

PETITIONER:
RAMESHWAR DAYAL

Vs.

RESPONDENT:
BANDA (DEAD) THROUGH HIS LRS. AND ANR.

DATE OF JUDGMENT 13/01/1993

BENCH:
SAWANT, P.B.
BENCH:
SAWANT, P.B.
RAY, G.N. (J)

CITATION:
1993 SCR (1) 198 1993 SCC (1) 531
JT 1993 (1) 213 1993 SCALE (1) 126

ACT:

Res Judicata--Suit on basis of title by sub-tenant for nullity of eviction decree and injunction from dispossession--Decision binding inter parties--Held, to operate as res judicata, the first finding must be on issue which was directly and substantially, and not incidentally, in issue in that suit--Decision of Small Causes Court not referring to issue, nor giving any finding, cannot operate as res judicata--Question of jurisdiction of Small Causes Court to decide issue of title to property merely academic--Provincial Small Causes Court Act, S.23. Code of Civil Procedure, 1908--S. 2(9), (2), (14), Order XX Rules 4(1) and (5), Order XIV Rules 1 and 3--Provincial Small Causes Court Act--S. 17(1)--Held, to be binding order of the court disposing of suit must amount to a decree--Held, further, in a controversy between the parties, only judgment could give rise to decree--Where point for determination of finding not even stated, it is not a judgment within S.2(9).

HEADNOTE:

The appellant claimed to have let out the property in dispute as owner in 1966. In 1974, he filed a suit for eviction of the tenant Habib and the sub-tenant Banda, first respondent in this case. This suit was decreed against both Habib and Banda. With the respondent's application for setting aside the eviction decree, and thereafter his revision petition being dismissed, according to the appellant the eviction decree against Habib and the respondent became final on that date.

However, Banda filed the present suit on the basis of his title as owner of the property and claimed two reliefs : that the eviction decree was a nullity, and for an injunction that the present appellant be restrained from dispossessing him from the property. The Trial Court dismissed the suit. On appeal the Civil Judge, District Mazaffarnagar decreed the suit. A second appeal by the present appellant to the High Court was dismissed.

199

In the Supreme Court, the appellant contended that the decree passed by a court of competent jurisdiction could not be declared as not binding on a person who was a party to

the suit; and the view that the judgment of the Small Causes Court did not operate as res judicata between the parties because the Small Causes Court had no jurisdiction to decide title to the suit property, is erroneous in law.

Dismissing the appeal, this Court,

HELD : 1. The bar of the res judicata is not applicable to the determination of the issue with regard to the title to the property in the present suit (p.9) [204E]

To operate as res judicata the first finding must be on an issue which has been directly and substantially in issue in the former suit. If the finding given is Incidentally while determining another issue which was directly and substantially in issue, such finding cannot be said to be on an issue which was directly and substantially in issue in the former suit.(p.10) [205C]

Gangabai w/o Rambilas Gilda v. Chhabubai w/o Pukharajji Gandhi, [1982] 1 SCR 1176, followed.

The so-called decision of the Small Causes Court does not refer to the present respondent or to the written statement filed by him where he had contended that he was the owner of the property and the suit was decreed ex parte. [205D]

Not only has the Small Causes Court not given any finding, it has not even referred to the said issue in its so called decision. (pp.8 and 11) [205D]

2.In order to be binding, the order of the court disposing of the suit must amount to a decree. The definitions of decree, order and judgment given in the Code show that decree or order as the case may be, can come into existence only if there is an adjudication on the relevant issues, which conclusively determines the rights of the parties. (pp.11 and 12)

[205D, 206A]

'Points for determination' in rule 4(1) are issues contemplated by Rules 1 and 3 of Order XIV of the Code. Since the matters were in controversy between the parties, it is only a judgment which could have given rise to a decree. The decision of the Small Causes Court which has 200

not stated the points for determination and given a finding thereon is not a judgment with S.2(9) of the CPC.(p.13) [206G-H]

3.Under S.17(1) of the Provincial Small Causes Court Act also it was obligatory for the Small Causes Court to state the points for determination and give its finding or decision on each of the said points.(p.14) [207B]

