IFTIKHAR AHMED AND OTHERS

v.

SYED MEHARBAN ALI AND OTHERS

February 26, 1974

[K. K. MATHEW AND A. ALAGIRISWAMI, JJ.]

Practice—Res-judicata between co-plaintiffs—Order of Court setting aside award and remitting award for fresh arbitration—If can be questioned in proceedings arising from the second award.

The dispute between the appellants and the respondents, as to who were the bhumidars of certain properties, was referred by the Consolidation Officer under the U.P. Consolidation of Holdings Act, 1953, to the Civil Judge, who referred it to an arbitrator appointed under the Act. The arbitrator held that the respondents had no title as bhumidars, relying upon a judgment of the High Court, which, according to the arbitrator operated as *res-judicata* between the parties. That judgment was delivered in a suit instituted by the appellant's predecessor and the present respondents for a declaration that a mortgage decree in favour of the defendant in that suit did not affect the shares of the respondents in the properties in dispute, and the High Court held that the appellant's predecessor alone was entitled to the properties, accepting the contention of the defendant in that suit that the respondents had no title whatsoever.

The Civil Judge held that the award was manifestly wrong because, that judgment according to him did not operate as *res-judicata* between the parties. He therefore set aside the award and remitted the case to another arbitrator. The second arbitrator held that the appellant and respondents were co-bhumidars and determined the shares of the parties holding that the judgment of the High Court did not operate as *res judicata*. This award was confirmed by the Civil Judge and the High Court agreed with the Civil Judge.

Allowing the appeal to this Court,

HELD : (a) If a judgment is to operate as *res judicata* between co-defendants it is necessary to establish (i) that there was a conflict of interest between the co-defendants, (ii) that it was necessary to decide the conflict in order to give relief to the plaintiff, and (iii) that the Court actually decided the question. There is no reason why a previous decision could not operate as *res judicata* between co-plaintiffs also if these three conditions are satisfied *mutatis mutandis*. [467 H; 468 B—C]

(b) In the judgment of the High Court which was relied upon as having operated as *res judicata* there was actual conflict of interest between the present appellant on the one hand and the present respondent on the other, they were the plaintiffs in that suit, and it was necessary to decide that conflict in order to give relief to the defendant in that suit; and the High Court decided that the properties belonged exclusively to the appellant's predecessor. The effect of that judgment is that the present respondents failed to establish their contention that they had title to the properties. [467 F—H]

(c) There was no finding by the arbitrator that by adverse possession the respondents had acquired title to the property at any time. [468 F]

(d) The provisions of Arbitration Act apply to proceedings before an arbitrator under the U.P. Consolidation of Holdings Act. Therefore, if the judgment of the High Court operated in law as *res judicata* it would be an error of law apparent on the face of the award if it says that the judgment would not operate as *res judicata*. Hence, the Award in the present case was liable to be set aside under s. 30 of the Arbitration Act. [468 F—H]

(e) Under s. 39 of the Arbitration Act no appeal lies from an order remitting an award to an arbitrator under s. 16 of the Arbitration Act. Therefore,

A the appellant could not have challenged the order when the Civil Judge set aside the first award and remitted the case to the arbitrator for passing a fresh award. Hence, there is no reason why the appellant should be precluded from challenging the correctness of that order in this appeal and getting relief on that basis. [469 B]

(f) Since, in the circumstances of the case it would be an empty formality to remit the case again to the arbitrator the award of the first arbitrator is B restored. [469 C]

Sheonarayan Singh v. *Ramnandan Prasad Narayan Singh* A.I.R. [1916] P.C. 78, applied.

Chandu Lal v. *Khalilur Rahaman* A.I.R. [1950] P.C. 17, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1646 (N) of 1967.

C Appeal by Special Leave from the judgment and order dated the May 19, 1967 of the Allahabad High Court in First Appeal No. 424 of 1969.

J. P. Goyal and *Sobhagmal Jain*, for the appellants.

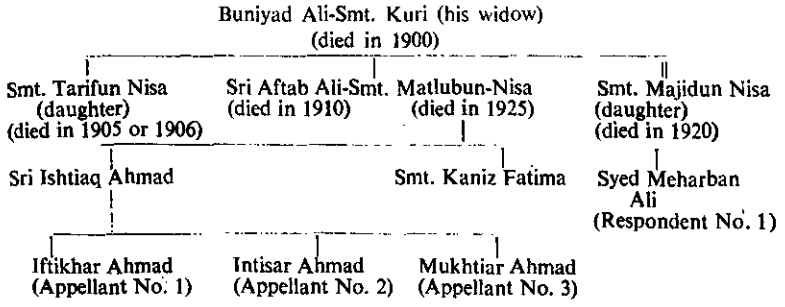
Hira Lal Jain, (not present) for respondent No. 1(a).

