CASE NO.:
Appeal (civil) 8246 of 2004

PETITIONER:
Bhanu Kumar Jain

RESPONDENT:
Archana Kumar & Anr.

DATE OF JUDGMENT: 17/12/2004

BENCH:
N. Santosh Hegde, B.P. Singh & S.B. Sinha

JUDGMENT:
J U D G M E N T

(Arising out of S.L.P. (C) No. 6392 of 2003)

S.B. SINHA, J.

Leave granted.

The remedies available to a defendant in the event of an ex-parte decree being passed against him in terms of Order 9 Rule 13 of the Code of Civil Procedure (Code) and the extent and limitation thereof is in question before us in this appeal which arises out of a judgment and order dated 19.12.2002 passed by the High Court of Madhya Pradesh at Jabalpur in First Appeal No. 109 of 1986.

The fact of the matter relevant for the purpose of this appeal is as under:

One Shri N.N. Mukherjee was the owner of the premises in suit. He died leaving behind his wife Smt. Suchorita Mukherjee, (original defendant No. 1), son Shri P.P. Mukherjee, (original plaintiff) and daughter Smt. Archana Kumar, (original defendant No. 2). The family is said to be governed by Dayabhag School of Hindu Law. The original plaintiff filed a suit for partition in the year 1976. The original defendants filed their written statements. Respondent No. 2 herein, Surender Nath Kumar who is husband of Smt. Archana Kumar, Respondent No. 1 herein also filed a written statement and counterclaim by setting up a plea of mortgage by deposit of title deeds in respect of property in suit said to have been created by his mother in law (original defendant No. 1).

Smt. Suchorita Mukherjee died on 15.9.1984 whereupon Respondent No. 1 herein was transposed as defendant No. 1; whereas Respondent No. 2 was transposed as defendant No. 2 therein. In the suit, the defendant No. 1 did not file any document. Respondent No. 2 also did not file any document in support of his purported counter claim.

Having regard to the rival contentions raised in the pleadings of the parties, the following issues were framed:

"1(a) Whether partition of property owned by late Shri NN Mukherjee had taken place during his life time?

(b) If so, what property was available for partition?

(c) What were the shares allotted to the Plaintiff and the defendant No. 1 in the said partition?

(d) Whether the Plaintiff had separated from his

father during his life time and was in separate possession of his share in the property?

2. Whether the Plaintiff is entitled to = share and separate possession of his share in the property described in para 3 of the plaint?

3. Whether the plaintiff is entitled to claim mesne profits for the income derived by the defendant No. 1 from the share in the property? If so, at what rate and to what sum?

4. Whether the claim in suit is barred by limitation?

5. Whether the decision in Civil Suit No. 63-A of 1972 decided on 22.11.75 by IInd Civil Judge, Class II, Jabalpur will operate as res-judicata in the present case?

(a) Whether the suit is not maintainable as no relief has been sought against defendant No. 2?

(b) Whether at the request of Defendant No. 1, Defendant No. 3 spent Rs. 21000/- till 31.10.74 on construction and alteration of the suit property and the interest as on 31.10.74 came to Rs. 10,000.00?

(c) Whether in order to secure the above amount defendant No. 1 deposited the title deeds of the suit property with defendant No. 2 and created a mortgage by deposit of title deeds in favour of defendant No. 3 and the suit property stands mortgaged with the defendant No. 3?

(d) Whether defendant No. 3 further spent Rs. 9500/- in the year 1976, 1977 and 1980 and defendant No. 2 spent Rs. 10500.00?

(e) Whether defendant No. 3 is entitled to get declaration shown as in para 6(A)(B)(C) of the written statement of defendant No. 3?

(f) Whether the mother of defendant No. 2 had made will in favour of defendant No. 2 and thus, after the death of mother defendant No. 2 became absolute owner and plaintiff has no right?

(g) Whether the plaintiff had already separated in the year 1951 and thus he has no right over the suit property?