4.The decision of the Small Causes Court is non est as far as the respondent is concerned.(p.14) [207C]

Mohammed Fasi v. Abdul Qayyum, AIR 1978 Allahabad 470; Alimuddin v. Mohammed Ishak, AIR 1974 Rajasthan 170; Ata Mohammed v. Ghera, AIR 196 H.P. 17; Nongthombam Mani Singh v. Puyam Chand Mohan Singh, AIR 1959 Manipur 14; Labhu Rarn v. Mool Chand AIR 1921 Lahore 91; Ganga Prasad v. Nandu Ram AIR 1916 Patna 75; Smt. Qaisari Begum v. Munney & Anr., (1981) 1 All India Rent Control Journal 549 and Richpal Singh & Ors. v. Dalip, [1987] 4 SCC 410, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 140 of 1993. From the Judgment and Order dated 23.7.1988 of the Allahabad High Court in Second Appeal No. 1116 of 1986.

Shanti Bhushan and Vijay K. Jain for the Appellant.

P.P. Rao and Shakil Ahmed for the Respondents.

The Judgment of the Court was delivered by

SAWANT, J. Leave granted.

2.The appellant claimed to be the owner of 'Gher' (property in dispute) in the town of Shameili and in that capacity, according to him, he had let out the property to one Habib as long ago as in 1966. He had filed suit No. 591/66 against Habib for recovery of rent and the suit was decreed. According to the appellant, Habib sublet the property to one Banda. In 1974, the appellant filed a suit for eviction of both Habib and the subtenant Banda in the Court of Small Causes. This suit was decreed against both Habib and Banda.

Thereafter, Banda, filed an application for setting aside the said

201

decree. His application was dismissed. The revision filed by him before the Additional District Judge was also dismissed on 26th September, 1977. Thus, according to the appellant, the eviction decree against both Habib and Banda became final on that date.

However, Banda filed the present suit on the basis of his title as the owner of the property which has given rise to the present appeal. In the suit, he claimed two reliefs, viz., that the decree passed by the Small Causes Court in Suit No. 45/1974 was nullity, and an injunction restraining the defendant in the suit, namely, Rameshwar Dayal the present appellant, from dispossessing him of the property. The Trial Court dismissed the suit on 7th May, 1979 by recording a finding that plaintiff Banda was not the owner but it was the appellant before us, viz. Rameshwar Dayal who was its owner. In support of its conclusion, the Trial Court relied on a registered rent deed dated 7th December, 1956 under which the present appellant had let out the property in dispute to some other tenant, earlier.

3.The judgment of the Trial Court was set aside in appeal by the Civil Judge, District Muzaffarnagar by his decision dated 13th December, 1985 the effect of which was to decree the suit filed by the respondent Banda. The second appeal filed by the appellant was dismissed by the High Court by the impugned order.

4.Two contentions were raised before us by Shri Shanti Bhushan, the learned counsel appearing for the appellant. The first was that the decree passed by a court of competent jurisdiction could not be declared as not binding on a person who was a party to the suit, and the second was that, the view taken by the lower appellate court that the judgment of the Small Causes Court did not operate as res judicata between the parties because the Small Causes Court had no jurisdiction to decide the title to the suit property, is erroneous in law.

5.In support of his contentions, Shri Shanti Bhushan relied upon Mohammed Fasi v. Abdul Qayyum, AIR 1978 Allahabad 470; Alimuddin v. Mohammed Ishak, AIR 1974 Rajasthan 170; Ata Mohammad v. Ghera, AIR 1962 H.P. 17; Nongthombam Mani Singh v. Puyam Chand Mohan Singh, AIR 1959 Manipur 14; Labhu Ram v. Mool Chand, AIR 1921 Lahore 91; Ganga Prasad v. Nandu Ram, AIR 1916 Patna 75 and Smt. Qaisari Begum v. Munney & Anr., (1981) 1 All India Rent Control Journal 549 which is a decision of the Allahabad High Court.

