APPELLATE CIVIL

Before Grover, J.

BRAHMANAND PURI CHELA OF SHANKAR PURI,—
Plaintiff-Appellant

versus

NEKI PURI CHELA OF KISHAN PURI,—*Defendant-Respondent.*

Regular Second Appeal No. 1065 of 1956

1958

Feb. 12th

Code of Civil Procedure (Act V of 1908)—Section 100—Finding of fact—When can be said to be vitiated—Section 11—Finding in previous suit against a successful party—Whether res judicata *in a subsequent suit—Judgment* inter parties *—Whether binding precedent.*

Held, that if a Court of fact, whose decision on a question of fact is final, arrives at a decision by considering

material which is partly relevant and partly irrelevant or bases its decision partly on conjectures, surmises and suspicions and partly on evidence, then in such a situation the finding of fact arrived at will be open to reversal in second appeal.

Held, that where the lower appellate Court drew an adverse presumption against the plaintiff under section 114 of the Indian Evidence Act, which it was not entitled to do and used certain decuments as substantive pieces of evidence, which also could not be done, and failed to apply its mind to the rule with regard to the admissibility and use of the findings given in the previous judgments *inter partes*, its finding will be vitiated.

Held, that a finding in the previous suit against a successful party cannot found an actual plea of *res judicata*, for that party, having succeeded on the other plea or pleas, had no occasion to go further as to the finding against him. But that finding being a finding of a court of fact creates a paramount duty on that party to displace the same in the subsequent suit by putting forth some cogent evidence. A judgment *inter partes* even if not *res judicata*, may be a binding precedent or valuable piece of evidence not liable to be ignored.

Dhirajlal v. *I. T. Commissioner, Bombay*, (1), *Midnapur Zamindari Company, Ltd.* v. *Naresh Narayan Roy* (2), *and R. B. Seth Ganga Sagar* v. *Inam Ali* (3), relied upon.

Second Appeal from the decree of Shri Madan Mohan Singh, Additional District Judge, Hissar, dated the 6th day of December, 1956, reversing that of Shri Harnam Singh Chadha, Senior Sub-Judge, Hissar, dated the 17th October, 1955, and dismissing the plaintiff's suit with costs throughout.

F. C. MITTAL AND MELA RAM, for Appellant.

DALIP CHAND GUPTA, for Respondent.

(1) A.I.R. 1955 S.C. 271
(2) I.L.R. 48 Cal. 460
(3) 1946 P.L.R. 195

JUDGMENT

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GROVER, J.—This appeal arises out of a dispute relating to the succession of Mahantship of Dera Kharak, Tehsil Hansi, District Hissar. Kishan Puri,*chela* of Ramdayal Puri, had been a Mahant of the main Dera at Kharak and he died on 15th February, 1951. There is a subsidiary Dera in Zira where Shankar Puri was a Mahant and Brahamanand Puri is said to have succeeded Shankar Puri there and to have held charge of it. After the death of Kishan Puri there seems to have been a scramble for getting hold of the Mahantship of the main Dera at Kharak. It is alleged that on the 17th day after the death of Kishan Puri a ceremony was performed in which the *bhekh* appointed a Mahant. The dispute centres round the person who was so appointed. On the one hand it is claimed by Brahamanand Puri that he was appointd by the *bhekh* as Mahant, and, on the other, Neki Puri claiming to be a *chela* of Kishan Puri asserts that he was appointed as the Mahant. Brahamanand Puri further claims that he is a *gurbhai* of Kishan Puri and Neki Puri had absolutely no claim as he was not a *chela* of Kishan Puri nor was he appointed by the *bhekh*. On 7th March, 1951, i.e., two days after the alleged appointment of the Mahant by the *bhekh* a report was made by Ram Puri, who seems to be a *chela* of Shankar Puri as is shown in the pedigree table set out by the lower appellate Court, to the police stating that Neki Puri had forcibly taken possession of the Dera and that he has been installed as a Mahant by a certain group of people who were armed with lethal weapons. He further stated that the *sadhus* and the villagers had in fact appointed Lakshman Puri as the Mahant. It may be stated that this Lakshman Puri is a natural son of Ram Puri. On the 9th March, 1951, however,