6. Relief & Costs?"

An additional issue was framed on 13.6.1985 and the case was fixed for evidence on 3.8.1985. On 3.8.1985 nobody was present on behalf of the defendant but the plaintiff’s advocate was present whereupon, the case was directed to be placed after some time. At 2.35 p.m. a request was made for adjournment on the ground that the defendant could not come from Delhi whereafter an application was filed by the plaintiff that he had closed his evidence. It was further contended that the burden to prove the additional issue rested on the defendant and if any evidence is to be adduced, he should adduce evidence first. It appears that the plaintiff was also not cross-examined by Respondent No. 1 herein. As the plaintiff was attending to the court proceedings from Calcutta, a cost of Rs. 200/- was imposed on the

defendants. It was further directed that if the costs were not paid, the right of cross-examination will be closed. The matter was again posted on 7.10.1985 on which day again the counsel for the defendant was not present. Even the costs awarded against them was not paid. Having regard to the fact that the Respondent No. 1 herein was absent and did not cross-examine the plaintiff; the case was directed to be posted ex-parte against her and the right of cross-examination was forfeited. The case was fixed for final argument on 11.10.1985. Yet again on 11.10.1985 the plaintiff was present but the defendants were not. Allegedly, owing to strike of the advocates the case was adjourned for 14.10.1985. On 14.10.1985 the learned Judge fixed the case for 25.10.1985 for delivery of judgment. The judgment, however, was not pronounced on 25.10.1985. However, on the next date, viz., 30.10.1985, an application was filed by the Respondents herein purported to be in terms of Order 9, Rule 7 of Code for setting aside the order dated 7.10.1985 whereby the suit was posted for ex-parte hearing. The said application was rejected by an order dated 31.10.1985. A preliminary decree for partition, thereafter was passed on 1.11.1985 in favour of the plaintiff.

An application under Order 9, Rule 13 of Code was filed by the Respondents herein on 5.11.1985 which was marked as Misc. Judicial Case No. 30/1985. The said application was dismissed by an order dated 15.1.1986 by the 6th Additional District Judge, Jabalpur holding that the defendants failed to prove good and sufficient cause for their absence on 7.10.1985. An appeal marked as Misc. Appeal No. 19/86 thereagainst in terms of Order 43, Rule 1(d) of the Code was filed on 30.1.1986 which was also dismissed.

A Civil Revision Application was also filed challenging the order dated 31.10.1985 whereby and whereunder the Respondents' application under Order 9, Rule 7 of Code was dismissed. The said petition was also dismissed. Yet again a regular First Appeal being No. 109/86 was filed in the High Court. It is contended that the Respondent No. 2 did not file any appeal against the rejection of his counter claim. The said Misc. Appeal No. 19/86 was dismissed by an order dated 5.4.1994 whereagainst a Special Leave Petition was filed which also came to be dismissed as withdrawn by an order dated 16.12.1994. In the meanwhile, it appears that the original plaintiff transferred his right title and interest in favour of the present Appellant. The plaintiff died on 1.5.2001. By reason of the impugned judgment, the High Court allowed the First Appeal No. 109/86 holding:

"i. That the Trial Judge has grossly erred in law by proceeding ex-parte against the defendants.

ii. The learned counsel further canvassed that the appellant No. 2, Surendra Kumar, filed the counter claim and therefore it was incumbent upon the learned trial judge to decide the counter claim filed by the defendant in view of the mandate contained in Order 8 Rule 6(D) of the Code."

Mr. Anup G. Choudhary, learned senior counsel appearing on behalf the Appellant would submit that as the counter claim filed by the defendants under Order 8 Rule 6(D) of the Code was dismissed by the learned Trial Judge, the First Appeal should not have been entertained by the High Court at the instance of the Respondent No. 2 and, thus, the impugned judgment must be set aside.

