GANGABAI W/O RAMBILAS GILDA

v.

CHHABUBAI W/O PUKHARAJJI GANDHI

November 6, 1981

[D.A. DESAI AND R.S. PATHAK, JJ.]

Res judicata, bar of—Question of title in Small Cause Suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as res judicata—Section 11 of the Code of Civil Procedure.

Evidence Act—Admissibility of oral evidence—Bar imposed by sub-section (1) of section 92 of the Act—Scope of.

Being in need of money, respondent entered into an agreement with the appellant for a loan of Rs. 2,000 and it was decided that simultaneously she should execute a nominal document of sale and rent note, of her house situated near Sarafa Bazar in Amravati. These documents were executed on January 7, 1953. The respondent continued in the possession of the house property throughout and carried on repairs from time to time. Since the appellant was attempting to enforce the document as a sale deed by filing suits in the Court of Small Causes for recovery of rent and the said suits had resulted in a decree, the respondent filed a suit for declaration that she was and continued to be owner of the house property. The documents executed on January 7, 1953, it was said, were never intended to be acted upon. In defence, the appellant maintained that the sale deed represented a genuine transaction, and ownership of the house property had passed to her. It was further pleaded that the decrees passed by the Court of Small Causes operated as res judicata barring the respondent from pleading that the sale deed was merely a nominal transaction. Reliance was also placed on section 92 of the Indian Evidence Act.

Dismissing the appeal by special leave, the Court

HELD : 1:1. 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 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. [1181 G—1182A-C]

A

1:2. Explanation VIII to section 11 of the Code of Civil Procedure operates only where an issue has been heard and finally decided in the earlier suit. [1182 D-E]

1:3. In the instant case, the finding rendered by the Court of Small Causes in the two suits filed by the appellant that the document executed by the respondent is a sale deed cannot operate as res judicata. [1182 E]

B

Poholi Mullick v. *Fukeer Chunder Patnaik*, (1874) 22 Suth W.R. 349; *Chet Ram and Others* v. *Ganga*, 1686 Allahabad Weekly Notes; *Anwar Ali* v. *Nur-Ul-Haq and Another*, (1907) 4 Allahabad Law Journal 517; *Khandu Valad Keru* v. *Tatia valad Vithoba*, (1871) 8 Bombay H.C.R.A.C. 23(24) (DB); *Mohd. Yusuf and another* v. *Abul Wahid*, A.I.R. 1948 All. 296 and *S.A.A. Annamalai Chettiar* v. *Molaiyan and others*, A.I.R. 1970 Mad. 396, approved.

C

Muhammad Abdul Ghafur Khan v. *Gokul Prasad and others*, A.I.R. 1914 All. 527; *Gulabchand Chhotalal Parikh* v. *State of Bombay*, [1965] 2 S.C.R. 574; *Madan Kishor and Another* v. *Mahabir Prasad and others*, A.I.R. 1929 All. 816; *Ram Dayal Sonar* v. *Sukh Mangal Kalwar*, A.I.R. 1937 All. 676; *Ganga Prasad* v. *Nandu Ram*, A.I.R. 1916 Patna 75; *Ganesh Das* v. *Feroze Din*, A.I.R. 1934 Lahore 355, *Puttangowda Mallangowda Patil* v. *Nilkanth Kalo Deshpande*, XV Bombay Law Reporter 773; *Asgarali Roshanalli and another* v. *Kayumalli Ibrahimji*, A.I.R. 1956 Bombay 236: *Lala Jageshwar Prasad* v. *Shyam Behari Lal*, A.I.R. 1967 All. 125; *Shyam Behari Lal* v. *Lala Jogeshwar Prasad*, [1970] 3 S.C.C. 591; *Manzural Haq and another* v. *Hakim Mohsin Ali*, A.I.R. 1970 All. 604; *Pateshwari Parshad Singh* v. *A. S. Gilani*, A.I.R. 1959 Punjab 420, referred to and dissented from.

D

2. The bar imposed by sub-section (1) of section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties. [1183 C-F]

E

F

Tyagaraja Mudaliyar and another v. *Vedathanni*, A.I.R. 1936 Privy Council 70, followed.

G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1537 of 1970.

Appeal by special leave from the judgment and order dated the 10/30th June, 1969 of the Bombay High Court, Nagpur Bench, Nagpur in Appeal No. 90 of 1962.

H

A *U. R. Lalit* and *A. G. Ratnaparkhi*, for the Appellant.

S. S. Khanduja for the Respondent.

The Judgment of the Court was delivered by

B PATHAK, J : This appeal by special leave arises out of a declaratory suit in respect of title to a house property.

