TULSAN

v.

PYARE LAL AND ORS.

SEPTEMBER 29, 2006

[S.B. SINHA AND DALVEER BHANDARI, JJ.]

Code of Civil Procedure, 1908:

s.47, Order 23, Rule 1—Suit for declaration with regard to shares in property allocated in a consent decree passed in a suit for injunction—Held, in view of provisions of s.47, subsequent suit is clearly barred—A consent decree remains valid unless it is set aside—It would be binding on parties—Although principles of **res judicata stricto sensu** *would not apply, principles of estoppel would apply –A consent decree in terms of Order 23, r.1 need not be confined to relief prayed or subject matter of suit—It would be binding on parties and on revenue authorities—Estoppel.*

Respondent no. 1 filed a suit against respondent no. 3 and the appellant, the wife of respondent no. 2, for permanent injunction. The parties were co-sharers. A settlement was arrived at between the parties with regard to allocation of shares in the properties, and the suit was decided in terms of the compromise. The respondents moved the revenue-authorities for mutation, on the basis of the consent decree. Their request was stated to have been declined on the ground that by reason of the said consent decree, their right, title and interest had not been declared. Therefore, a second suit was filed for declaration. The present appeal was filed against the decision of the High Court in the second appeal arising out of the said suit for declaration.

It was contended for the appellant that in view of the provisions of s.47 of the Code of Civil Procedure, 1908, the said second suit was not maintainable.

Allowing the appeal, the Court

HELD:1.1. A consent decree in terms of Order 23, Rule 1 of the Code of Civil Procedure, 1908 need not be confined only to the reliefs prayed for. It may not be confined to the subject matter of the suit. Although, the consent decree was passed in a suit for injunction, for all intent and purpose it was a

A preliminary decree passed in a suit for partition. A fresh proceeding could not be initiated for giving effect thereto, even if respondents' contention that their rights to possess under the consent decree were not found to be enforceable by the Revenue authorities was to be accepted. [871-D-E]

1.2. In view of the provisions contained in Section 47 of the Code, a B subsequent suit was clearly bared. A consent decree, it is trite, remains valid unless it is set aside. It would be binding on the parties. Although, the principles of *res judicata stricto sensu* would not apply, the principles of estoppel would. The respondents could not disclaim the said consent decree by filing a suit for declaration. The consent decree was also binding on the C Revenue Authorities. Respondents also could initiate a proceeding for preparation of final decree. They could also have filed an appropriate application for measurement of the land and delivery of possession pursuant thereto. But, by no stretch of imagination, a second suit could be held to be maintainable. [871-E-F; 872-F-G]

D *Venkata Reddy and Ors.* v. *Pethi Reddy,* AIR (1963) SC 992, relied on.

Uma Shankar (dead) and Ors. v. *Sarabjeet (dead) by LRs. and Ors.,* [1996] 2 SCC 371, held not applicable.

2. The High Court failed to take into consideration that there existed E an error apparent on the face of record. As the second suit filed by respondent no. 1 was not maintainable, the question of directing appellant to give one bigha of land, out of her share to respondent no. 1 did not arise. It also erred in holding that in terms of the compromise arrived at by and between the parties, respondent no. 1 was entitled to 1/3rd of the total property plus one bigha. [873-B-C]

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3. The respondents would be at liberty to file an appropriate application, if they so desire, for measurement of lands in question and division of lands in terms of the said consent decree. It is further declared that the consent decree shall be binding on the Revenue Authorities. [873-C-D]

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4329 of 2006.

From the final Judgment and Order dated 23.3.2004 of the High Court of Himachal Pradesh at Shimla in Civil Review Nos. 34 and 52 of 2003.

