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BALDEVDAS SHIVLAL & ANR.

v.

FILMISTAN DISTRIBUTORS (INDIA) (P) LTD. & ORS.

April 29, 1969

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[J. C. SHAH AND G. K. MITTER, JJ.]

Code of Civil Procedure, 1908, *ss.* 1, 115—*Consent decree whether operates as res judicata—Trial Court disallowing objection to certain questions in cross-examination—Order disallowing question is not a 'case decided' within meaning of s.* 115—*High Court's jurisdiction in revision.*

C

R and F who held a cinema building in Ahmedabad on lease entered on November 27, 1954 into an agreement with respondent no. 1 giving the latter a right to exhibit cinematograph films in the said building. Later respondent no. 1 filed suit No. 149 of 1960 to assert his right to exhibit films in the building. The suit resulted in a compromise decree. In pursuance of the compromise a further agreement dated December 1, 1960 was executed between the parties. However in 1963 respondent no. 1 again filed a suit claiming as a sub-lessee or as lessee a right to exhibit

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films in the said building and praying that the defendants be restrained from interfering with that right. The suit was filed under s. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 in the Court of Small Causes. In this suit respondent no. 1 asked the court to try additional issues Nos. 11, 12 and 13 as preliminary issues. In issue no. 11 the question raised was whether the consent decree in the earlier suit operated as *res judicata* so that R & F could not question that the agreements between them and respondent no. 1 constituted a lease. Issue

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no. 12 raised the question whether in view of the consent decree R & F were estopped from leading evidence and asking questions in cross-examination to show that the said agreements did not constitute a lease. Issue No. 13 raised the question whether s. 92 of the Indian Evidence Act debarred R & F from leading evidence to the effect that the documents in question did not constitute a lease. The Trial Court refused to try these as preliminary issues and its order was upheld by the High Court.

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At the hearing of the case when the counsel for the defendants sought to ask a witness for respondent No. 1 whether the agreement dated November 27, 1954 was a commercial transaction and not a lease respondent No. 1 objected to the question. The objection was disallowed by the trial court. In revision under s. 115 of the Code of Civil Procedure the High Court did not interfere with the trial court's order in respect of issues Nos. 12 and 13. In respect of issue No. 11, the High Court held that the agreement dated November 27, 1954 must in view of the consent

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decree in suit No. 149 of 1960 be held to be a lease, and that the consent decree created a bar of *res judicata* in respect of the issue whether the said agreement created a lease. The defendants-appellants appealed to this Court.

HELD : (i) The High Court had no jurisdiction to record any finding on the issue of *res judicata* in a revision application filed against an order refusing to uphold an objection to certain question asked to a witness under

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examination. The Court erred in proceeding to decide matters on which no decision was till then recorded by the trial court and which could not be decided by the High Court until the parties had opportunity of leading evidence thereon. [441 F]

(ii) By ordering that a question may properly be put to a witness who was examined, no case was decided by the Trial Court within the meaning of s. 115 of the Code of Civil Procedure. The expression 'case' is not limited in its import to the entirety of the matter in dispute in a proceeding. Such an interpretation may result in certain cases in denying relief to the aggrieved litigant where it is most needed. But equally, it is not every order of the court in the course of a suit that amounts to a case decided. A case may be said to be decided only if the court adjudicates, for the purpose of the suit, some right or obligation of the parties in controversy. [441H-442C]

Major S. S. Khanna v. *Brig. F. J. Dillon*, [1964] 4 S.C.R. 409, referred to.

(iii) A consent decree, according to the decisions of this Court, does not operate as *res judicata*, because a consent decree is merely the record of a contract between the parties to a suit, to which is superadded the seal of the court. A matter in contest in a suit may operate as *res judicata* only if there is an adjudication by the court: the terms of s. 11 of the Code leave no scope for a contrary view. [441E]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1940 of 1967.

Appeal by special leave from the judgment and order dated April 17, 27, 1967 of the Gujarat High Court in Civil Revision Application 328 of 1967.