The learned counsel would urge that the subject matter of an application under Order 9, Rule 13 of the Code and the subject matter of the appeal being same, it is against public policy to allow two parallel proceedings to continue simultaneously. Reliance in this behalf has been placed on Badvel Chinna Asethu and another Vs. Vettipalli Kesavayya and another [AIR 1920 Madras 962], Munassar Bin Jan Nisar Yarjung (died) his L.Rs Marian Begum and others Vs. Fatima Begum and others [AIR 1975 AP

366], M/s. Mangilal Rungta, Calcutta Vs. Manganese Ore (India) Ltd., Nagpur [AIR 1987 Bombay 87], Dr. M.K. Gourikutty and etc. Vs. M.K. Raghavan and Others [AIR 2001 Kerala 398], Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury [(1982) 2 SCC 596] and P.Kiran Kumar Vs. A.S. Khadar and Others [(2002) 5 SCC 161].

In any event, Mr. Choudhari would contend that the Respondents' claim would be hit by the doctrine of Issue Estoppel. Reliance in this behalf has been placed on Y.B. Patil and Others Vs. Y.L. Patil [(1976) 4 SCC 66], Vijayabai and Others Vs. Shriram Tukaram and Others [(1999) 1 SCC 693] and Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another [(1999) 5 SCC 590].

As regard the counter claim of Respondent No. 2 herein, Mr. Choudhari would contend that the same was directed only against his mother in law being the original defendant No. 1, and, thus, it could not have been enforced against the plaintiff. The learned counsel in this connection has drawn our attention to Issue No. 5 framed by the learned Trial Judge. Drawing our attention to the judgment of the learned Trial Judge, it was argued that the High Court committed a manifest error in coming to the conclusion that the learned Trial Judge did not determine the counter claim which in fact was done.

Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the Respondents, on the other hand, would contend that the Respondents were entitled to maintain an appeal against the ex-parte decree in terms of Section 96(2) of the Code. The learned counsel would argue that the High Court in its impugned judgment having arrived at a conclusion that the suit was directed to be proceeded ex-parte only against Respondent No. 1 and not against the Respondent No. 2; he was entitled to raise a contention as regards the legality or validity of the order dated 31.10.1985. It was further submitted that in any event, Respondents herein were entitled to assail the judgment on merit of the matter. Drawing our attention to the provisions of Order 8, Rule 10 of the Code, the learned counsel would contend that even in a case where no written statement is filed, the Court may direct the parties to adduce evidence in which event the Court must pass a decree only upon recording a satisfaction that the plaintiff has been able to prove his case. If on the basis of the materials on record, Mr. Ranjit Kumar would urge, the plaintiff fails to prove his case, the judgment would be subject to an appeal in terms of Section 96(2) of the Code which confers an unrestricted statutory right upon a party to a suit.

The learned counsel would further contend that the Appellant herein has no locus standi to maintain this appeal as upon the death of the original plaintiff he was not substituted in his place. Mr. Ranjit Kumar would submit that, in the event if it be held that the Respondents are not entitled to question the order of the learned Trial Judge to pass an ex-parte decree against both the Respondents, the matter may be remitted to the High Court for a decision on merit of the matter.

In reply, Mr. Choudhari would point out that only two contentions were raised before the High Court and its findings thereupon being ex facie erroneous, no purpose would be served by remitting the matter back to the High Court for determination of the merit of the matter. It was argued that the Respondents have not raised any contention on merit of the matter and in any event, they having not adduced any evidence, there is no material on the record of the appeal enabling the court to determine the same on merit. It was further contended that even the deed in terms whereof the purported mortgage was created was not annexed with the written statement of the Respondent No. 2 as it was mandatorily required under Order 8, Rule 1 of the Code, he cannot raise any contention on merit of the counter claim and furthermore even no evidence was produced in support thereof.