R. Sundaravaradan, R.N. Keshwani and Ramlal Roy for the Appellant.

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Bhupender Yadav, R.C. Kohli and Deepak Yadav for the Respondents. A

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

The parties are co-sharers. Respondent No. 1 herein filed a suit against B Bir Singh, Respondent No. 3 as also Appellant herein for permanent injunction. Appellant is wife of Respondent No. 2. A settlement was arrived at by and between the parties. The terms of the settlement were reduced to writing. It was filed before the Court and accepted. A decree was passed on the basis of the terms of the said settlement. It was recorded therein:

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> "...Now, the Panchayat has settled the disputes amongst the parties to the effect that the portion where there is abadi and which is in the possession of which party, has been given to the same party and that there is no objection to the second party in this regard nor shall be there any objection in the future also. Apart from it has been decided that the 1/3rd portion of the remaining lands shall go to Pyare Lal and D 1/3rd portion shall go to Amrit Pal and Mohan Lal and Ved Prakash sons of Kewal, grand sons of Bir Singh and the 1/3rd share shall go to Bir Singh son of Shri Asa Ram. It has been further decided that all the criminal and civil cases going on between the parties shall be withdrawn and they shall be bound by the same. Apart from the E above, the Will executed earlier shall be treated as cancelled and a new Will shall be executed in the light of the above decision. All the three parties shall bear the expenses in equal shares. For which none of the parties shall have any objection. It has been further decided that out of the portion given to Bir Singh, one bigha of land shall be given to Pyare Lal and to which proposal all the parties have agreed. F Apart from this none of the parties shall fight/ dispute with regard to the aforesaid properties in future..."

Pursuant to or in furtherance of the said consent decree, Respondents allegedly moved the Revenue Authorities for mutation of their names. The same was denied on the ground that by reason of the said consent decree G the right, title and interest of Respondents had not been declared.

A second suit, therefore, was filed for declaration. A counter-claim was also filed by Appellant. The plaint was amended. In the plaint it was stated:

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A "That the Defendant No. 2 Tulsan, instituted suit against Bir Singh and Kewal Ram Defendants on 22.4.1987 about the land bearing Khasra Nos. 39,57,38,45,46,47,52,53,54,55,56 and 376 total area 7191.94 by leaving the land in dispute as was settled in between the parties in earlier suit as stated above. Although the suit filed by Tulsan against Bir Singh and Kewal Ram was collusive in nature yet the plaintiff has B no cudgel with the land as stated above which she got in a collusive decree from Bir Singh and Kewal Ram, because the Defendants have already admitted the Plaintiff to be the owner in possession of the land in suit alongwith one bigha of land out of land fallen at that time to the share of Bir Singh Defendant as mentioned in its para of the C plaint"

The reliefs claimed in the said suit *inter alia* are as under:

"(i) That the plaintiff may kindly be declared as owner in possession of the property mentioned in para no. 1 of the plaint as well as D mentioned in para no. 6 of the plaint.

(ii) That the defendants may kindly be restrained permanently from claiming any right, title and interest in the property in suit and from interference of any nature in the property in suit. The revenue record be also ordered to be recorrected and made up to date as per judgment E and decree of this land by substituting the name of the plaintiff in column of ownership.

(iii) That the Defendants be restrained from interfering in any manner in the passage existing on khasra No. 53. In case the Defendants succeeded in blocking the path at the end of khasra No, 57 and to the F beginning of Khasra No. 53 during the pendency of the suit then in that event in the alternative the decree for mandatory injunction be passed by giving directions to the Defendants to remove the blockade of the path/ passage at the end of khasra No. 57 and to the beginning of Khasra No. 53 which is the only connecting path to the house of the Plaintiff which is also depicted in the revenue record itself and for G decree for mandatory injunction directing the Defendant No. 1 to execute the Will and honour the compromise Ext. P.A. and further relief in the failure of the defendant No. 1 to execute the document the order be issued to the court official to execute the same on behalf of the defendant No. 1; or any other relief which may become due on the H facts and circumstances of the case may also be passed in favour of

the plaintiff and against the defendants with costs." A

A contention was raised in the written statement that the said suit was not maintainable in view of the provisions contained in Section 47 of the Code of Civil Procedure.

