MANU/BH/0065/1984

Equivalent Citation: AIR1984Pat220, 1985(33)BLJR129, 1984()PLJR370

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.D. No. 383 of 1970

Decided On: 17.02.1984

Appellants: **Haribans Singh**
Vs.
Respondent: **Basist Kumar and Ors.**

Hon'ble Judges/Coram:
L.M. Sharma , S.S. Hasan and S.B. Sanyal , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Gorakh Nath Singh, Adv. and Shashi Bhushan Prasad Sinha, Adv. No. 2

For Respondents/Defendant: Janeshwar Singh, U.S. Singh, S.K. Singh and A.K. Singh, Advs., Dilip Kumar Sinha, Adv. No. 2 and Guru Sharan Sharma, Adv. for minor Respondents 2 to 4, 11, 13 to 14

JUDGMENT

L.M. Sharma, J.

1. The suit out of which this appeal arises, was filed by the plaintiff-appellant for (a) recovery of possession for portion of land delineated by letters ABCD and ACEF. sketch man attached to the plaint, forming cart of S. P. 347. (b) removal of encroachment from public land S. P. 354. shown as GHIJ and (c) closure of the door opened by the defend ant-respondent at point 'I' shown in sketch man as the same violated plaintiff's privacy as well as for injunction. The defendants denied the claim and contested the suit.

2. The trial court dismissed the suit so far it related to prayers (a) and (b) but allowed the prayer (c).

3. The plaintiff preferred Title Appeal No. 42/65 for relief sought in prayers (a) and (b) and the defendant also preferred another appeal being T. A. No 43/65 so far prayer (c) was concerned. The two appeals were heard together by 2nd Additional Sub-Judge. Sasaram. who dismissed plaintiff's appeal 42/65 and allowed defendant's appeal No. 43/65 and thus dismissed the suit in its entirety. The plaintiffs have thereafter filed the present second appeal challenging the decision in both the title appeals and pravine for a full decree in the suit. They attached a certified copy of the common judgment and certified copies of both the decrees in the two appeals, and paid full court-fee, necessary for setting aside the two decisions of the lower appellate court and for decreeing the suit in its entirety. In the aggrieved portion of the memorandum of appeal they specifically mentioned that the decrees in both the two title appeals were under challenge.

4. The maintainability of a single second appeal challenging the two decrees of the

learned Subordinate Judge was questioned when the case " was initially placed for hearing before me singly. I directed the appeal to be placed for hearing before a Division Bench. Accordingly, it was placed for hearing before H. L. Asrawal and C. S. S. Sinha, JJ. who observed that "the question of maintainability of the appeal is one of importance and a somewhat vexed one", and it should, therefore, be settled by a Full Bench. Accordingly, the appeal was Placed for hearing before us. The question, therefore, is whether a single second appeal is maintainable as against the common judgment followed by twp (sic) dismissing the plaintiffs' suit in (sic) Mr. Janeshwar Singh, appearing on behalf of the respondents strongly relied on the decision in Badri Naravan v. Kamdco Prasad Singh (MANU/SC/0219/1961 : AIR 1962 SC 338) ir support of his contention that the appeal is not maintainable.

5. Ordinarily, separate appeals ought to be filed against decrees passed in separate title appeals, but does it follow that a single second appeal can or should be dismissed as not maintainable in the facts and circumstances mentioned above? Since the two reliefs dealt with by the lower appellate court in separate title appeals were prayed for in a single suit, which was concurrently held by both the courts as not bad for multifarious ness (and rightly so). I am of the view that the prayer of the plaintiffs in the present second appeal for decreeing the suit in full should be entertained and the second appeal should be treated as a consolidated appeal. No provision or the Code of Civil Procedure has been claimed by Mr. Singh to support his stand. The Rule 1 of Order 41 of the Civil P. C. enjoins a copy of the decree to be filed with the memorandum of appeal and. as has been stated above, copies of both the decrees have been appended in the present case and full court-fee payable for the challenge of the decree and for decreeing the suit in its entirety has been paid. I. therefore, do not see any reason to reject the appeal as being not maintainable.