Order 9, Rule 7 of the Code postulates an application for allowing a defendant to be heard in answer to the suit when an order posting a suit for

ex-parte hearing was passed only in the event, the suit had not been heard as in a case where hearing of the suit was complete and the court had adjourned a suit for pronouncing the judgment, an application under Order 9, Rule 7 would not be maintainable. (See Arjun Singh Vs. Mohindra Kumar and others, AIR 1964 SC 993) The purpose and object of Order 9, Rule 7 of the Code has been explained by this Court in Vijay Kumar Madan and Others Vs. R.N. Gupta Technical Education Society and Others [(2002) 5 SCC 30] and Ramesh Chand Ardawatiya Vs. Anil Panjwani [(2003) 7 SCC 350]

It is true that the suit was not directed to be heard ex-parte against Respondent No. 2 herein but it remains undisputed that both the Respondents filed application for setting aside the ex-parte decree before the learned Trial Judge, preferred appeal against the judgment dismissing the same as also filled a revision application against the order dated 31.10.1985 setting the suit for ex-parte hearing. The said applications and appeal had been dismissed. Even a Special Leave Petition filed was dismissed as withdrawn. In that view of the matter it is not permissible for the Respondents now to contend that it was open to the Respondent No. 2 to reagitate the matter before the High Court. The contention which has been raised by the Respondent No. 2 before the High Court in the first Appeal, furthermore, was not raised in the said application under Order 9, Rule 13 of the Code and even in the Misc. Petition and the Revision Application filed in the High Court. Such a question having not been raised, in our opinion, the Respondents disentitled themselves from raising the said contention yet again before the High Court in the First Appeal.

It is now well-settled that principles of res judicata applies in different stages of the same proceedings. [See Satyadhyan Ghosal and others Vs. Smt. Deorajin Debi and another, AIR 1960 SC 941) and Prahlad Singh Vs. Col. Sukhdev Singh [(1987) 1 SCC 727].

In Y.B. Patil (supra) it was held:

"4\005 It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent state of that proceeding..."

In Vijayabai (supra), it was held:

"13. We find in the present case the Tahsildar reopened the very question which finally stood concluded, viz., whether Respondent 1 was or was not the tenant of the suit land. He further erroneously entered into a new premise of reopening the question of validity of the compromise which could have been in issue if at all in appeal or revision by holding that compromise was arrived at under pressure and allurement. How can this question be up for determination when this became final under this very same statute ?..."

Yet again in Hope Plantations Ltd. (supra), this Court laid down the law in the following terms:

"17\005One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice."

It was further held:
"31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. But that situation does not exist here. Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule. 1) review is not permissible on the ground "that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment"."

The question which now arises for consideration is as to whether the First Appeal was maintainable despite the fact that an application under Order 9, Rule 13 of the Code was dismissed.

An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:
(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and
(ii) The suit could not have been posted for ex-parte hearing.

In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein.

It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex-parte decree can be filed; one after the other; on the ground of

public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

There is a distinction between 'issue estoppel' and 'res judicata' [See Thoday vs. Thoday \026 1964 (1) All. ER 341]

Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res-judicata creates a different kind of estoppel viz Estopper By Accord.
In a case of this nature, however, the doctrine of 'issue estoppel' as also 'cause of action estoppel' may arise. In Thoday (supra) Lord Diplock held :
"\005"cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment\005.If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."

The said dicta was followed in Barber vs. Staffordshire Country Council, (1996) 2 All ER 748. A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See C. (a minor) Vs. Hackney London Borough Council, (1996) 1 All ER 973].

It is true that the Madras High Court in Badvel Chinna Asethu (supra) held that two alternative remedies in succession are not permissible stating:
"Assuming that it is open to a defendant in the appeal against the exparte decree to object to the decree on the ground that he had not sufficient opportunity to adduce evidence in a case where he did not choose to avail himself of the special procedure, it does not by any means follow that, where he did actually avail himself of the special procedure and failed, still it would be open to him to have the same question reagitated by appealing against the decree."