202

6.As against the aforesaid decisions, the learned counsel Shri P.P. Rao appearing for the respondent has relied upon two decisions, viz., Gangabai w/o Ram Bilas Gilda v. Chhabubai w/o Pukharajji Gandhi, [1982] 1 SCR 1176 and Richpal Singh & Ors. v. Dalip, [1987] 4 SCC 410.

7. In order to appreciate the rival contentions, it is first necessary to reproduce Section 23 of the Provincial Small Causes Court Act (hereinafter referred to as the 'Act').

"23. Return of Plants in suits involving questions of title. (1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

(2) When a Court returns a plaint under sub-section (1), it shall comply with the provisions of the second paragraph of section 57 of the Code of Civil Procedure and make such order with respect to costs as it deems just, and the Court shall, for the purposes of the Indian Limitation Act, 1877, be deemed to have been unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction."

8. It is sought to be argued before us on the basis of the aforesaid provisions of Section 23, that it is not obligatory on the Small Causes Court to refer the issue of title to immovable property to a Court having jurisdiction to determine such title. The expression 'The Court may at any stage of the proceedings.....' suggests that an option is given to the Small Causes Court to use its discretion whether it would proceed to decide the title itself or refer the question to the Court having jurisdiction to do so. According to us, in the facts of the present case, it is not necessary to go into that question since the decision of the Small Causes Court nowhere indicates that the Court had used any such discretion, even assuming that it is the discretion of the Court to refer or not the question, to the Court of competent jurisdiction. The decision which is contained in two paragraphs only, reads as follows:

203

"This suit is for ejectment of the defendant from a Gher (House) as per details given at the foot of the plaint as well as for the recovery of Rs. 1756.50 towards rent at Rs. 50 a month with effect from 7.6.1974 upto date of delivery of possession. The defendant did not turn up to contest the suit on the date fixed for hearing. Hence, the case proceeded ex-parte against him. The plaintiff has proved his case by adducing necessary evidence. The suit is ex-parte decreed with costs for the ejectment of the defendants from the suit property as well as for the recovery of Rs. 1756.50 as prayed. The plaintiff shall further be entitled to recover mesne profits with effect from 7.6.74 upto the date of delivery of possession as permitted by law at Rs. 50 a month on paying the requisite court-fees on the execution side.'

9. In order to appreciate what the Small Causes Court has and has not done, it is necessary to remember that in that suit the present appellant was the plaintiff and both Habib

and the present respondent Banda were defendant Nos. 1 and 2 respectively. It is not disputed that the present respondent had filed his written statement, and had in terms contended that he was the owner of the property in question being in possession of the same since the time of his ancestors, and he had not been living in the property as subtenant. However, the aforesaid so-called decision of the Small Causes Court does not refer to the present respondent or to the written statement filed by him and the plea taken by him in the said written statement. It only states that "the suit is for ejectment of the defendant (not defendants) as per the details given at the foot of the plaint as well as for the recovery of Rs. 175650 towards rent etc. etc. It also says that "the defendant (not defendants) did not turn up to contest the suit hence the case proceeded ex-parte against him (not them)." Then it proceeds to state that the plaintiff has proved his case by adducing necessary evidence.

In the second paragraph, the decision says that "the suit is ex-parte decreed with costs for the ejectment of the defendants from the suit property.....".

10. It is, therefore, obvious that the Small Causes Court proceeded to dispose of the suit as if what mattered in the suit was only the presence or absence of the defendant Habib. It did not take any cognizance of the

204 present respondent's presence or absence, and of the written statement filed by him. Had it taken cognizance of the written statement, it would have become obligatory on its part to set down the points for determination. Had it further itself decided to proceed with adjudication of the title instead of referring it to the Court of competent jurisdiction, it could have done so after stating the points for determination. What is more, the Court had to give its decision on the point. The Small Causes Court did neither. In fact, as is clear from the so-called decision the whole of which is reproduced above, there is no reference to the written statement or to the question of title to the suit property raised, therein nor is there a decision on the point even remotely, not to say incidentally.

