IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Mr. Justice Subrata Talukdar

CO 2726 Of 2013

Gobinda Mahato & Ors
-Vs-
Imran Ansari & Ors

For the Petitioners : *Mr. Supriyo Chattapadhyay;*
Ms. S. Samanta

For the Respondents : *Mr. P.B. Sahoo;*
Mr. Sudhakar Biswas;
Mr. Kalyan Chatterjee;
Mr. Syed Nazmul Hossain;
Mr. Washef Ali Mondal

Heard on : *19/08/2014*

Judgement on : *12/09 /2014*

Subrata Talukdar, J.: By filing the present CO 2726 of 2013 the petitioners challenge the order impugned dated 9th July, 2013 passed by the Learned Second Civil Court (Senior Division) at Howrah in Miscellaneous Appeal 201 of 2011.

By the said impugned order the Learned Second Civil Court (Senior Division) was pleased to decide an application filed by the petitioner under Order 22 Rule 3 of the Code of Civil Procedure. By filling the said application the present petitioners who are also the appellants in Misc. Appeal No. 201 of 2012, prayed for substitution of the legal heirs of the appellant namely, Shanti Devi alias Mahato (since deceased).

The said legal heirs of the deceased appellant were stated to be Gobinda Mahato, Bhagabati Mahato, Mamta Mahato and Gita Mahato. The proposed substituted legal heirs had pointed out before the Learned Appellate Court that the late Shanti Devi/appellant died on 30th of January 2012. In support of their claim to be the legal heirs of the Late Shanti Devi, the proposed substituted appellants have filed copies of their Voter Identity Cards.

Before the Learned Appellate Court the Learned Counsel for the present opposite parties/respondents objected to such substitution on the ground that in another proceeding between the parties the Learned First Assistant District Court, Howrah in Title Appeal No. 182 of 1987 arising from the judgment and order in Title Suit No. 53 of 1986 had specifically held that the petitioners/proposed substituted appellants are not the legal heirs of the original tenant, one Kalkatia Mahato.

According to the Learned Counsel for the Respondents the proposed substituted applicants in the present Misc. Appeal No. 201 of 2012 have been held by the Learned Appellate Court in Title Appeal No. 182 of 1987 to be the legal heirs of only Shanti Devi and not Kalkatia Mahato. It was pointed out before the Learned Appellate Court in Misc. Appeal No. 201 of 2012 that the present opposite parties/respondents have jointly filed suit for eviction against the original tenant, Kalkatia Mahato and one Baburam Mahato, son of Kalkatia Mahato. Kalkatia Mahato died during pendency of the proceedings and was substituted by Shanti Devi, his widow.

In respect of the eviction suit, being Title Suit No. 53 of 1986, Shanti Devi preferred Title Appeal No. 182 of 1987 and, in the said Title Appeal the Learned Appellate Court specifically held that Baburam Mahato and Shanti Devi are the only legal heirs of the late Kalkatia Mahato. In respect of the present petitioners/proposed substituted appellants the Learned Appellate Court in Title Appeal 182 of 1987 came to the clear finding that the legal heirs of Late Shanti Devi are not from her marriage with the late Kalkatia Mahato. In other words, the present petitioners may be the sons and daughters of the late Shanti Devi out of a separate marriage. However, their father is not the late Kalkatia Mahato.

It was further pointed out by the Learned Counsel for the present opposite parties/respondents before the Learned Appellate Court in Misc. Appeal No. 201 of 2012 that against such decision of the Learned Appellate Court in Title Appeal No. 182 of 1987, no further appeal was preferred by the present petitioners. The judgment of the Appellate Court in Title Appeal No. 182 of 1987 is a judgment *in rem* and has attained finality. The findings in the said judgment in Title Appeal 182 of 1987 shall apply with full force to the present Misc. Appeal No. 201 of 2012.

Upon consideration of the rival submissions the learned appellate Court in Misc. Appeal No. 201 of 2012 came to the following conclusions:-

I) That on perusal of the judgment in Title Appeal No. 182 of 1987 there is to be found mention of the legal heirs of the late Kalkatia Mahato. The petitioners are found to be the legal heirs of the late Shanti Devi who is simply a substituted tenant in the suit property after the death of Kalkatia Mahato.