The learned Trial Judge while dismissing the said suit allowed the B counter-claim. The appeal preferred thereagainst was, however, allowed by the Appellate Court stating:

> "In view of the above finding, both the appeals are accepted and the judgment and decree under appeals are set-aside. Consequently, the suit of the plaintiff - appellant is decreed and it is hereby declared that C he is owner in possession of the suit land and the defendants are restrained from interfering in his possession over the suit land in any manner whatsoever. The prayer for issuance of permanent prohibitory injunction with respect to the alleged path existing on khasra No. 57 is, however, dismissed, as no evidence has been led by the plaintiff D in support of the plea that he has the right to pass through khasra No. 57 for approaching his abadi. The counter claim of the defendants is dismissed in its entirety. Decree sheet be drawn accordingly. The original judgment be placed on the record of appeal No. ll-NL/13 of 1993 while its authenticated copy be placed on the other Appeal No. 12-NL/13 of 1993. Record be completed and consigned to the record E room. Lower court's record be returned with a copy of this judgment."

In the Second Appeal filed by Appellant before the High Court of Himachal Pradesh, Shimla, the following questions of law were framed:

> "1. Whether the first appellate court has misread and misinterpreted F the oral and documentary evidence on record, especially Ext. PW2/A, the compromise to arrive at its findings?
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> 2. Whether the parties had entered into a valid compromise Ext. PW2/A, if yes, whether the suit is not maintainable in view of this compromise?" G

It was partly allowed stating:

> "The plaintiff had rightly instituted the suit. Both the substantial questions of law are answered accordingly.

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A Though the Addl. District Judge has dismissed the counter claim of the defendants in toto, yet this Court finds that the plaintiff had only claimed one bigha of land out of 173rd share of Bir Singh which was kept by him for himself. The plaintiff is not aggrieved by the decree passed in favour of defendant no. 2 Smt. Tulsan Devi in respect of land measuring 7191.94 square metres, as defined hereinabove. Therefore, the impugned decree and judgment is modified to the extent that the counter claim of the defendants if partly allowed and defendant no. 2 Smt. Tulsan Devi is declared absolute owner in possession of above mentioned land measuring 7191.94 square metres, except one bigha of land, which was given to the plaintiff as per compromise Ext. PW2/A and the plaintiff is restrained from interfering in her possession over the said land.

In the result, the appeal RSA no. 151 of 1994 which is against the dismissal of the counter claim is partly allowed as indicated herein above whereas the other appeal RSA No. 150 of 1994 is dismissed. There is no order as to costs"

A Special Leave Petition filed by Appellant was allowed to be withdrawn with liberty to file a review petition. The review petition filed by Appellant was dismissed observing :

"There is no denying that pursuant to the compromise dated 11.6.1986, only 1/3rd share in the estate left with the deceased Bir Singh. Therefore, he could have given the property only to that extent to defendant no. 2 Smt. Tulsan Devi.

It appears that after the compromise which was arrived at between the parties on 11.8.1986, a suit was filed by Smt. Tulsan Devi claiming herself the owner and in possession of the land measuring 7191.94 sq. mts. In this suit, the deceased Bir Singh was impleaded as defendant no. 2. The plaintiff was not a party to that suit. The said suit was decreed in favour of defendant no. 1 Smt. Tulsan Devi on the basis of her claim having been admitted by deceased Bir Singh. Assuming that the defendant - petitioner Smt. Tulsan Devi got the land measuring 7191.84 sq. mts. from Bir Singh and proceeding on the assumption that the land to this extent had fallen to the share of Bir Singh consequent upon the compromise dated 11.8.1986, Bir Singh could not have given the entire land to defendant - petitioner Smt. Tulsan Devi since one bigha therefrom, was to go to the plaintiff in terms of the compromise

dated 11.8.1986.