11. In the circumstances, the controversy raised before us as to whether the Small Causes Court is under an obligation or not to refer the issue with regard to the title to the property to a Court of competent jurisdiction and whether the bar of res judicata would apply to the present suit brought to establish title to the property, is purely academic. It would be a travesty of justice to hold that by the above order the Small Causes Court had even incidentally decided the issue with regard to the title which fell for determination directly and substantially in the subsequent suit which has led to the present appeal.

12. We are, therefore, more than satisfied that the bar of res judicata is not applicable to the determination of the issue with regard to the title to the property in the present suit. It is for these reasons that we do not think it necessary to discuss in detail the decisions cited on both sides. However, we may refer to a decision of this Court Gangabai w/o Rambilas Gilda v. Chhabubai who Pukharajji Gandhi [1982] 1 SCR 1176, which has a direct bearing on the question as to when a finding on the question of title to immovable property rendered by a Small Causes Court would operate as res judicata. After discussing various decisions on the point, this Court has held there as follows :

"when a finding as to title to immovable

property is rendered by a Court of Small Causes res judicata cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the

205

former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. A question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as res judicata in a subsequent suit in which the question of title is directly raised."

This is a sufficient answer to the contention that when Small Causes Court incidentally determines the question of title, it operate as res judicata. The contention ignores that to operate as res judicata the first finding must be on an issue which has been directly and substantially in issue in the former suit. If the finding is given incidentally while determining another issue which was directly and substantially in issue, such finding cannot be said to be on an issue which was directly and substantially in issue in the former suit. However, it is not necessary for us to discuss this point at length since we have come to the conclusion that not only the Small Causes Court has not given any finding on the issue even incidentally, it has not even referred to the said issue in its so-called decision.

13. The next question is whether the decision of the Small Causes Court is binding on the respondent Banda. In order to be binding, the order of the Court disposing of the suit must amount to a decree. Section 2 (2) of Code of Civil Procedure (the 'Code') defines decree as follows :

"(2) 'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final....."

The definition of 'Order' given in Section 2 (14) of the Code is as follows:

(14) "Order' means the formal expression of any decision of a Civil Court which is not a decree."

However, neither the order nor the decree should be confused with judgment' which is defined by Section 2 (9) of the Code as "the statement

206

given by the Judge of the grounds of a decree or order'. The definitions of decree, order and judgment given in the Code show that decree or order as the case may be, can come into existence only if there is an adjudication on the relevant issues, which conclusively determines the rights of the parties.

14. We have already pointed out earlier that the Small Causes Court has not even noticed the matters in controversy between the appellant and the respondent, and consequently, there has been no adjudication or decision on the said

matters. There is thus no 'formal expression of adjudication..... conclusively determining the rights of the parties with regard to..... the matters in controversy in the suit".

15. It must be remembered in this connection that Rules 4 (1) and 5 of order XX of the Code are applicable to the judgments of the Small Causes Court. The Rules are as follows :

"4. Judgment of Small Causes Courts (1)
Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

(2) Judgments of other Courts Judgments of other courts shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

"S. Court to state Its decision on each issue. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefore, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit."

'Points for determination' referred to in Rule 4(1) are obviously nothing but 'issues' contemplated by Rules 1 and 3 of Order XIV of the Code. The present decision of the Small Causes Court which has not even stated the points for determination and given finding thereon, is obviously not a judgment within the meaning of Section 2 (9) of the Code. Since the matters were in controversy between the parties, it is only a judgment which could have given rise to a decree. The so-called decision of the Small Causes Court, therefore, does not amount to a decree within the me
207

of Section 2 (2) read with Section 2(9) and Rules 4(1) and 5 of Order XX of the Code.

16. It is not disputed that in view of the provisions of Section 17 (1) of the Provincial Small Causes Court Act, the Code is applicable to Small Causes Court except where it is otherwise provided either by the Code or the said Act. Apart from Rules 4 (1) and .5 of Order XX of the Code, on this count also, it was obligatory for the Small Causes Court, in the present case, to state the points for determination and give its finding or decision on each of the said points. Hence the present decision of the Small Causes court is not a judgment and a decree in the eye of law and is, therefore, non est as far as the respondent is concerned.

17. In the circumstances, the appeal is dismissed with costs.

U.R.

Appeal dismissed.

208