Oldfield, J. in his concurring judgment stated:
"\005No case has been cited before us in which the question now under consideration, whether a party against whom a decree has been passed ex parte can proceed in succession under O.9, R.13, as well as by taking objection to the order placing him ex parte in his appeal against the substantive decree has been dealt with. On principle it would appear that he could only do so at the expense of the rules as to res judicata; and there can be no reason why the adjudication on his application under O.9, R.13, if there were one should not be conclusive against him for the purpose of any subsequent appeal. In the present case it is suggested that the

facts that his application under O.9, R.13, was not carried further than the District Munsif's Court and that he acquiesced in the District Munsif's unfavourable order, would make a difference to his right to appeal against the decree on this ground. The answer to this is that the District Munsif's order not having been appealed against, has become final. It seems to me that it would be a matter for great regret if a party could pursue both of two alternative remedies in succession and that the recognition of a right to do so would be a unique incident in our procedure. I am accordingly relieved to find that such a right has not been recognized by authority\005"

The aforementioned view was reiterated in the subsequent decisions of different High Courts in Marian Begum (supra) M/s. Mangilal Rungta, Calcutta (supra) and Dr. M.K. Gourikutty (supra).

However, it appears that in none of the aforementioned cases, the question as regard the right of the defendant to assail the judgment and decree on merit of the suit did not fall for consideration. A right to question the correctness of the decree in a First Appeal is a statutory right. Such a right shall not be curtailed nor any embargo thereupon shall be fixed unless the statute expressly or by necessary implication say so. [See Deepal Girishbhai Soni Vs. United India Insurance Co. Ltd. (2004) 5 SCC 385 and Chandravathi P.K. and Others Vs. C.K. Saji and Others, (2004) 3 SCC 734]

We have, however, no doubt in our mind that when an application under Order 9, Rule 13 of the Code is dismissed, the defendant can only avail a remedy available thereagainst, viz, to prefer an appeal in terms of Order 43, Rule 1 of the Code. Once such an appeal is dismissed, the Appellant cannot raise the same contention in the First Appeal. If it be held that such a contention can be raised both in the First Appeal as also in the proceedings arising from an application under Order 9, Rule 13, it may lead to conflict of decisions which is not contemplated in law.

The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex-parte hearing by the Trial Court and/ or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the First Appeal filed by him against Section 96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Choudhari that the 'Explanation' appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this court in Rani Choudhury (supra), P. Kiran Kumar (supra) and Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others [2004 (9) SCALE 270].

We, therefore, are of the opinion that although the judgment of the High Court cannot be sustained on the premise on which the same is based, the Respondents herein are entitled to raise their contentions as regards merit of the plaintiff's case in the said appeal confining their contentions to the materials which are on records of the case.

We, however, do not agree with Mr. Ranjit Kumar that the Appellant herein has no locus standi to maintain this appeal. In terms of Order 22, Rule 10 of the Code he could have been substituted in place of the plaintiff. Even if he was not substituted in terms of the aforementioned provision, an application under Order 1, Rule 10 of the Code on his behalf was maintainable as he became the legal representative of the original plaintiff.

For the view we have taken, it is not necessary for us to examine the claim of the original plaintiff for partition of suit properties or claim of the Respondent No. 2 herein as regard creation of a mortgage in relation thereto by the original defendant No. 1 and/ or efficacy thereof. We refrain ourselves from even considering the submission of Mr. Choudhari to the effect that even otherwise the Respondent No. 2 herein could not have raised a counter claim in the partition suit vis-'-vis the plaintiff and the effect, if any, as regards his non-filing of an appeal relating to his counter claim. We may notice that Mr. Choudhari has further contended that in terms of Order 17, Rule 2 of the Code in the event, in the suit which was adjourned and if on the date of adjourned date the defendant did not appear, the court has no other option but to proceed ex-parte. The High Court, in our opinion, should be allowed to examine all aspects of the matter.

For the reasons aforementioned, we are of the opinion that although the judgment of the High Court is not sustainable as the reasons in support thereof cannot be accepted, the High Court for the reasons assigned hereinbefore must examine the Respondents' claim on merit of the matter.

The Appeal is, therefore, allowed, the impugned judgment is set aside and the case remitted to the High Court for consideration of the case of the parties on merit of the matter. As the suit is pending since 1976, we would request the High Court to dispose of the appeal at an early date and preferably within a period of three months from the date of communication of this order. No costs.