The respondent filed a suit in the Court of the Second Joint Civil Judge, Amrawati alleging that the house situated near Sarafa C Bazar in Amrawati had been purchased by her in 1950 for Rs. 4,000 and thereafter improvements had been affected by her to the property. Being in need of money, she entered into an agreement with the appellant for a loan of Rs. 2,000 and it was decided that simultaneously she should execute a nominal document of sale and a rent note. These documents were executed on January 7, 1953. She D alleged that the documents were never intended to be acted upon, and that the rent paid by her represented in fact interest at 18% on the loan. She continued in possession of the house property throughout and, it is said, carried on repairs from time to time. It was stated that the appellant was attempting to enforce the document as a sale deed by filing suits in the Court of Small Causes for re- E covery of rent. As two suits had resulted in decrees, she considered it necessary to file the present suit for a declaration that she was, and continued to be, owner of the house property. In defence, the appellant maintained that the sale deed represented a genuine, transaction, and ownership of the house property had passed to the appellant. It was pleaded that the decrees passed by the Court of F Small Causes operated as res judicata barring the respondent from pleading that the sale deed was merely a nominal transaction. Reliance was also placed on s. 92 of the Indian Evidence Act.

The trial court held that the sale deed was never intended to be acted upon and decreed the suit. The appellant appealed to the G District Court, Amravati, but the learned District Judge did not accept the case that a sale had taken place. He held, however, that the transaction between the parties constituted a mortgage. He modified the trial court decree to conform to that finding. The High Court of Bombay, in second appeal, did not agree with the H finding of the lower appellate court that the transaction was a mortgage and affirmed the findings of the trial court that the sale deed and rent note were sham documents, that the decrees of the

Court of Small Causes did not operate as res judicata and that s. 92 of the Indian Evidence Act did not prevent the respondent from establishing the true nature of the transaction. Accordingly, the High Court set aside the decree of the lower appellate court and resorted that of the trial court.

When this appeal was heard by us, it appeared that the parties may settle the dispute by negotiated compromise. It seems, however, that no compromise has been possible. Accordingly, we proceed to dispose of the appeal on its merits.

Two points have been raised before us. The appellant urges that the Small Causes Court decrees, in view of the general principles of res judicata, precluded the trial of the question whether the sale transaction was a genuine transaction. The other point concerns the operation of section 92 of the Evidence Act.

The successive suits were filed by the appellant against the respondent in the Court of Small Causes for recovery of arrears of rent. In each suit the appellant contended that she was owner of the property and the respondent was her tenant. The tenancy was alleged on the basis of the document dated January 7, 1953 which on its terms purported to be a sale deed by the respondent in favour of the appellant. The respondent resisted the suits. The court decreed the suits on the finding that the document was a sale deed, and therefore the respondent was not the owner of the property but merely a tenant of the appellant. The question is whether this finding operates as res judicata in the instant suit. The High Court repelled the plea of res judicata on the ground that s. 11 of the Code of Civil Procedure governed the case, and that as a Court of Small Causes is not competent to try a suit for a declaration of title to immovable property, the court which passed the decrees relied on by the appellant was not competent to try the present suit and therefore an imperative condition of s. 11 was not satisfied.

It is contended before us on behalf of the appellant that the High Court erred in applying the statutory provisions of s. 11 of the Code, and should have invoked instead the general principles of res judicata. On that, it is submitted, all that was necessary to find was whether the Court of Small Causes was competent to try the two earlier suits and decide the issues arising therein. We have been referred to *Gulabchand Chhotalal Parikh* v. *State of Bombay*[1] where

(1) [1965] 2 S.C.R. 574.

A this Court has taken the view that the provisions of s. 11 of the Code are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit, and that on the general principles of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording B fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary, it was said, "that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter". The observations were made in considering C the question whether decisions on matters in controversy in writ petitions under Article 32 or Article 226 of the Constitution could operate as res judicata in subsequent regular suits on the same matters in controversy between the same parties.

D A number of other cases have been cited on behalf of the appellant in support of the plea of res judicata. We have considered them and we do not think that they help the appellant. In *Muhammad Abdul Ghafur Khan* v. *Gokul Prasad and others*(1) the Allahabad High Court limited itself to observing that a Court of Small Causes possessed a discretion on whether to return the plaint under s. 23, E Provincial Small Cause Courts Act on a finding that the relief claimed depended on proof of title. The same High Court in *Madan Kishor and Another* v. *Mahabir Prasad and others*(2) merely observed that it was for the Court of Small Causes to decide under s. 23 of the Provincial Small Cause Courts Act whether a question of F title was involved in the suit and on finding so it was open to it to return the plaint. That was also the view expressed by it in *Ram Dayal Sonar* v. *Sukh Mangat Kalwar*(3). So also in *Ganga Prasad* v. *Nandu Ram*(4), the Patna High Court said that the Court of Small Causes had power under s. 23 to return the plaint where it was of opinion that the question of title raised was so intricate that it G should not be decided summarily. To the same effect was the view expressed by the Lahore High Court in *Ganesh Das* v. *Feroze Din*.(5)

H (1) A.I.R. 1914 All.
(2) A.I.R. 1929 All. 816.
(3) A.I.R. 1937 All. 676.
(4) A.I.R. 1916 Patna 75.
(5) A.I.R. 1934 Lahore 355.