In view of the said fact, the learned Single Judge vide Judgment dated 27.9.2002 has rightly declared the defendant - petitioner Smt. Tulsan Devi to be the owner and in possession of the land measuring 7191.94 sq. mts. less one bigha of land which was given to the plaintiff as per compromise dated 11.8.1986."

Mr. R. Sundaravaradan, learned senior counsel appearing on behalf of Appellant would submit that the impugned order cannot be sustained as the High Court failed to notice the clear mandate of law that the suit was not maintainable in view of Section 47 of the Code of Civil Procedure.

The learned counsel for Respondents, on the other hand, supported the judgment.

Respondents had filed a suit. It may be a suit for injunction, but therein, the parties resolved their disputes and differences. A compromise petition was filed. A decree was passed in terms thereof. The parties were bound thereby. A consent decree in terms of Order 23, Rule 1 of the Code of Civil Procedure need not be confined only to the reliefs prayed for. It may not be confined to the subject matter of the suit. Although, the consent decree was passed in a suit for injunction, for all intent and purport it was a preliminary decree passed in a suit for partition. A fresh proceeding could not be initiated for giving effect thereto, even if Respondents' contention that their right to possess under the consent decree were not found to be enforceable by the Revenue Authorities was to be accepted. A consent decree, it is trite, remains valid unless it is set aside. It would be binding on the parties. Although, the principles of *res judicata* strict sensu would not apply, the principles of estoppel would. In the plaint it was accepted that a compromise decree was passed. The High Court while passing its judgment in the second appeal also noticed the same. Thus, in the subsequent suit, the effect of the consent decree could not have been ignored.

In *Venkata Reddy and Ors.* v. *Pethi Reddy,* AIR (1963) SC 992, this Court opined:

"..A decision is said to be final when, so far as the court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which

A would operate as *res judicata* between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which
B contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and
C though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in
D any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree....."

E Respondents could not, thus, disclaim the said consent decree by filing a suit for declaration. We may, however, hasten to add that the same would not mean that their right in relation to the other land, as for example, *abadi* land could be denied. We may record that in fact it was accepted at the bar that they are entitled thereto.

F Submission of the learned counsel for Respondents is that the suit for declaration had to be filed in view of refusal on the part of the Revenue Authorities to mutate their names may not be correct as keeping in view the provisions contained in Section 47 of the Code of Civil Procedure, a subsequent suit was clearly barred. The consent decree was also binding on the Revenue Authorities. Respondents also could initiate a proceeding for preparation of
G final decree. They could also have filed an appropriate application for measurement of the land and delivery of possession pursuant thereto. But, by no stretch of imagination, a second suit could be held to be maintainable.

In *Uma Shanker (Dead) and Ors.* v. *Sarabieet (Dead) By LRs. and Ors.*, [1996] 2 SCC 371, whereupon reliance has been placed by the learned counsel,
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a distinct and separate cause of action arose, *viz.*, despite a decree for possession of the land in favour of Appellant, they were subsequently dispossessed. The said decision, therefore, has no application to the facts of this case. A

The High Court, thus, failed to take into consideration that there existed an error apparent on the face of record. As the second suit filed by Respondent No.l was not maintainable, the question of directing Appellant to give one bigha of land, out of 7191.94 sq.mtrs., to Respondent No.l did not arise as the same would be inconsistent with the judgment and decree dated 22.4.1987 passed in Suit No.l 13/1/1987 holding them to be the owner in possession of land measuring the area of 7191.94 sq.mtrs. It also erred in holding that in terms of the compromise arrived at by and between the parties, Respondent No. I was entitled to l/3rd of the total property plus one bigha. B C

For the reasons aforementioned, the appeal is allowed with liberty to Respondents to file an appropriate application, if they so desire, for measurement of lands in question and division of lands in terms of the said consent decree. We further declare that the consent decree shall be binding on the Revenue Authorities. No costs. D

R.P. Appeal allowed.