question of status.

14. We have no hesitation in answering both the questions in the negative, and in stating that the judgment of the 26th September, 1853, was not admissible, either as prima facie or conclusive evidence, against the plaintiff upon the question of adoption.

15. The decision is quite in accordance with the decision of the Privy Council in the Raja of Shivagunga''s case 9 Moore''s I.A., 539, 601. In that case their Lordships remarked that a "judgment is not a judgment in rem, because in a suit by A for the recovery of an estate from B, it has determined an issue raised concerning the status of a particular person or family. It is clear that this particular judgment was nothing but a judgment inter partes."

16. In the case of Rajkristo Roy v. Kishoree Mohun Mojoomdar 3 W.R., 14, in consequence of which this case was referred to a Full Bench, the Judges, referring to the Shivagunga case 9 Moore''s I.A., 539, 601 say: "In Goodeve on Evidence, adoption, like marriage and bastardy, is expressly mentioned as one of the cases in which a judgment would be final and conclusive. The reasoning of their Lordships of the Privy Council in the Shivagunga case 9 Moore''s I.A., 539, 601 seems to point to the same conclusion." So far from this being the case, the decision of the Privy Council appears to us to be in direct opposition to the rule laid down by Mr. Goodeve [4]. The case will be sent back to the first Bench which referred it [5].

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[1] See Mahima Chandra Chuckerbutty v. Rajkumar Chuckerbutty, 1 B.L.R., A.C., 5; and Jogendro Deb Roykut v. Funindro Deb Roykut, 11 B.L.R., 246, 247; see also Act I of 1872, s. 41.

[2] Norton on Evidence, 2nd edit., p. 42.

[3] See now Act IV of 1869, and Hay v. Gordon, 10 B.L.R., 301; and as to certain other marriages, see Act III of 1872, s. 17.

[4] In the first edition of his work, p. 289. Mr. Goodeve, after quoting Smith''s definition of a judgment in rem, says: "Thus were it a question of marriage or of adoption, the validity or invalidity of the marriage or of the adoption would be what is called its status." A little lower Mr. Goodeve observes: "The practical view of the subject is thus well put by Mr. Norton:-- ''Certain classes of judgments are, however,

conclusive upon all the world this from necessity, and also from regard to general convenience. Such for instance are judgments in rem: judgments declaring personal status or condition, as judgments of bastardy, adultery, and in this country, of adoption. For the absurdity of holding that A was at one and the same time a bastard and not a bastard, adopted and not adopted, is manifest.""

(5) The views expressed by the learned Chief Justice in the above judgment have lately been adopted by the Legislature, as appears from the following passage in the Draft Report of the Select Committee on the Indian Evidence Bill, which subsequently passed into law as the Indian Evidence Act (I of 1872): "For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments in rem, we have adopted the statement of the law by Sir Barnes Peacock in Kanhya Lall v. Radha Churn."--See also next case.