there was a compromise between Neki Puri and Ram Puri and Lakshman Puri by which Neki Puri was allowed to remain in possession of the Dera as a Mahant. Quite a number of other villagers also signed this document. On the 14th March, 1951, Brahamanand Puri filed a suit for injunction against Neki Puri claiming that he was the Mahant and the latter could not interfere with his management. Neki Puri pleaded in that suit that Brahamanand Puri was not in possession of the Dera and the suit was liable to dismissal on that ground. He further asserted that he was the *chela* of Kishan Puri and had legitimately succeeded to the Mahantship after his death. It was not admitted that Brahamanand Puri was a *gurbhai* of Kishan Puri, and it was further denied that he was never appointed a Mahant by Kishan Puri. The trial Court framed the following issues:—

(1) Whether the suit is not maintainable in the present form?

(2) What is the proper value for purposes of court-fee and jurisdiction?

(3) Whether the plaintiff is barred by his own conduct to bring this suit?

(4) Whether the plaintiff was appointed as a Mahant after the death of Kishan Puri by the village and *bhekh*?

(5) Whether defendant No. 1 was appointed as a Mahant after the death of Kishan Puri by the village and *bhekh*?

(6) What is the rule of succession to the Gaddi of this Dera and who is a fit person to be appointed a Mahant?

(7) Relief.

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The trial Court decided issue No. 5 against the defendant but issues Nos. 1 and 4 were decided against the plaintiff with the result that his suit was dismissed. The matter seemes to have been argued at considerable length before the learned Senior Sub-Judge in appeal and he gave these findings. With regard to issues Nos. 1 and 4 he came to the conclusion that the witnesses produced by the plaintiff Brahamanand Puri were not independent and reliable, and only a suit for possession could have been instituted. On issue No. 5 he agreed with the finding of the trial Court that Neki Puri had never been appointed a Mahant by the *bhekh*. The suit was, however, dismissed on the findings given on issues Nos. 1 and 4. This decision was given in June, 1954 and in August, 1954, Brahamanand Puri filed the present suit for possession of a house and land attached to the Dera on the ground that he was the heir of the last Mahant Kishan Puri, being his *gurbhai* and also because he had been appointed as a Mahant by the *bhekh*. The defendant Neki Puri once again controverted the plaintiff's allegations and asserted that he was entitled to succeed to the *gaddi* as also to all the properties attached to the same as he was the *chela* of the last Mahant. He further claimed that he had been appointed by the *bhekh* as Mahant. Certain other pleas were raised with regard to the suit being barred under the provisions of Order 2, rule 2, and section 11 of the Code of Civil Procedure. The following issues were framed in this suit:—

(1) Is the plaintiff a *gurbhai* of the last Mahant and as such his heir under custom?

(2) Was the plaintiff appointed a Mahant by the *bhekh* and could they do so?

(3) Is the defendant a *chela* of the last Mahant?

(4) If issues Nos. 1 and 3 are answered in the affirmative, is the plaintiff a better heir than the defendant to the disputed *gaddi* and Dera?

(5) Are the matters in issues Nos. 1 to 3 *res judicata* or what is the effect of the dismissal of the plaintiff's previous suit?

(6) What is the value of the suit for purposes of court-fee and jurisdiction?

(7) Is this suit barred under the provisions of Order 2 rule 2. of the Civil Procedure Code?

(8) Relief.

The trial Judge this time, who happened to be the same who had heard the appeal in the previous litigation, was somewhat influenced by his previous decision, but his remarks that the oral evidence in this case was not of much use because the villagers and others residing in the neighbourhood seemed to be divided into two factions, one supporting Brahamanand Puri, plaintiff, and the other supporting Neki Puri, defendant, seem to be quite correct. On issue No. 1 he found that the plaintiff Brahamanand Puri was the *gurbhai* of Kishan Puri deceased and would be entitled to succeed to the *gaddi* as *gurbhai* of the last Mahant if it was not proved that Kishan Puri left any *chela*. Issue No. 2 was decided against the plaintiff and it was decided that the plaintiff had not been appointed a Mahant by the *bhekh*. On issue No. 3 he came to the same conclusion as in the previous litigation that the defendant had not been proved to be a *chela* of the last Mahant. On issue No. 4 he found that as the defendant had not