II) It is difficult to presume that the legal heirs of a person who is under litigation in different suits and appeals will be different in each of the suits or appeals. It must be presumed that the identity of the original parties being the same, the names and status of the legal heirs cannot fluctuate.

III) It has been elaborately discussed in TA 182 of 1987 that the petitioners are the legal heirs of the late Shanti Devi but, not the legal heirs of the late Kalkatia Mahato. Such conclusive discussion in Title Appeal No. 182 of 1987 must be held to prevail on the question of legal heirship and substitution even in the present appeal being Misc. Appeal No. 201 of 2012. In such view of the matter the present petitioners do not have any case for being substituted in Misc. Appeal No. 201 of 2012 and, therefore, the application under Order 22 Rule 3 of the Code of Civil Procedure stands rejected.

IV) On the point of limitation it was pointed out that Shanti Devi, the sole appellant died on 30th January, 2012. The application for substitution under Order 22 Rule 3 was filed on 2nd April, 2013. The Learned Appellate Court, therefore, held that limitation had expired a long time back and the appeal must be held to have abated against the deceased sole appellant.

Sri Supriyo Chattopadhya, Learned Counsel appearing for the petitioner has argued that the date of death has been wrongly incorporated in the application for substitution as 30th of January, 2012. He submits that the same was in the nature of a typographical error.

He, however, states that the date of death is 30th January, 2013 and the same will appear from a copy of the death certificate annexed to CO 2726 of 2013. He also submits that the date of death has been correctly recorded as 30th of January, 2013 by the present opposite parties/respondents in their written objection filed to the substitution application.

In the above premises there could have been no occasion on the part of the Learned Appellate Court to treat the date of death as 30th January, 2012 instead of 30th January, 2013. The Learned Appellate Court acted contrary to the factual position visible from the records and erroneously held that the application for substitution is barred by limitation. The consequent order recording abatement is also bad.

Relying on a judgment of this Hon'ble Court reported in ***AIR 1981 Calcutta page 444*** in the matter of ***Abhimanya Biswas versus Abdul Seikh & Ors,*** Sri Chattopadhya has argued that the question of determining the legal heirs of the late Shanti Devi must be left to trial. According to him, only after taking evidence at the trial the legal heirs of the late Shanti Devi and the late Kalkatia Mahato can be identified. He also submits that the proposed substituted applicants were never parties to Title Appeal No. 182 of 1987 and, therefore, the status of their legal heirship was determined behind their back.

Per Contra Sri P.B. Sahoo, Learned Senior Counsel appearing for the opposite parties submits as follows:-

a) In TA 182 of 1987 arising out of Title Suit No. 53 of 1986 notice to quit the suit premises was served only on Shanti Devi (since deceased) and Baburam Mahato. The said suit was proceeded with by both the learned trial court and the learned appellate court on the basis of such notice.

b) Drawing the attention of this Court to the deposition in Title Appeal No. 182 of 1987, Sri Sahoo submits that not only Shanti Devi (since deceased) but also Gobinda Mahato adduced evidence. From the oral evidence of Shanti Devi (since deceased) as noticed in Title Appeal No. 182 of 1987 Sri Sahoo points out that she has deposed as the wife of the Kalkatia Mahato. From the evidence of Gobinda Mahato it is noticed that he claims to be a son of Kalkatia Mahato.

c) Sri Sahoo takes this Court further to the evidence of Shanti Devi (since deceased) noticed by the Learned Appellate Court in Title Appeal No. 182 of 1987. In her cross-examination on 13th July, 1987 she has admitted that her husband Kalkatia died 19-20 years back. She has further admitted in her cross-examination that her youngest daughter Geeta is aged around 10/11 years. Sri Sahoo, therefore points to the fact that it is improbable that Geeta could

be the daughter of Kalkatia considering her age as on the date of deposition of Shanti Devi and also considering the period of death of Kalkatia Mahato.

d) Similarly, Sri Sahoo points out from the evidence of Gobinda Mahato that at the time of his deposition on 13th of July, 1987, Mamta, the second sister was aged around 14 years. Again, Sri Sahoo points out that if Mamta is aged around 14 years and Kalkatia Mahato died 19/20 years back, it is not probable that Mamta is the daughter of Kalkatia.

e) Similarly, Gobinda has claimed to the son of Kalkatia and, in his cross-examination he claims that his age as on 13th July, 1987 is 32 years. The age of Shanti Devi is disclosed in the evidence as 40 years. It is, therefore, improbable that Gobinda could be born to Shanti Devi when she was only 8 years old.