S. T. Desai and *I. N. Shroff*, for the appellants.

M. P. Amin, P. M. Amin, P. N. Dua and *J. B. Dadachanji*, for respondent No. 1.

R. P. Kapur, for respondents Nos. 2 and 3.

The Judgment of the Court was delivered by

Shah, J. By insistence upon procedural wrangling in a comparatively simple suit pending in the Court of Small Causes at Ahmedabad the parties have effectively prevented all progress in the suit during the last six years.

A building in the town of Ahmedabad used as a cinematograph theatre belonged originally to Messrs. Popatlal Punjabhai. estate of the owners and on August 19, 1954, the receivers estate of the owners and on August 19, 1954, the receivers granted a lease of the theatre on certain terms and conditions to two persons, Raval and Faraqui. By an agreement dated November 27, 1954, between Raval and Faraqui on the one hand and Messrs. Filmistan Distributors (India) Private Ltd. hereinafter called 'Filmistan—on the other hand, right to exhibit cinematograph films was granted to the latter on certain terms and conditions. "Filmistan" instituted suit No. 149 of 1960 in the Court of the Civil Judge (Senior Division) at Ahmedabad against Raval and Faraqui and two other persons claiming a declaration that it

A was entitled pursuant to the agreement dated November 27, 1954, to exhibit motion pictures in the theatre. By an order dated December 1, 1960 the suit was disposed of as compromised. It was *inter alia* agreed that Raval and Faraqui were bound and liable to allow Filmistan to exercise its "exhibition rights" in the theatre; that Raval and Faraqui, their servants and agents were B not to have any right to exhibit any picture in contravention of the terms and conditions of the agreement dated November 27, 1954; and that Raval and Faraqui shall "execute and register" an agreement in writing incorporating the said agreement with the variation as to rental. Pursuant to this agreement, a fresh agreement was executed on December 1, 1960. On September 1, C 1963, Filmistan filed suit No. 1465 of 1963 in the Court of Small Causes at Ahmedabad, *inter alia,* for a declaration that as sub-lessee or as lessee under law it was entitled to obtain and remain in possession of the theatre and to exhibit cinematograph films and to hold "entertainment performances" etc. in the theatre, and that one Shabeer Hussain Khan Tejabwala had no right, title D or interest in the theatre, that the defendants in the suit be ordered to hand over vacant and peaceful possession of the theatre, and the defendants, their servants and agents be restrained by an injunction from interfering directly or indirectly with its rights to obtain and remain in possession of the theatre or any part thereof and to exercise its right of exhibiting "motion pictures" E and entertainment performances etc. This suit was filed against the receivers in insolvency of the owners of the theatre, against Raval and Faraqui, against Tejabwala and also against Baldevdas Shivlal who claimed to be the owner of the theatre. The suit was based on the claim by Filmistan as lessees or sub-lessees of the theatre and was exclusively triable by the Court of Small Causes F by virtue of s. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Three sets of written statements were filed against the claim made by Filmistan, but no reference need be made thereto, since at this stage in deciding appeal the merits of the pleas raised by the defendants are not relevant. After issues were raised on June 20, 1966, the plaint G was amended and additional written statements were filed by the defendants. The learned Judge was then requested to frame three additional issues in view of the amended pleadings : the issues were :

> "1. Whether in view of the said consent decree in H suit No. 149 of 1960 defendants Nos. 5 and 6 are debarred on principles of *res judicata* from agitating the question that the said document dated November 27, 1954 as confirmed by their letter dated January 31,

1955 and further confirmed by document dated December 1, 1960 is not a lease ? A

12. Whether in view of the said consent decree, defendants 5 and 6 are estopped from contending and leading any evidence and putting questions in cross-examination of plaintiffs witnesses to show that the said document dated November 27, 1954 as confirmed by their letter dated January 31, 1955 and further confirmed by document dated December 1, 1960 is not a lease ? B

13. Whether in respect of the terms of the said consent decree as also of the said document dated November 27, 1954, as confirmed by their letter dated January 31, 1955 and further confirmed by document dated December 1, 1960 defendants Nos. 5 and 6 are debarred from leading any evidence of the plaintiffs witnesses in view of s. 92 of the Evidence Act ?" C