In *Puttangowda Mallangowda Patil* v. *Nilkanth Kalo Deshpande*(1), the Bombay High Court declared that a Court of Small Causes could render a finding on an issue as to title to immovable property but only in a suit which did not ask for that relief and merely for payment of a sum of money. Our attention was drawn to *Asgarali Roshanalli and another* v. *Kayumalli Ibrahimji*(2), but we find nothing there of assistance to the appellant. Reliance was placed on the decision of the Allahabad High Court in *Lala Jageshwar* v. *Shyam Behari Lal*(3). There a learned Single Judge took the view that as a Court of Small Causes is a Court of exclusive jurisdiction the restrictive conditions imposed by s 11 of the Code of Civil Procedure requiring "two-fold competency" of the Court whose decision is to operate as res judicata cannot be invoked. It was sufficient, he observed, that the decision had been rendered by a court of competent jurisdiction and it was not necessary that that court should also be competent to decide the subsequent suit. The judgment was brought in appeal to this Court but while disposing of the appeal, *Shyam Behari Lal* v. *Lala Jageshwar Prasad*(4), this Court declined to decide whether a Court of Small Causes could be regarded as a Court of exclusive jurisdiction. We find, however, that the view taken by the High Court in *Lala Jageshwar Prasad* (supra) was expressly overruled by a Full Bench of the High Court in *Manzurul Haq and another* v. *Hakim Mohsin Ali*(5) and it was laid down that a Court of Small Causes could be described as a court of "preferential jurisdiction" but not as court of "exclusive jurisdiction". It was also held by the Full Bench that a decision rendered by a Court of Small Causes in a suit for arrears of rent would not operate as res judicata in a subsequent suit filed in the Court of the Munsif for recovery of arrears of rent for a different period and for ejectment. That the principle of res judicata could not be availed of where a decision given by a Court of Small Causes was relied on in a subsequent regular civil suit was the view also taken by the Punjab High Court in *Pateshwari Parshad Singh* v. *A. S. Gilani*(6).

It seems to us that when a finding as to title to immovable property is rendered by a Court of Small Causes res judicata cannot

(1) XV Bombay Law Reporter 773.
(2) A.I.R. 1956 Bombay 236.
(3) A.I.R. 1967 All .125.
(4) [1970] 3 S.C,C. 591.
(5) A.I.R. 1970 All. 604.
(6) A.I.R. 1959 Punjab 420,

A be pleaded as a bar in a subseqpent 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 former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or B incidentally in issue for the purposes of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. It has long been held that 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. *Poholi* C *Mullick* v. *Fukeer Chunder Patnaik*(1), *Chet Ram and Others* v. *Ganga*,(2) *Anwar Ali* v. *Nur-Ul-Haq and Another*,(3) *Khandu valad Keru* v. *Tatia valad Vithoba*(4). See also *Mohd. Yusuf and another* v. *Abdul Wahid*(5) and *S.A.A. Annamalai Chettiar* v. *Molaiyan and others*(6). Our attention has been drawn to Explanation VIII to s. 11 in the Code D of Civil Procedure recently inserted by the Code of Civil Procedure (Amendment) Act, 1976. Section 97(3) of the Amendment Act declares that the new provision applies to pending suits, proceedings, appeals and applications. In our opinion the Explanation can be of no assistance, because it operates only where an issue has been heard and finally decided in the earlier suit.

E Accordingly, we hold that the finding rendered by the Court of Small Causes in the two suits filed by the appellant that the document executed by the respondent is a sale deed cannot operate as res judicata in the present suit.

The next contention on behalf of the appellant is that sub-s. F (1) of s. 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parol evidence in support of the contention. Section 91 of the Evidence Act provides that when the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all G cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the

(1) [1874] 22 Suth W.R. 349.
(2) 1886 Allahabad Weekly Notes.
(3) [1907] 4 Allahabad Law Journal 517.
H (4) [1871] 8 Bombay H.C.R.A.C. 23 (24) (DB).
(5) A.I.R. 1948 All. 296.
(6) A.I.R. 1970 Mad. 396.

terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-s. (1) of s. 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms And the first proviso to s. 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contradicting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-s. (1) of s. 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties. *Tyagaraja Mudaliyar and another* v. *Vedathanni.*[1] The Trial Court was right in permitting the respondent to lead parol evidence in support of her plea that the sale deed dated January 7, 1953 was a sham document and never intended to be acted upon. It is not disputed that if the parol evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must also fail.

In the result, the appeal is dismissed with costs.

S.R. *Appeal dismissed.*

(1) A.I.R. 1936 Privy Council 70.