Privy Council Appeal No. 8 *of* 1948

Chandu Lal Agarwalla and another - - - - - - *Appellants*

v.

Khalilur Rahaman and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH NOVEMBER, 1949

Present at the Hearing:

LORD SIMONDS

LORD RADCLIFFE

SIR LIONEL LEACH

[*Delivered by* LORD SIMONDS]

In this appeal, which is brought ex parte from a judgment and decree of the High Court of Judicature at Fort William in Bengal affirming a judgment and decree of the Subordinate Judge, Jalpaiguri, it is necessary for their Lordships to deal only with one of the many questions which have in the course of the proceedings been debated in the Courts of India. Upon all other questions it has been properly conceded by learned counsel for the appellants that the judgments under appeal cannot seriously be challenged.

The single question argued before the Board was as to the validity of the plea raised by the appellants that the claim of the plaintiffs in the present suit to be lawful heirs of one Safiquddin, who died intestate on the 11th March 1924, was res judicata in a previous suit, namely Suit No. 1 of 1922, which had been heard and determined by the Subordinate Judge of Jalpaiguri on the 23rd August 1924. If that plea was valid, there was no question but that the appeal must succeed: if it was not, then, though the appellants had raised a number of alternative pleas, it was plain to their Lordships that they could not be maintained and the appeal must fail.

The appellants contended that the judgment in Suit No. 1 of 1922 (which will be referred to as "the previous suit") operated under the principle of res judicata to preclude the plaintiffs from asserting that they were the lawful wife and lawful children of Safiquddin. Upon this question the judgments of the Subordinate Judge and the High Court were alike adverse to the appellants and their Lordships see no reason for coming to a different conclusion.

In *Munni Bibi* v. *Tirloki Nath* L.R. 55 I.A. 158 the conditions for the application of the doctrine of res judicata as between parties who have been co-defendants in a previous suit are thus laid down: there must be (1) a conflict of interest between the co-defendants, (2) the necessity to decide that conflict in order to give the plaintiff the appropriate relief.

and (3) a decision of that question between the co-defendants. 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.

It is at this point that the appellants' case breaks down. Their Lordships do not follow the High Court in saying that it appears from the evidence on the record that the first plaintiff in the present suit, Khatemmanessa, who claims to be a lawful widow of Safiquddin, was in the previous suit designedly kept from the knowledge that in that suit there was a conflict of interest between herself and her co-defendant Tanjina Khatun, admittedly a lawful widow of the deceased. It was in fact admitted upon an application to the High Court for leave to appeal to His Majesty in Council, that this statement could not be supported. On the other hand it appears to their Lordships that the appellants have by no means discharged the burden, which lies upon them, of showing that Khatemmanessa had or must be deemed to have notice of that conflict.

The only documents in the previous suit that have been made available in these proceedings are (1) the written statement of Tanjina Khatun and her lawful children, (2) the judgment of the learned Subordinate Judge, and (3) his decree. From these documents it appears, though much is obscure, that the suit was originally brought against Safiquddin (or, it may be, against Safiquddin and others) for recovery of rent for a considerable period in respect of a substantial area of land, and that on Safiquddin's death there were substituted for him as defendants Tanjina Khatun and her children and Khatemmanessa and her children. It appears further that Tanjina pleaded for herself and her children that they were "the only heirs in enjoyment of the properties left by Safiquddin", that Khatemmanessa and her children were not his heirs and had no right or interest or possession of the rent lands in suit, that Khatemmanessa was not the wife of the deceased and that she and her children had been unjustly joined in the suit. Khatemmanessa did not enter an appearance in the suit and it is not to be assumed that she was aware of the contents of her co-defendants' written statement.

Within two days of the filing of the written statement the learned Judge gave judgment. Among the issues framed by him was No. 4 "Is the suit bad for misjoinder of parties?" and upon this he said that both the parties [i.e., presumably the plaintiff and Tanjina Khatun and her children] agreed that Khatemmanessa and her children were not Safiquddin's heirs, that according to them Khatemmanessa was not his married wife but a concubine and that her children were not his legal heirs and accordingly the suit must be dismissed against them. The claim was accordingly decreed with costs against the defendants other than Khatemmanessa and her children. So far it is abundantly clear that there is no justification for attributing to Khatemmanessa knowledge that in the suit for rent brought against her co-defendants and herself the question of her status would as between herself and Tanjina Khatun have to be decided. She might indeed assume from the fact of her joinder that that question was not in issue. The appellants, however, have relied upon the fact that in the title to the decree as it appears in the record she is described as "The concubine of the deceased 20 (cha) Khatemmanessa." Whatever value there may be in this is somewhat diminished by the fact that in the same title her children are described as "the minors aforesaid being represented by their guardian and mother Khatemmanessa widow of late Safiquddin." But in any case their Lordships think that from this single fact it would not be proper to draw the inference that Khatemmanessa either knew or should have known that any conflict of interest between Tanjina Khatun and herself

would fall to be determined. It is not clear to them why, if the plaintiff sought to charge Khatemmanessa as one of the lawful heirs, he should have described her by a title which removes her from that category. They have not had the advantage of seeing the plaint, original or amended, or the summons that was served on Khatemmanessa. Much has been left obscure, but for that she cannot be held liable. The appellants have failed to show that the conditions are satisfied upon which alone the principle of res judicata can be applied.

The appellants also placed some reliance on the conduct of Khatemmanessa in subsequent proceedings, and there is no doubt that, so far as appears on the face of the record, she was not consistent in the attitude she adopted upon the question of status. But these are matters which do not appear to be relevant to the question whether the judgment in the previous suit operated to bar her present claim.

Their Lordships will humbly advise His Majesty that this appeal must be dismissed.

(66765) Wt. 8084—42 180 12/49 D.L. G. 338

In the Privy Council

CHANDU LAL AGARWALLA AND ANOTHER

v.

KHALILUR RAHAMAN AND OTHERS

DELIVERED BY LORD SIMONDS

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1949