6. The decision in Badri Naravan v. Kamdeo Prasad (MANU/SC/0219/1961 : AIR 1962 SC 338) (supra) has no application to the present case. In that case, the election of Badri Narain to the Legislative Assembly was challenged by respondent Kamdeo Prasad by an election petition on the ground of corrupt practices and also on the ground that the appellant being a Ghatwal held an office of profit, and was therefore, not eligible for the election. The respondent further prayed for being declared as a duly elected candidate on the basis of the second ground. The Election Tribunal set aside the election on the ground of corrupt practices but dismissed the other prayer by holding that the office of a Ghatwal was not one of profit. The appellant filed Election Appeal No. 7 in the High Court against setting aside of his election on the ground of corrupt practice and the respondent filed Election Appeal No. 8 against the rejection of his prayer. for being declared as elected to the Legislative Assembly by questioning the correctness of the finding about the office of a Ghatwal being not one of profit. The High Court reversed the finding of corrupt practices, but agreeing with the Respondent, that the appellant being a Ghatwal held an office of profit maintained the judgment of the Tribunal setting aside the election and dismissed Appeal No. 7. The Court allowed Appeal No. 8 on the basis of the finding against the appellant recorded in Appeal No. 7. The appellant thereafter, filed one appeal before the Supreme Court, directed against the decision in Appeal No. 8 only. In these circumstances. it was held that the decision in Appeal No. 7 that the appellant was holder of an office of profit under the State of Bihar. having become final in absence of an appeal therefrom could not be set aside in the appeal before the Supreme Court directed against the decision in Appeal No. 8 only The judgment of the Supreme Court rested on the principle of res judicata. The decision clearly has no application to the present case, as here both the decrees in the two title appeals have been expressly assailed. The case is squarely covered by the ratio in Narhari v. Shankar

(MANU/SC/0047/1950 : AIR 1953 SC 419) where theplaintiff-appellant claimed possession of separate areas of land against the defendants first and second set. The suit was decreed and each set of the defendants filed an appeal before the first appellate court. Both the appeals were allowed by a common judgment. The plaintiff thereafter filed two appeals numbered as 331 and 332 before the High Court. The latter appeal was rejected on the ground of limitation and the High Court dismissed Appeal 331 on the basis of res judicata. The Supreme Court reversed the decision on the view that Appeal 331 was directed against the dismissal of the entire suit. The principle enunciated in Narhari's case (supra) has been reaffirmed by the Supreme Court in the case of Lonankutty v. Thomman (MANU/SC/0358/1976 : AIR 1976SC 1645), the Supreme Court Quoted with approval the following observations of the said case (Para 21) :

> "When there is only one suit, the question of res judicata does not arise at all. This was out on the around that where there has been one trial, one findinff. and one decision, there need not be two appeals even though two decrees may have been drawn un."

Narhari's case was distinguished in Badri Naravan v. Kamdeo Prasad (MANU/SC/0219/1961 : AIR 1962 SC 338) (supra) on the around that the plaintiff had impleaded all the defendants as respondents in Appeal No. 331 before the High Court, had paid the full court-fee necessary for an appeal against the dismissal of the entire suit and the prayer in the appeal covered the subject matter of both the appeals before the lower appellate court. These features are common to Narhari's case and the present second appeal before us. I would, therefore, hold, as was observed in paragraph 11 of the judgment of Badri Naravan v. Kamdeo Prasad that this Appeal is really a consolidated Appeal against the decrees in both the title appeals which could have been split un for the purposes of record into two separate second anneals. If it is not so done, it does not render the single second Appeal unmaintainable. The pre-liminary objection raised on behalf of the defendants is therefore, rejected.

