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Calcutta High Court

Case No: Appeal from Appellate Decree No. 349 of 1934

Rakhal Dass Ray and Others		APPELLANT
	Vs	
Haridas Sarcar and Others		RESPONDENT

Date of Decision: March 9, 1936

Judgement

R.C. Mitter, J.
Although the suit related to two plots of land, viz., C. S. Dag No. 2022 and 2038 of village Potajia, the appeal is confined only to C. S. Dag. No. 2022 which is a big tank. The Plaintiffs and the Defendants are members of the Nabaratna Roy family, and it is admitted that the properties in suit belonged to their ancestors in lakhraj right. The Plaintiffs in the suit prayed for declaration of their title to sixteen annas, said to fee partly acquired by inheritance and partly by adverse possession and for confirmation of possession. They have brought this suit as in the record-of-rights their share has been recorded as one anna and six pies and the remaining shares have been recorded in the names of the Defendants. The Plaintiffs" title as co-sharers bas not been denied, but their claim to sixteen annas has been resisted. The Plaintiffs have failed to establish that they have by inheritance more than the share recorded in the record-of-rights and their claim founded on adverse possession has been negatived, both the Courts below finding that their co-sharers were also in possession. The contention of the Appellants before me is that the Courts below ought to have held that they, the Plaintiffs-Appellants, have acquired by adverse possession the shares of Defendants Nos. 5, 7 to 12, 17, 19, 25 and 31 to 33 in the tank. The claim is pul forward on the ground of res judicata.

2. The point of res judicata arises in the following manner. In the year 1918 Plaintiffs Nos. 7 to 12 and the father of Plaintiffs Nos. 1 to 6 instituted a suit to recover possession of the tank from one Srish Chandra Roy, not a member of the Nabaratna Roy family but a trespasser. The suit is Title Suit No. 780 of 1918. The pleadings of that suit are not on the record. The final judgment alter remand of this Court and the decrees of the lower Courts are the only exhibited documents (exhibits 1, 2 and 5). From the judgment of this Court

(Ex. 1) it appears that the Plaintiffs in that suit pleaded that they had sixteen annas share in the tank, partly by inheritance and partly by adverse possession acquired against their co-sharers, the other Nabaratna Roys. Defendants Nos. 5, 7 to 12, 17, 19, 25 and 31 to 33 of this suit were impleaded as pro forma Defendants in that suit, no relief being claimed against them. The said Defendants did not appear in that suit, which was ultimately decreed by this Court against Srish. According to my reading of the final judgment of this Court, this Court held that the Plaintiffs had four annas share by inheritance and had acquired the remaining twelve annas share by adverse possession. After this suit the record-of-rights was finally published with the entries which I have indicated above. The contention of the Plaintiffs Appellants is that by reason of the decision of this Court in the said suit of 1918, the Nabaratna Roys who were parties to that suit cannot urge as against the Plaintiffs that they have any subsisting title in the tank. Mr. Gupta appearing for the Appellants has urged that although the said Roys were pro forma Defendants in that suit, they were bound to appear and defend their title, as a challenge was thrown to them by the Plaintiffs in that suit and not having appeared and contested the Plaintiffs" claim in that suit based on adverse possession, they are now debarred from setting up their title. Mr. Gupta has further contended that the Plaintiffs of that suit could not have got the decree as made, unless they had succeeded in establishing their claim founded on the fact of extinction of the title of their co-sharers by reason of adverse possession on their part. For the purpose of supporting his argument he has referred to a number of cases which I will notice hereafter. All I say at the present is that the facts of those cases are different, they have no direct bearing upon the question before me, and are at most remote analogies. The rule of " might and ought " in connection with res judicata is well-settled. It is in the statute itself, but the question is when a party Defendant to a suit ought to set up a defence. In my judgment a pro forma Defendant against whom no relief is claimed is not bound to intervene actively. He is entitled to mark his time and to appear and defend his position when a direct challenge is thrown to him, that is when a Plaintiff claims relief against him. Being in the position of a pro forma Defendant, there cannot be any decree against him; if the Plaintiff succeeds, there being no decree against him, he cannot challenge by way of appeal any finding inconsistent with his title that may be recorded in the judgment. He has no hand in the carriage of the suit, and cannot insist on the Court proceeding with the suit it the principal Defendant withdraws his defence. There is strictly speaking no issue between him and the Plaintiff. It is unnecessary to review the authorities on this point again as I have reviewed most of them already in my judgment pronounced in Second appeal No. 765 of 1934 decided on the 21st February, 1936. [* Since reported as Gajanan Agarwala v. Hamidar Rahaman, 40 C.W.N., p. 1205, ante.] In a case of the type which I have before me, there would be no issue between the pro forma Defendants and the principal Defendants either. For these reasons I am of opinion that the question whether the Plaintiffs in this suit had acquired by adverse possession the interest of the Nabaratna Roys who were parties in the Suit of 1918 is not res judicata.