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been proved to be a *chela* of the last Mahant, the plaintiff being the *gurbhai* was entitled to succeed. On issue No. 5 he held that the findings given on issue No. 4 in the previous suit operated as *res judicata* so far as the decision of issue No. 2 in the present suit was concerned. Other findings, however, did not have the effect of *res judicata*. Issues Nos. 6 and 7 were found in favour of the plaintiff. As a result of his findings on all the issues the trial Judge decreed the suit. In appeal the learned Additional District Judge affirmed the findings of the trial Court on issues Nos. 1, 2, 4, 6 and 7, but reversed the findings on issue No. 3. It was held that the defendant had been proved to be a *chela* of the last Mahant. On issue No. 5 the lower appellate Court came to the conclusion that none of the matters raised in the present suit were barred by the rule of *res judicata*. In view of the findings given mainly on issue No. 3, the judgment of the first Court was reversed and the plaintiff's suit was dismissed. The plaintiff has preferred a second appeal to this Court.

The first submission of Mr. F. C. Mital, learned counsel for the plaintiff-appellant, is that the decision of both the Courts below on issue No. 2 was erroneous. He contends that there was ample evidence to show that the plaintiff had been appointed a Mahant by the *bhekh*. He submits that when the *bhekh* chose the plaintiff as the Mahant on 5th March, 1951, certain *bahi* entries were recorded which are contained in Exhibit P. 1 and that it was clear from this document that the plaintiff had in fact been appointed by the *bhekh*. Both the Courts below examined the *bahi* and came to the conclusion that the *bahi* did not appear to be genuine. The *bahi* entry had not been relied upon in the list

of reliance filed on 18th August, 1954, and it was produced for the first time in the present case on the 5th January, 1955. In the previous litigation no reference was made to this *bahi* in the plaint. The value to be attached to the *bahi* entry, therefore, is concluded by a concurrent finding of fact by both the Courts below and it is not open in second appeal to re-open the same. It is then contended by Mr. Mital that as many as 18 witnesses were produced who deposed to the appointment of the plaintiff by the *bhekh* as a Mahant and their evidence had been completely ignored by the lower appellate Court. It is true that the lower appellate Court did not fully examine the evidence of these witnesses. I have, however, been taken through their evidence and I find that the witnesses are not of a reliable type and the remark of the trial Court seems to be fully justified that two factions exist in this village each supporting a rival candidate. In these circumstances, therefore, it would be wholly unsafe to rely on their testimony and as there is no other satisfactory evidence to support the plaintiff's appointment by the *bhekh*, I consider that the concurrent finding of both the Courts below is quite correct. Even otherwise, I consider that this point was never seriously agitated by the plaintiff before the lower appellate Court. In para 4 of the judgment of that Court all the points which required determination have been set out and this point does not find mention there. If the plaintiff's counsel had pressed for a reversal of the finding of the trial Court on issue No. 2 it is very doubtful that the lower appellate Court would not have mentioned it or dealt with it fully in his judgment which seems to be fairly lengthy. It, therefore, must be held that the plaintiff has failed to show that he had been appointed a Mahant by the *bhekh* as alleged by him.

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The next important question is whether the finding given by the lower appellate Court on issue No. 3 that the defendant was a *chela* of the last Mahant is correct or not. On the face of it it is a finding of fact and unless it can be shown to be vitiated, according to the well settled rules which have emerged out of various judicial decisions, it cannot be set aside in second appeal. According to Mr. F. C. Mital the first error of law which has been committed by the lower appellate Court on this point is with regard to the voters' list, Exhibit P. 15. This list had been produced by the plaintiff to show that in 1948-49, the name of Kishan Puri appeared at serial No. 553 but the name of Neki Puri *chela* was not to be found anywhere in the list. The lower appellate Court was quite justified in saying that such an evidence was of a negative type and on that account it was open to that Court to have rejected the aforesaid piece of evidence as valueless, but it proceeded on to say—"The best possible evidence would have been the entry of Neki Puri in some other village as voter and this has not been produced and I would draw an adverse presumption against the plaintiff respondent for its non-production under Illustration (g) of section 114 of the Indian Evidence Act." According to the suggestion of Mr. Mital the lower appellate Court committed an error in drawing the presumption under section 114. The Court referred to Illustration (g) given under the aforesaid section which is as follows:—