In drawing up the additional issues not much care was apparently exercised : whether a party is entitled to lead evidence or to put questions in cross-examination of the plaintiff's witnesses cannot form the subject-matter of an issue. D

Filmistan then applied to the Court of Small Causes for an order that issues Nos. 11, 12 & 13 be tried as preliminary issues. The learned Judge observed that the issues were not purely of law, that in any event the case or any part thereof was not likely to be disposed of on these issues, and that ordinarily in "appealable cases" the Court should, as far as possible, decide all the issues together and that piecemeal trial might result in protracting the litigation. He also observed that the issues were not of law going to the root of the case and were on that account not capable of being decided without recording evidence. E F

A revision application against that order was dismissed *in limine* by the High Court of Gujarat. When the case reached hearing and the evidence of a representative of Filmistan was being recorded, counsel for the defendants asked in cross-examination the question whether the "agreement between the plaintiff and defendant Nos. 5 and 6 was a commercial transaction and was not a lease ?" The question was objected to by counsel appearing for Filmistan. Thereafter elaborate arguments were advanced and the Trial Judge passed an order disallowing the objection. G

The objection to the question raised by Filmistan was not that it related to a matter to be decided by the Court and on which the opinion of witnesses was irrelevant. The objection was raised as H

A an attempt to reopen the previous decision given by the Trial Judge refusing to try issues Nos. 11, 12 & 13 as preliminary issues. Counsel for Filmistan contended that an enquiry into the nature of the legal relationship arising out of the agreement dated December 1, 1960 "was barred by the principle of *res judicata* and estoppel under the provisions of s. 92 of the Evidence Act", since B the question was already concluded by the consent decree in suit No. 149 of 1960. The Trial Judge observed that he had carefully gone through the consent decree and the registered agreement dated December 1, 1960, and he found that the consent decree had not decided that the transaction between the parties of the year 1954 was in the nature of a lease; that in the plaint in the earlier suit it was not even averred that the rights granted were C in the nature of leasehold rights; that suit No. 149 of 1960 was for declaration of the rights of Filmistan to exhibit motion pictures in the theatre under the agreement dated November 27, 1954, and for an injunction restraining the defendants from violating the said rights of Filmistan under the agreement; and that the agreement dated December 1, 1960 was "not plain enough to exclude D the oral evidence of the surrounding circumstances and conduct of the parties to explain its terms and language". Accordingly he held that the question asked in cross-examination of the witnesses for Filmistan intended to secure disclosure of the surrounding circumstances and conduct of the parties in order to show in what manner the language of the document was related to the E existing facts, could not be excluded. The Court also rejected the contention that there was any bar of estoppel, and held that evidence as to the true nature of the transaction was not inadmissible by virtue of s. 92 of the Evidence Act.

Filmistan feeling dissatisfied with the order invoked the revi- F sional jurisdiction of the High Court of Gujarat under s. 115 of the Code of Civil Procedure. The revision petition was entertained and elaborate arguments were advanced at the Bar. The High Court referred to a number of authorities and observed that the correctness of the findings of the Trial Court on issues Nos. 12 and 13 may not be examined in exercise of the powers under s. 115 of the Code of Civil Procedure. The Court proceeded to G observe :

> "The question then arises for consideration whether in fact the subordinate Court has decided the question of *res judicata*", and that "it is true that the jurisdiction of the Court of mall Causes to decide disputes between a H tenant and his landlord and falling within the purview of s. 28 of the Bombay Rent Control Act is derived from s. 28 of the said Act, but at the same time if an issue is in fact barred by *res judicata*, then the Court has no

jurisdiction on principles of *res judicata* to go into that question or to decide that question over again to the extent to which the Court, *viz.*, the trial court in the instant case, proposed to go into that question and allow the whole question, that was closed once for all by consent decree of December 1, 1960, to be reopened, it is proposing to exercise the jurisdiction which is not vested in it by law. It is not open to any Court of law to try an issue over again or reopen the same if an earlier decision operates as *res judicata*. Once the jurisdiction of the Court has been taken away, any proposal to reopen the question closed by the earlier decision would be exercise of jurisdiction which is not vested in the Court by law and to that extent the decision would become revisable, even if it is the decision as to the *res judicata* of an issue",

and concluded :

"It is not open to me in revision at this stage to express any opinion about the rights and contentions of the parties with reference to the agreement of December 1, 1960. But the only thing that can be said is that so far as the agreement of November 27, 1954, is concerned, it must be held, in view of the consent decree of December 1, 1960, that that document of November 27, 1954, created a lease.....