Sri Sahoo, therefore, argues that the Learned Appellate Court while deciding Title Appeal No. 182 of 1987 by its judgment and order dated 6th February, 1993 came to the correct conclusion that except Baburam and Shanti Devi there are no other legal heirs of Kalkatia. The Learned Appellate Court was, therefore, correctly pleased to dismiss the claims of the other legal heirs of Kalkatia, who are the present applicants in this substitution application by holding that they are not eligible to claim legal

heirship. Furthermore, according to the Learned Appellate Court in Title Appeal 182 of 1987 the refusal of the notice to quit by both Baburam and Shanti Devi is sufficient indication of the fact that they were the legal heirs of the original tenant, Kalkatia.

f) Sri Sahoo, therefore, asserts that the issue of identity of the legal heirs of Kalkatia Mahato stands established by both the decree in Title Suit No. 53 of 1986 and the judgment in Title Appeal No. 182 of 1987. Based on the decree in Title Suit No. 53 of 1986 as affirmed in Title Appeal No. 182 of 1987, Execution Case has been filed by the decree holders/present opposite parties. The issue of legal heirship having being settled and / or having attained finality pursuant to orders of the competent Courts which have not been challenged, such issue cannot be reopened in collateral proceedings in the nature of an application under Order 22 Rule 3 of the Code of Civil Procedure. Sri Sahoo points out that in view of such finality as indicated above, no further Cognizance need be taken of the issue.

g) Learned Counsel for the opposite parties also points out that Title Suit No. 193 of 2013 has been filed by the present applicants in the substitution application only after such substitution application was disposed of by the order impugned dated 9th July, 2013 by the Learned Second Civil Court (Senior Division)at Howrah

in Misc. Appeal No. 201 of 2012. According to Sri Sahoo, Title Suit No. 193 of 2013 has been filed by some of the purported heirs of Shanti Devi who are not the heirs of Kalkatia.

h) Sri Sahoo argues that the principle of Issue Estoppel shall apply to the facts of this case. Relying on the principle of Issue Estoppel Sri Sahoo submits that the issue of legal heirship cannot be decided any further in any collateral proceeding for substitution when such issue has already been decided in substantive previous proceedings between the same parties. In support of such argument Sri Sahoo relies upon two decisions of the ***Hon'ble Supreme Court reported in 2014 Volume 6 SCC page 351*** in the matter of ***Gobinda Mahato & Ors. -versus- Imran Ansari & Ors. (at paras 75 and 76)***. The said paragraphs read as follows:-

> *"75) Thus, the principle of finality of litigation is based on a sound firm principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end to litigation. The doctrine of res-judicata has been evolved to prevent such an anarchy.*
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> *76) In a country governed by the rule of law, finality of judgment is absolutely imperative and great sanctity is attached to the finality of the judgment and it is not permissible for the parties to reopen the concluded judgments of the court as*

it would not only tantamount to merely an abuse of the process of the court but would have far reaching adverse affect on the administration of justice. It would also nullify the doctrine of stare decisis a well established valuable principle of precedent which cannot be departed from unless there are compelling circumstances to do so. The judgments of the court and particularly the Apex Court of a country cannot and should not be unsettled lightly."