7. Coming to the merits of the case. Mr. Gorakh Nath Singh. learned counsel for the appellants, contended that although the courts below held in favour of the plaintiff on the question of illegal encroachment over a portion of the suit land, they illegally refused to pass a decree for eviction on the ground that the area encroached was small. Mr. Janeshwar Singh supported the view of the Courts by arguing that no decree can be passed with respect to an area which is less than 5 links wide. He relied on the decision in Niranjan Mandal v. State of Bihar MANU/BH/0001/1978 to which I was a party. The relevant observation in that case was made with reference to the facts of the case and it was not meant to be of universal application. Where the case of encroachment is sought to be proved by reference to a man prepared on such a scale that it is not possible to come to a conclusion with certainty in regard to the encroachment, the prayer for eviction has to be rejected. But there may be cases where a bigger man of the area is prepared on a larger scale making it possible to infer therefrom the fact and extent of encroachment. Then again, there may be other evidence Independent of a map providing reliable evidence in this regard. by wav of illustration, let us take a case where two plots A and B are contiguous to each other with a common boundary. Their respective (sic) are also admitted or established and far side boundaries of the plots are also determined with exactitude. If the owner of one of the plots encroaches on his neighbour's land, the extent of the encroachment can be scientifically determined by measuring the widths of the plots after encroachment and comparing them with the admitted or proved widths. I had earlier

also explained the cited decision in my judgment dated 29-8-83 in S. A. 510 of. 1979. I, therefore, hold that the principle that if the aliened encroachment is less than five links, it cannot be held with certainty that there is encroachment at all is not an inflexible rule of universal application. The Courts were, therefore, not right in dismissing the suit on this basis.

8. In view of what I have said above. I would have been inclined to remit the case to the lower appellate court for fresh consideration of the evidence, but it appears that the second appeal is concluded against the appellant by another finding of fact. According to the defendant's case, there ancestor Ratan Kahar had acquired the area in question by oral purchase and defendants built their pucca house thereupon 15 or 16 years before the filing of the suit. The appellate court has accented this case. It follows that the defendants are not trespassers on the area in suit and alternatively, they have acquired a title thereto by prescription. I do not find any illegality in this finding.

9. In the result, the Appeal is dismissed, but in the circumstances without costs.

S.S. Hasan, J.

10. I agree.

S.B. Sanyal, J.

11. I had occasion to go through the judgment of my Lord L. M. Sharma. J. and am in full agreement with him. I, however, feel to add few words.

12. In my opinion, two appeals are required to be filed when the main relief in the appeal preferred cannot be granted without traversing or setting aside the finding arrived at in the other appeal as against which no appeal has been preferred, as in the case of Badri Naravan (MANU/SC/0219/1961 : AIR 1962 SC 338) (supra). In tha case Appeal No. 7 of Badri Narayan was dismissed by the High Court wherein he prayed to quash the order setting aside his election. Badri Narayan did not prefer any appeal before the Supreme Court against this decree. He only preferred an appeal before the Supreme Court against the decree in Appeal No. 8 preferred by Respondent No. 1 which was allowed by the High Court and respondent No. 1 was declared elected to the Assembly. Question arose how can the declaration in favour of respondent No. 1 of having been elected can be gone into, without there being any appeal against the decision in Appeal No. 7 setting aside the election of the appellant, the later having already attained finality. Further the correctness of some finding by the High Court in the said appeal, could not have been gone into by the Supreme Court in the ap-peal taken before them.

13. It is true that principles of res judicata apply also as between two stages in the same litigation. The same is to this extent only that a court whether the trial Court or a higher Court having at an earlier stage decided the matter in one way will not allow the parties to reagitate the same matter attain at a subsequent stage of the same proceeding (see Satvadhvan v. Smt. Deoraiin Devi. AIR 1960 SC 9411. For application of this principle to different stages of the same suit, which is not confined to Section 11 of Civil P. C. various factors are required to be borne in view. i.e. the nature of the proceedings, the scope of the enquiry which the adjective law provides for the derision being reached as well as specific provision made on matters touching such decision etc. (See Arjun Singh v. Muhindra Ku-mar. MANU/SC/0013/1963 : AIR 1964 SC 993). This is not the position in the case in hand.

14. I have hastened to add these few lines, only to indicate, that we are aware of the said legal position while referring to and receiving upon Narhari's case (MANU/SC/0047/1950 : AIR 1953 SC 419) (supra) and Lonankutty's case MANU/SC/0358/1976 .