Equivalent Citation: AIR 1930 Lah 501, 126Ind. Cas.591

IN THE HIGH COURT OF LAHORE

Decided On: 14.12.1929

Appellants: **Ata Muhammad**
Vs.
Respondent: **Allah Baksh and Ors.**

JUDGMENT

Agha Haidar, J.

1. This appeal arises out of a suit for a declaration that the possession of defendants 3 to 10 over the land and houses in suit shall have no effect as against the plaintiff after the death of defendants 1 and 2. The following pedigree-table has been found to be correct by the Courts below and its accuracy has not been challenged in appeal before us.

3. The land in suit originally belonged to Gulaba who made a gift of it to one Bhika. Bhika died, leaving him surviving Wazir, who inherited the property and, on his death, his widow, Mt. Zenab succeeded to it. She died, and the land in suit was mutated in favour of her daughter, Mt. Douli, on 11th July 1907. This mutation, however, was contested in a regular suit by Badar and other collaterals and Mt. Douli had to give up the land. The property is at present in the possession of defendants 3-10, and the plaintiff's case is that, as the succession in the family is governed by the rule of chundawand, and as defendants 1 and 2 have not thought fit to protect their interests, the Court may grant a declaration that he is entitled to the property after the demise of defendants 1 and 2.

4. Various pleas were raised in the trial Court; but, for the purposes of this appeal, it is only necessary to consider the effect of the plea which gave rise to issue 8 which runs as follows: "What is the effect of the previous suit on the present suit?"

5. The history of the previous suit may be briefly stated. In the year 1886 Allah Bakhsh, the father of the plaintiff, Gahia and Imamudin (defendant 2) brought a suit for certain lands against Badar and others for the enforcement of their rights and interests in the property. The defendants raised the plea that Aziman, the ancestor of the then plaintiffs was not a legitimate son of Mt. Raji by Daula Khan but was a mere pichhlag, and that, therefore, the plaintiffs were not entitled to succeed. This contention was upheld by the presiding officer of the Court-Rai Buta Mal and the plaintiffs' suit was dismissed on the finding that Aziman, the ancestor of the plaintiffs, was not a descendant of Daula Khan but a pichhlag of Mt. Raji, and the plaintiffs, therefore, had no right to maintain the suit. This decision, has been relied upon by the defendants in the present suit as res judicata, and the plea has been given effect to by the Courts below with the result that the plaintiff's suit has been dismissed.

6. This finding of the Courts below has been attacked in appeal before us by the learned Counsel for the appellant who has raised two contentions. In the first place, it was argued that there was an appeal from the decree of Rai Buta Mal and his finding was set aside by the appellate Court and, therefore, the bar of res judicata had been removed. On a perusal of the record, however, it appears that the plaintiffs, after the dismissal of their suit in 1886, made an application to the appellate Court asking for permission to appeal in forma pauperis. This application came up for hearing and was eventually dismissed. Belianee is placed upon certain observations in the order dismissing the application by the learned Counsel for the plaintiff-appellant and it is contended that

they constitute a finding in his favour on the question of Amman's status as the legitimate son of Daula Khan. But it is manifest that there was no decision of the appeal on the merits and the issues, which arose in the appeal, were never heard and finally decided. The order dismissing the application for permission to appeal in forma pauperis was an order limited in its scope to the disposal of the application only and the merits of the appeal were never gone into, That being so, the contention of the learned Counsel on this point fails.

7. In the second place, it was strenuously urged on behalf of the appellant that Rai Buta Mal had no pecuniary jurisdiction to try the present suit and, therefore, any decision given by him in the previous litigation could not have the effect of res judicata. This contention is sought to be supported by Sarupa v. Khem Lal A.I.R. 1928 Lah. 929. It is obvious Chat if this contention is made out the present suit would not be barred by res judicata on account of the decision given by Rai Buta Mal. But there are no materials on the record which would enable us to determine the land revenue of the land in suit in the year 1886. There is also some confusion in the judgments of the Courts below as regards the land in dispute now and the land which was in suit in 1886. We, therefore, in order to decide the point of res judicata satisfactorily, remit the following issues to the lower appellate Court:

(1) Is the land in suit now the same land which was in dispute in the suit of 1886? If not, what are their respective areas?

(2) What was the amount of the land revenue is 1886 of the land in dispute in the present suit?

8. The lower appellate Court shall receive such evidence as may be adduced by the parties and, after recording its findings shall submit the same to this Court within two months. The parties would be at liberty to file objections in this Court to the findings of the lower appellate Court within ten days of the arrival of the record.