He also relies on the decision reported in ***2005 Volume 7 SCC page 190*** in the matter ***Ishwar Dutt –vs- Land Acquisition Collector and Anr.*** of on the principle of Issue Estoppel. At ***paras 14, 18 to 24*** the Hon'ble Apex Court was pleased to observe as follows:-

"14) It is not in dispute that the High Court issued a writ of mandamus. It is also not in dispute that the direction of the High Court was acted upon. The principle of res judicata, as is well known, would apply in different proceedings arising out of the same cause of action but would also apply in different stages of the same proceedings. As the judgment and order passed in CWP No. 510 of 1985 attained finality, we are of the opinion that the respondents herein could not have raised any contention contrary thereto or inconsistent therewith in any subsequent

proceedings. In fact the Land Acquisition Officer while passing the award on 31-1-1991 took into consideration the said direction and awarded 12% additional compensation at the market value. The said order of the Land Acquisition Officer never came to be questioned and, thus, attained finality.

18) In the Reference Court or for that matter the High Court exercising its appellate jurisdiction under Section 54 of the Act could not have dealt with the said question. The principle of res judicata is a specie of the principle of estoppel. When a proceeding based on a particular cause of action has attained finality, the principle of res judicata shall fully apply.

19) Reference in this regard may be made to Wade and Forsyth on Administrative Law, 9th Edn., p. 243, wherein it is stated:

"One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are

sometimes distinguished as 'cause of action estoppel' and 'issue estoppel'."

20) In Hope Planatations Ltd. V. Taluk Land Board this Court observed: (SCC p. 611, para 31)

"31) Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum."

21) In The Doctrine of Res Judicata, 2nd Edn. By George Spencer Bower and Turner, it is stated:

"A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it…."

22) Reference, in this connection, may also be made to Ram Chandra Singh v.Savitri Devi.

23) Yet recently in Swamy Atmananda v. Sri Ramakrishna Tapovanam in which one of us was a party, this court observed: (SCC p. 61, paras 26-27)

"26) The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment.

27) The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."

It was further noticed: (SCC p. 64, para 42)

"42) In Ishwardas v. State of M.P. this Court held: (SCC p. 166, para 7)

'In order to sustain the plea of res judicata it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim'."

24) Yet again in Arnold v National Westminster Bank Plc. The House of Lords noticed the distinction between cause of action estoppel and issue estoppel: (All ER pp. C-E and 47 C-D)

"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been litigated between the same parties or their privies and having involved the same subject-matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened. ….issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to

which the same issue is relevant, one of the parties seeks to reopen that issue."

Here also the bar is complete to relitigation but its operation can be thwarted under certain circumstances. The House then finally observed: (All ER p. 50 C-E)

"But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice have greater force in cause of action estoppel, the subject-matter of the two proceedings being identical, than they do in issue estoppel, where the subject-matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success."

25) In Gulabchand Chhotalal Parikh v. State of Bombay the Constitution Bench held that the principle of res judicata is also applicable to

subsequent suits where the same issues between the same parties had been decided in an earlier proceeding under Article 226 of the Constitution."

i) Another the limb of Sri Sahoo's submission is that in a separate proceedings among the same parties the issue of legal heirship was discussed by the Controller of Thika Tenant, Howrah. By his order dated 2nd March, 2009 the learned Thika Controller held as follows:-

"Under the circumstances, it is clear that Md. Idrish, at present the legal heirs of Md. Idrish are the actual thika tenants of this case No. M-53/83-84 in respect of Thika holding No. 342, Belilious Road, PS Howrah and Shanti Devi and others, the legal heirs of Kalkatia driver are the 'Ghar Bharatia' over the said premises at a monthly rent of Rs. 125. The relationship between Imran Ansari and others, the legal heirs of Md. Idrish and Shanti Devi and others are as Thika Tenants and Bharatias.'

It is clear from the judgment of the Title Appeal Case No. 182 1987 of Ld. 1st Asst. District Judge, 1st Court, Howrah that only Shanti Devi & Baburam are the legal heirs of late Kalkatia Driver. Gobinda Mahato

and others are not the legal heirs of Late Kalkatia and so they have no locus standi in this case".

In above premises Sri Sahoo strongly points out that even the Controller of Thika Tenancy, Howrah affirmed the findings with regard to heirship arrived at by the Learned Appellate Court in Title Appeal 182 of 1987 and such findings cannot be now disturbed in collateral proceedings arising out of the present substitution application.

Sri Sahoo concludes his submission by stating that the order impugned dated 9th July, 2013 is neither illegal nor perverse.