V. S. Desai and *N. M. Kshatriya*, for respondent no. 1.

D The Judgment of the Court was delivered by

MATHEW, J.—In this appeal, by special leave, the question for consideration is whether the High Court of Allahabad was right in setting aside the decree passed by the District Judge, Meerut, in appeal, setting aside an award passed by the arbitrator appointed under the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter re-E ferred to as the Act).

In order to appreciate the question in issue, the following pedigree is useful :



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The appellants are the legal representatives of Ishtiaq Ahmed. In the consolidation proceedings under the Act with respect to the properties in question which originally belonged to Buniyad Ali, dispute arose between Ishtiaq Ahmed on the one hand and Meharban Ali and Kaniz Fatima on the other hand as regards the title to them. Meharban Ali and Kaniz Fatima claimed that they were co-bhumidhars H of the properties along with Ishtiaq Ahmed. Ishtiaq Ahmed contended that all the assets of Buniyad Ali were inherited by his son Aftab Ali and that after the death of Aftab Ali in 1910 and his widow in 1925, he became the exclusive owner of the properties as the other heirs had

relinquished their rights in them. Ishtiaq Ahmed also claimed title to the properties by adverse possession. As the dispute between the parties was concerned with the title to the properties, the Consolidation Officer referred the matter to the Civil Judge, Meerut who referred the same to an arbitrator appointed under the Act. The arbitrator held that Meharban Ali and Kaniz Fatima had no title and so were not co-bhumidhars of the properties with Ishtiaq Ahmad. For reaching this conclusion the arbitrator mainly relied on a judgment of the High Court of Allahabad which, according to the arbitrator, operated as *res judicata* between the parties with respect to the title to the properties.

Both the parties filed objections to the award before the learned II Civil Judge, Meerut. He held that the judgment of the High Court relied on by the arbitrator did not operate as *res judicata* between the parties as regards the title to the properties and that the decision of the arbitrator, based as it was on that judgment operating as *res judicata,* was manifestly wrong and the award was consequently vitiated by an error of law apparent on the face of the award. He, therefore, set aside the award and remitted the case to the arbitrator for a fresh decision.

The arbitrator Mr. R. P. Gupta considered the case. He came to the conclusion, on the basis of the oral and documentary evidence, that the parties were co-bhumidhars of the properties except in respect of 9 *bighas* 3 *biswas* 3 *biswasis* and determined their shres in the properties. The arbitrator was of the view that the judgment of the High Court was not *res judicata* as regards the title of the parties to the properties.

Against this award, Ishtiaq Ahmed filed objections before the II Civil Judge, Meerut. The Civil Judge considered the objections and found that there was no manifest error or illegality in the award and he confirmed the award.

Ishtiaq Ahmed preferred an appeal from this decision before the District Judge. Ishtiaq Ahmed died during the pendency of the appeal and his legal representatives, the present appellants, prosecuted the appeal. The District Judge held, that the award suffered from an error of law apparent on the face of the record in that the arbitrator ignored the judgment of the High Court which operated as *res judicata* as regards the title of the parties to the properties. He, therefore, allowed the appeal and set aside the decree appealed from and remitted the case to the arbitrator for a fresh decision.

The respondents filed a revision before the High Court against the decision of the District Judge and the High Court reversed the decision and restored the decree passed by the Civil Judge confirming the award.

Mr. Goel appearing for the appellants submitted that the High Court went wrong in reversing the decree of the District Judge. He argued that the award was vitiated by an error of law apparent on the face of the record as the award proceeded on the basis that the judgment of the High Court did not operate as *res judicata* in respect

A of the title of the parties to the properties, and therefore, the decision of the District Judge setting aside the award was correct.

Now, let us consider the nature of the judgment passed by the High Court and see whether it operated as *res judicata* in respect of the question of title of the parties to the properties and whether there was any manifest error of law apparent on the face of the award. That B judgment related to the properties in dispute and was passed in second appeal from a decree in a suit (Suit No. 600 of 1934) instituted by Meharban Ali, Kaniz Fatima and Ishtiaq Ahmed for a declaration that the decree obtained in O.S. No. 128 of 1929 by Ishari Prasad, the defendant in that suit on the foot of a mortgage deed dated November 5, 1925 executed in his favour by Matlub-un-nissa did not affect the shares of Meharban Ali and Kaniz Fatima in the mortgaged properties C and that the mortgage, and the decree obtained thereon were invalid to the extent of their shares in the properties. Ishari Prasad, the defendant in that suit, contended that Matlub-un-nissa, the mortgagor alone was entitled to the properties mortgaged and that the decree obtained by him on the mortgage was valid. In substance, the contention of Ishari Prasad was that Meharban Ali and Kaniz Fatima had no title D to the properties as the latter and the former's mother had relinquished their shares and that the title to the properties vested exclusively in the mother of Ishtiaq Ahmed, namely, Matlub-un-nissa. The trial Court passed a decree dismissing the suit holding that Kaniz Fatima and Meharban Ali's mother relinquished their shares in the properties and that Matlub-un-nissa, the mortgagor, alone was entitled to the properties and, therefore, the mortgage, and the decree based thereon were E valid. The plaintiffs in the suit (Suit No. 600 of 1934) preferred an appeal from the decree. That was dismissed. The decree dismissing the appeal was confirmed by the High Court in the second appeal filed by them.