> "That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

It is wholly incomprehensible how any presumption could be drawn against the plaintiff for non-production of voters' list from other villages. The

only object with which the voters' list of the village, where the Dera is situate, had been produced previously was to show that Neki Puri who claimed to have been residing there as *chela* of Kishan Puri for the last two decades was not recorded as a voter in that village. It did not make it obligatory on the plaintiff to produce entries from voters' list of other villages to show that possibly Neki Puri's name had been entered elsewhere. If, however, it was the case of Neki Puri that his name had not been recorded as a voter in Kharak village and that it had been recorded elsewhere, it was open to him to produce the relevant entry, and, actually under section 106 of the Indian Evidence Act, the fact, as to where his name was entered as a voter if at all, was especially within his knowledge, and the burden of proving the same was on Neki Puri. In any case, the lower appellate Court could not draw any such adverse presumption against the plaintiff-respondent as was drawn by it. The other error which has been pointed out is with regard to the postcard, Exhibit P. 5. This is a postcard, which bears the postal mark of 25th March, 1949, which was written by Brahamanand Puri, the plaintiff, Baijnath Puri and others to Kishan Puri and in this letter it is said by them that they had been thinking of some plan by which one or the other might be able to serve him and that as they were his *gurbhais* they would like to help him with regard to the lands, etc., and that he should let them know soon, and on receipt of his communication some one would be sent. While discussing this the trial Court stated as follows:—

> "Lastly, if the defendant had been the *chela* of Kishan Puri, he would not have written the postcard, Exihbit P. 5, or got written the postcard, Exhibit P. 4, saying that

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he wanted a *shish* (*chela*) and a manager to look after the property of the Dera."

The lower appellate Court considered that the aforesaid remarks of the trial Court showed that it was in very great haste to decide issue No. 3 against the defendant because it had previously formed an opinion in the other case against the defendant, and that the postcard was not even read by the trial Court. Mr. Mital contends that the word "he" in the paragraph containing the judgment of the trial Court set out before referred not to the defendant but to the plaintiff as the trial Court could not have possibly treated the postcard, Exhibit P. 5, as having been written by the defendant when clearly it had been written by the plaintiff and others and not by the defendant. It seems, however, that there was some confusion in what the trial Court wrote and, therefore, there was nothing seriously wrong with the lower appellate Court pointing out the mistake, although it seems that the lower appellate Court itself formed a wrong impression about the so-called great haste of the trial Court in deciding the issue against the defendant. It is next pointed out that the lower appellate Court completely ignored the case of the defendant and his witnesses that he was appointed a *chela* of Kishan Puri more than two decades ago, otherwise there was no justification for the lower appellate Court observing—"Therefore, even if Exhibit P. 5 had been written by Brahamanand, Baijnath Puri and others to Kishan Puri on 25th March, 1949, it is quite possible that Kishan Puri might have found some other *chela* and did not think it worth his while to reply to this letter." It is suggested that this inference was wholly conjectural and divorced from the case of the defendant as it was nobody's

case that Kishan Puri had appointed any other *chela* after 25th March, 1949, and the very fact that such a letter was written to Kishan Puri long before any litigation started showed that Kishan Puri had no *chela* whatsoever and that is why his *gurbhais* offered to help him in the work. It is contended that there would have been no occasion to write a letter of this kind if Neki Puri had actually been there as his *chela* as is being claimed by him for the last so many years and this shows that the whole story of the defendant about his being a *chela* of Kishan Puri was a concocted one. It seems to me that the approach of the lower appellate Court with regard to Exhibit P. 5 was not quite correct, but that by itself would not be sufficient to vitiate the finding of fact. Mr. Mital then submits that the mind of the lower appellate Court was largely influenced by the documents, Exhibits D. 1 and D. 2, the complaint by Ram Puri and the subsequent compromise, and that it had treated them as substantive pieces of evidence. In paragraph 16 the lower appellate Court came to the conclusion that from the fact that Neki Puri had remained in possession from the beginning was proved from the admission of Ram Puri in Exhibit D. 1 and of Lakshman Puri in Exhibit D. 8 according to which Neki Puri had been stated to have taken possession of the Dera. It is submitted that the aforesaid documents could be used only for the purpose of contradicting or corroborating the evidence of Ram Puri and Lakshman Puri who appeared as C.W. 1 and C.W. 2 and that they could not be used as substantive evidence. There seems to be substance in this contention of Mr. Mital. Mr. Mital has further urged that the oral evidence produced by the plaintiff regarding Neki Puri not residing in the Dera had not been properly understood and appreciated by the lower appellate