3. The cases cited by Mr. Gupta, namely. Sri Gopal v. Prithi Singh L.R. 20 I.A. 11S: S.C. 6 C.W.N. 889 (1902), Syed Mahomed Ibrahim Hossein v. Ambika Pershad Singh L.R. 39 IndAp 68: S.C. 16 C.W.N. 505 (1912), Radha Krishna v. Khurshed Hussain L.R. 47 IndAp 11: S.C. 25 C.W.N. 417 (1919), Munni Bibi v. Triloki Nath L.R. 58 IndAp 158: S.C. 35 C.W.N. 661 (1931) and Maung Sein Done v. Mo Pan Nyun L.R. 59 IndAp 247: S.C. 36 C.W.N. 720 (1932), are not cases where the question of res judicata against a pro forma Defendant was considered. The first three cases arose out of suits to enforce mortgages. In the first of them where the question of res judicata was answered in favour of the puisne mortgagee and against Sitaram and Srigopal, the priority of Sitaram and Srigopal''s security was challenged and relief claimed against them in the earlier suit. The relief was for their postponement. The said persons pleaded one of their mortgages and claimed priority, but omitted to plead the second which was also executed prior to the mortgage of the said puisne mortgagee. It was held in the later suit that they were debarred from setting up the said second mortgage not so pleaded in the earlier suit. In the second of the aforesaid cases Syed Mahomed Ibrahim Hossein v. Ambika Pershad Singh L.R. 39 IndAp 68 : S.C. 16 C.W.N. 505 (1912), Dwarka Nath Roy who held a mortgage of 1879 and Raghunath Singh and another, who held mortgages of the year 1880, instituted in the year 1890 suits to enforce their mortgages. They impleaded in the suit one Mussamat Alfan as a subsequent mortgage. In fact her mortgage was dated 1888. Relief was accordingly claimed against Alfan. Alfan''s money was however utilised to satisfy a prior charge of 1874 in favour of Girwar Singh over some of the properties included in the securities of Dwarka Nath Roy and Raghunath Singh and another, but she did not plead subrogation to the rights of Girwar Singh in the suits of 1890. In a later suit instituted by the assignee from her to enforce her security of the 1888 it was held that priority could not be claimed by him over Dwarka Nath and Raghunath''s mortgage based on subrogation to the rights of Girwar Singh. These two cases do not, in my judgment, support Mr. Gupta. In the third case Radha Krishna v. Khurshed Hussain L.R. 47 IndAp 11: S.C. 25 C.W.N. 417 (1919) a prior mortgagee, Radha Kishen, was made a Defendant in a puisne mortgagee''s suit. His mortgage was not impugned nor any priority claimed over him. He was accordingly not a necessary nor a proper party in the puisne mortgagee''s suit, but only a formal party--a pro forma Defendant. He did set up his prior mortgage in the puisne mortgagee''s suit. In a suit to enforce his prior mortgage it was held that he was not produced from enforcing it by reason of constructive res judicata. This case, instead of supporting Mr. Gupta, goes against him.

4. The other two cases are cases of res judicata against co-Defendants in an earlier suit. In the case before me there was no issue, as I have already said, between the Plaintiff''s and pro forma Defendants in Suit No. 780 of 1918 and there was also no cross-issue between the principal Defendants and pro forma Defendants in that suit.

5. I accordingly hold that the decision in that suit does not operate as res judicata on the question of title of the pro forma Defendants, that is, it does not bar the adjudication of title of Defendants Nos. 5, 7 to 12, 17, 19. 25 and 31 to 33 of this suit. I accordingly

overrule Mr. Gupta"s contention and dismiss the appeal. Some of these Defendants have appeared through the Deputy Registrar whose costs have already been paid by the Appellants. The other contesting Respondents have no interest in the controversy raised before me by Mr. Gupta. But as in the grounds of appeal the Appellants put forth in this Court a claim to sixteen annas of the property, the Respondents who have appeared through Mr. Guha, Mr. Sinha and Mr. Sarcar had justification in appearing in this Court and they must accordingly have their costs of this appeal from the Appellants. The appeal is accordingly discussed with one set of costs, to be divided equally between the said three sets of Respondents appearing through Mr. Guha, Mr. Sinha and Mr. Sarcar.