There can be no doubt that by the written statement, Ishari Prasad, the mortgagee, denied the title of Kaniz Fatima and Meharban Ali to the properties and set up the contention that Matlub-un-nissa, the mor- F gagor, from whom Ishtiaq Ahmed traced his title, alone was entitled to the properties. There was, therefore, an actual conflict of interest between Ishtiaq Ahmed on the one hand and Kaniz Fatima and Meharban Ali on the other, and it was necessary to decide the conflict in order to give relief to the defendant (Ishari Prasad) and the Court decided that the properties belonged exclusively to the mortgagor, the mother G of Ishtiaq Ahmed.

The effect of the judgment is that Kaniz Fatima and Meharban Ali failed to establish their contention that they had title to the properties, and, the question is, could they be allowed to agitate the same question?

Now it is settled by a large number of decisions that for a judgment to operate as *res judicata* between or among co-defendants, it is neces- H sary to establish that (1) there was a conflict of interest between co-defendants; (2) that it was necessary to decide the conflict in order to give the relief which the plaintiff claimed in the suit; and (3) that the court actually decided the question.

In *Chandu Lal* v. *Khalilur Rahman*(1) Lord Simonds said : A

> "It may be added that the doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided". B

We see no reason why a previous decision should not operate as *res judicata* between co-plaintiffs if all these conditions are *mutatis mutandis* satisfied. In considering any question of *res judicata* we have to bear in mind the statement of the Board in *Sheoparsan Singh* v. *Ramanandan Prasad Narayan Singh*(2) that the rule of *res judicata* C "while founded on ancient precedent is dictated by a wisdom which is for all time' and that the application of the rule by the courts "should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

> "The *raison d'etre* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had D deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule."

(see *Ram Bhaj* v. *Ahmad Saidakhtar Khan*(3).

In the award, the arbitrator has stated that the judgment of the High Court in the second appeal would not operate as *res judicata* as E regards the title to the properties but was only a piece of evidence. The arbitrator came to the conclusion that the respondents were in joint possession of the properties and, therefore, there was no ouster. If the judgment operated as *res judicata,* the respondents had no title to the properties. There was no finding by the arbitrator that by adverse possession they had acquired title to the properties at any point of time. The question which was referred to the arbitrator was the dispute between the parties as regards the title to the properties. If the judgment F of the High Court operated in law as *res judicata,* it would be an error of law apparent on the face of the award if it were to say that the judgment would not operate as *res judicata.* The District Judge was, therefore, right in holding that the award was vitiated by an error of law apparent on its face in that it was based on the proposition that the judgment of the High Court would not operate as *res judicata* on G the question of title to the properties. If an award sets forth a proposition of law which is erroneous, then the award is liable to be set aside under s. 30 of the Arbitration Act. This Court has held that the provisions of the Arbitration Act will apply to proceedings by an arbitrator under the Act (see *Charan Singh and Others* v. *Babulal and Others*(4).

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(1) A.I.R. 1950 P.C. 17.
(2) A.I.R. 1916 P.C. 78.
(3) A.I.R. 1938 Lah. 571.
(4) [1966] Supp. S.C.R. 63.

A It might be recalled that the II Civil Judge set aside the first award and remitted the case to the arbitrator for passing a fresh award under s. 16 of the Arbitration Act. That was only on the basis that the arbitrator committed an error of law in relying upon the judgment of the High Court as finally determining the title to the properties. As no appeal under s. 39 of the Arbitration Act lay from an order remitting an award to an arbitrator under s. 16 of the Arbitration Act, Ishtiaq
B Ahmed could not have challenged the order. There is, therefore, no reason why the appellants should be precluded from challenging the correctness of that order in this appeal and getting relief on that basis.

We set aside the order of the High Court and allow the appeal. In the circumstances we think it would be an empty formality to restore the decision of the District Judge and remit the case again to the arbi-
C trator. We restore the award dated March 30, 1959, passed by Mr. K. C. Govil, the first arbitrator. We make no order as to costs.

V.P.S. *Appeal allowed.*