Heard the parties. Considered the materials on record.

This Court is of the considered view that once the competent Courts have arrived at the finding regarding the legal heirs of the late Kalkatia Mahato and such findings have attained finality, it cannot be argued that in separate proceedings the names of the legal heirs can be different from the previous proceedings. This Court finds that the Ld. Appellate Court in Title Appeal No. 182 of 1987 had the opportunity to scan the evidence for determining the names of the true legal heirs of the late Kalkatia Mahato. On scanning such evidence the Ld. Appellate Court concluded that Baburam and Shanti Devi are the true legal heirs. The Ld. Appellate Court was also pleased to notice that the notice to quit was attempted to be served on both Baburam and Shanti Devi and such service being refused, is sufficient

indication of the fact that they are the legal heirs of the late Kalkatia Mahato.

This Court further notices the order of the Ld. Thika Controller, Howrah dated 2nd March, 2009 by which the Ld. Controller was pleased to notice the judgment in Title Appeal No. 182 of 1987 and hold that only Shanti Devi and Baburam are the true legal heirs of the late Kalkatia Mahato, whereas Gobinda Mahato and others are not the true legal heirs.

Having regard to the concurrent findings of two Competent Courts/fora as above, this Court finds substance in the argument of Sri Sahoo that the principle of Issue Estoppel shall apply to the facts of this case.

This Court further notices that Miscellaneous Appeal No. 201 of 2012 is connected to the same suit property in which the present petitioners seek substitution of their names. The said Misc. Appeal No. 201 of 2012 arose out of a proceeding instituted by the present opposite parties/respondents for eviction of the original tenant, i.e. the late Kalkatia Mahato and one Baburam Mahato, his son. On the death of Kalkatia Mahato during pendency of the proceedings he was substituted by Shanti Devi, his widow.

This Court, therefore, finds that the proceedings both before the Ld. Trial Court and before the Ld. Appellate Court pertain to the

tenancy of the Late Kalkatia Mahato. On the death of the original tenant the legal heirs as noticed in Title Appeal No. 182 of 1987 stood substituted. It is, therefore, imperative that the legal heirs claiming substitution in the suit property must have some connection with the original tenant, the late Kalkatia Mahato. However, it was conclusively found both in Title Appeal No. 182 of 1987 and by the Ld. Thika Controller, Howrah (supra) that none of the present petitioners can be described to be the legal heirs of the original tenant, i.e. the late Kalkatia Mahato.

This Court is, therefore, persuaded by Sri Sahoo's argument that when the findings by two competent Courts/fora have clinched the issue with regard to the legal heirship of the original tenant, the late Kalkatia Mahato, the present petitioners cannot be allowed to agitate the issue *de novo* in a collateral proceeding for substitution. For the present petitioners to claim substitution in the eviction proceedings connected to the suit property, they must prove their nexus with the original tenant, the late Kalkatia Mahato. However, such nexus has been completely rejected by the competent Court/fora and such finding, in the absence of any challenge, has attained finality.

In such view of the matter the principle of Issue Estoppel will be attracted to the facts of this Case in order to have certainty in legal

proceedings. Admittedly the application for substitution filed by the present petitioners claims legal heirship in respect of Shanti Devi and not the original tenant, the late Kalkatia Mahato. For the purpose of contesting the eviction proceedings after the death of the original tenant it is necessary to record the names of the legal heirs of the deceased original tenant. The names of such legal heirs were noticed and recorded by the competent Courts/fora and such judgements/orders of the competent Courts/fora must be construed to be judgments/orders *in rem* and present petitioners cannot be allowed to reopen the same in collateral proceedings for substitution.

This Court is of the further considered view that the principle of *res judicata* read with the principles analogous thereto stands as a bar to allowing the relief claimed by the present petitioners. In this connection this Court also recognises the salutary legal maxim of avoidance of multiplicity of proceedings.

In the backdrop of the above discussion this Court holds that the order impugned dated 9th July, 2013 warrants no interference.

CO 2726 of 2013 is accordingly **dismissed.**

There will be, however, no order as to costs.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

(**Subrata Talukdar, J.)**

P.A. to S. Talukdar, J