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Court. I have already stated before that it will be wholly unsafe to rely on oral testimony in this case and, therefore, the approach of the trial Court with regard to oral evidence must be held to be perfectly correct, and it will be pointless to attach any importance to the aforesaid omission on the part of the lower appellate Court. The last submission of Mr. Mital on this point is that the lower appellate Court did not make proper use of the judgments delivered in the previous litigation, namely, Exhibit D. 12 and Exhibit D. 24, in which clear findings had been given that the defendant was not a *chela* of Kishan Puri. Reliance is placed on a decision of the Privy Council in *Midnapur Zamindari Company, Ltd.* v. *Naresh Narayan Roy* (1). In that case in 1877 a Zamindar had sued for possession of the chur land and the tenants had pleaded (i) an occupancy right, and (ii) that the suit was premature, no attempt having been made to settle a fresh rent. The trial Judge made a decree dismissing the suit; he held that there was no occupancy right, but that the suit was premature. Upon an appeal by the Zamindar to the High Court, the tenants filed a cross-objection to the finding that there was no occupancy right. The High Court affirmed the decree, on the ground that the suit was premature, and upon the cross-objection affirmed the finding that there was no occupancy right. It was held that the absence of an occupancy right was not *res judicata* against the appellants since the tenants had succeeded upon the other plea, but that it created a paramount duty on the appellants to replace the finding and that they had failed to perform that duty. At page 467 the following observation occurred:—

"Their Lordships do not consider that this will found an actual plea of *res judicata*,

(1) I.L.R. 48 Cal. 460

for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform."

It will be noticed that even in the case before the Privy Council only a finding had been given and that finding was considered such as to create a duty on the part of the opposite side to displace it in subsequent litigation. In the present case a very clear finding was given by the lower appellate Court in the previous suit that the defendant had not been shown to be a *chela* of Kishan Puri. It was, therefore, the duty of the defendant to have put forward something cogent to displace the finding given previously in accordance with the rule laid down by the Privy Council. Apart from producing oral evidence and certain other documents which have hardly any relevancy, the defendant has not produced such evidence in the present case as would carry conviction with the Court. The lower appellate Court has not applied its mind to this argument at all. In *R. B. Seth Ganga Sagar* v. *Inam Ilahi* (1). Din Mohammad and Mohammad Sharif, JJ., have laid down that a judgment inter partes even if not *res judicata* may be a binding precedent or valuable piece of evidence not liable to be ignored. The net result, therefore, is that the lower appellate Court drew an adverse presumption against the plaintiff under section 114 of the Indian Evidence Act, which it was not entitled to do and used certain documents as substantive pieces of

(1) 1946 P.L.R. 195

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evidence, which also could not be done, and failed to apply its mind to the rule with regard to the admissibility and use of the findings given in the previous judgments *inter partes*. I have very carefully read the judgment of the lower appellate Court and considered the submissions of Mr. D. C. Gupta in support of sustaining that judgment, but I consider that the finding given under issue No. 3 on the question as to whether the defendant was a *chela* of the last Mahant is vitiated on the grounds mentioned above. Their Lordships of the Supreme Court in *Dhirajlal* v. *I.T. Commissioner, Bombay* (1), have laid down that if a Court of fact whose decision on a question of fact is final, arrives at a decision of fact by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions and partly on evidence then in such a situation clearly an issue of law arises. And in such a case, it is well established that when a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. This rule was stated in an income-tax case, but it is very pertinent to the scope of an appeal under section 100 of the Code of Civil Procedure. If the finding of the lower appellate Court on issue No. 3 is reversed, then there can be no doubt that the plaintiff is entitled to succeed as a Mahant.

In the result, the appeal is allowed and the judgment of the lower appellate Court is set aside and that of the trial Court restored with costs.

(1) A.I.R. 1955 S.C. 271

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