The consent decree must be held to create a bar of *res judicata* as far as the question of document of November 27, 1954, creating a lease is concerned. The learned Judge will not proceed with the trial".

By s. 115 of the Code of Civil Procedure the High Court is invested with power to call for the record of any case decided by any Court subordinate to such High Court and in which no appeal lies thereo, if such subordinate court appears—(a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, and to make such order in the case as it thinks fit. Exercise of the power is broadly subject to three important conditions (1) that the decision is of a Court subordinate to the High Court; (2) that there is a case which has been decided by the subordinate Court; and (3) that the subordinate Court has exercised jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

A In the present case the Court of Small Causes had only decided that a question seeking information about the true legal relationship arising out of the document could be permitted to be put to the witnesses for Filmistan. The Court gave no finding expressly or by implication on the issue of *res judicata* or any other issue. In the view of the Trial Court the question whether the legal relaB tionship arising out of the agreement dated December 1, 1960 was in the nature of a lease or of other character had to be decided at the trial and the previous judgment being a judgment by consent "could not operate as *res judicata*", for, it was not a decision of the Court, and that the consent decree in suit No. 149 of 1960 had not decided that the agreement dated March 27, 1954, was of the nature of a lease, and that in the plaint in that suit it was not C even averred that it was a lease.

The Trial Judge in overruling the objection did not decide any issues at the stage of recording evidence : he was not called upon to decide any issues at that stage. The observations made by him obviously relate to the arguments advanced at the Bar and can D in no sense be regarded even indirectly as a decision on any of the issues. But the High Court has recorded a finding that the agreement dated November 27, 1954, created a lease and that the consent decree operated as *res judicata*. A consent decree, according to the decisions of this Court, does not operate as *res judicata*, because a consent decree is merely the record of a contract between the parties to a suit, to which is superadded the seal of the Court. E A matter in contest in a suit may operate as *res judicata* only if there is an adjudication by the Court : the terms of s. 11 of the Code leave no scope for a contrary view. Again it was for the Trial Court in the first instance to decide that question and thereafter the High Court could, if the matter were brought before it by way of appeal or in exercise of its revisional jurisdiction, have F decided that question. In our judgment, the High Court had no jurisdiction to record any finding on the issue of *res judicata* in a revision application filed against an order refusing to uphold an objection to certain question asked to a witness under examination.

The true nature of the order brought before the High Court G and the dimensions of the dispute covered thereby apparently got blurred and the High Court proceeded to decide matters on which no decision was till then recorded by the Trial Court, and which could not be decided by the High Court until the parties had opportunity to lead evidence thereon.

H It may also be observed that by ordering that a question may properly to put to a witness who was being examined, no case was decided by the Trial Court. The expression "case" is not limited in its import to the entirety of the matter in dispute in an action.

This Court observed in *Major S. S. Khanna* v. *Brig. F. J. Dillon*(1) that the expression "case" is a word of comprehensive import : it includes a civil proceeding and is not restricted by anything contained in s. 115 of the Code to the entirety of the proceeding in a civil court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But it was not decided in *Major S. S. Khanna's* case(1) that every order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of s. 115 of the Code of Civil Procedure.

The order passed by the High Court is set aside and the Trial Court is directed to proceed and dispose of the suit. We trust that the suit will be taken up early for hearing and disposed of expeditiously. We recommend that the form of the issues Nos. 11, 12 and 13 will be rectified by the learned Trial Judge.

Filmistan will pay the costs of the appeal in this Court and in the High Court.

G.C. *Appeal allowed.*

(1) 1964 4 S.C.R. 409.