SUPREME COURT OF INDIA

Lonankutty

Vs.

Thomman

C.A.No.1283 of 1973

(Y. V. Chandrachud, V. R. Krishna Iyer and N. L. Untwalia, JJ.)

15.04.1976

JUDGEMENT

CHANDRACHUD, J.:-

1. This 22-year old litigation concerns the right of two adjacent owners to catch prawns on their respective lands.

2. Survey No. 673 of Kadamkudi, District Ernakulam, measuring about 11 acres originally belonged to the Cochin Government but by diverse transfers the title thereto is now vested in the appellant, Lonankutty. The land is bounded on the West and South by a river. A portion of the land on the North-East can be put to agricultural use for a part of the year but the land, by and large, is water-logged and can profitably be used for prawn-fishing. In order to make fishing feasible, the appellant has constructed a bund on the western side of the land for arresting the flow of the river water. The contrivance is calculated to permit collection of water on the land, almost to the point of submerging it. The prawns enter the land with the high tide, they breed and multiply on the land and the water while receding leaves the prawns behind. The appellant then catches them, presumably under a

licence from the Government of Kerala.

3. Survey Nos. 672, 677, 655/4 and 670 which sprawl on all sides of survey No. 673 belong to the respondents: Thomman and his mother Annam. We are concerned with the prescriptive rights claimed by them in respect of survey No. 672 which is situated towards the north-east of survey No. 673. Survey No. 672 is almost land-locked and between it and the river on the south stands the vast expanse of survey No. 673 belonging to the appellant.

4. Prawns have an export value and catching them is so much more profitable than growing food-crops. But the respondents' land being land-locked, they have no direct access to the river on the west or the south. They cannot therefore do any fishing operations because, for prawn-fishing it is necessary that the river-water must enter their land, and collect on it so that after the prawns have bred the water can be released back to the river. For achieving this result, respondents constructed a bund with sluice-gates on the border between their land and survey No. 673. Their case is that they have a prescriptive easement to take water from the appellant's land and to divert it back through the same land both for fishing and agriculture. The appellant has grave objection to permitting the respondents to engage thus in prawn-fishing because along with the water which would pass from his land (survey No. 673) to the respondents' land (survey No. 672), prawns also would pass. And when the water would be released back from survey No. 672 through the sluice-gate, survey No. 673 would get flooded, carrying back the prawns left on his land, to the river on the south. This is the genesis of the dispute between the parties.

5. The appellant filed Civil Suit No. 666 of 1954 against the respondents for a perpetual injunction restraining them from taking water from survey No. 673, from discharging the water back through survey Number 673, and for a mandatory injunction directing them to demolish the bund and close the sluice-gates. The appellant disputed the right claimed by the respondents in its entirety, contending that they had no right to the flow of water either way for either purpose - fishing or agriculture.

6. The respondents filed Civil Suit No. 5 of 1957 for an injunction restraining the appellant from trespassing on the bund constructed by them and for preventing the appellant from interfering with their right to take water from Survey No. 673 and to discharge the water back through that land. Respondents claimed this prescriptive right for fishing as well as for agricultural purposes.

7. Both the suits were instituted in the court of the Munsiff of Cochin but in view of the timelag between their respective institution, they were tried and disposed of separately. By a judgment dated September 20, 1957 the learned Munsiff decreed the appellant's suit (No. 666 of 1954) partly, granting an injunction against the respondents to the effect that they had no right to take water from the appellant's land nor to discharge the water back through that land for the purposes of prawn-fishing. The learned Judge, however, expressly upheld the respondent's easementary right to the

two-way flow of water from and through the appellant's land for agricultural operations during the agricultural season.

8. The suit filed by the respondents (No. 5 of 1957) was disposed of by the learned Munsiff by a judgment dated October 11, 1958. Consistently with the decree passed in the appellant's suit, he dismissed the respondents' suit in so far as it related to the fishing rights claimed by them but decreed it to the extent of the right claimed by them in regard to agricultural user. Briefly, the result of the decrees passed in the two suits was that the respondents could take water from the appellant's land and discharge water back through that land for agricultural purposes only and during the agricultural season which begins on the 15th Mecham and ends on 15th Vrischigam of each year.

9. From th decree passed in the appellant's suit, two cross-appeals were filed in the court of the learned Subordinate Judge, Ernakulam, the appeal filed by the appellant being A. S. 64 of 1958 while that filed by the respondents being A. S. 66 of 1958. Similarly, two cross-appeals were filed by the parties as against the decree passed by the trial Court in the suit filed by the respondents, A. S. 1 of 1959 being the one filed by the respondents while A. S. 17 of 1959 being the one filed by the appellant. Since these four appeals involved common questions for decision the learned Subordinate Judge heard them together and disposed them of by a common judgment dated January 28, 1960. The learned Judge dismissed all the appeals and confirmed the decrees passed by the trial Court.

10. No further appeal was filed by either side from the decrees passed by the learned Subordinate Judge in Appeals Nos. 1 of 1959 and 17 of 1959, which arose out of the respondents' suit. But respondents filed a second appeal in the High Court against the decrees passed by the learned Subordinate Judge in appeal No. 66 of 1958 which arose out of the decree passed by the trial Court in the suit filed by the appellant. That was Second Appeal No. 1149 of 1960.

11. Before the High Court it was contended on behalf of the respondents that the Subordinate Judge had failed to consider the entire evidence in the case and therefore his judgment was vitiated. On the other hand, the appellants, who were defending the judgment of the Subordinate Judge, contended that the question raised by the respondents in their second appeal was barred by res judicata as the decrees passed by the Subordinate Judge in appeals arising out of the respondents' suit had become final, not having been appealed against. A learned single Judge of the High Court, by his judgment dated July 8, 1964 accepted the first of these contentions, set aside "the judgment and decree of the Subordinate Judge which was under appeal" and remanded the appeal for a fresh hearing. The appellant's contention of res judicata was rejected by the learned Judge on the ground that since in the four appeals the Subordinate Judge had passed only one judgment and one decree, it was enough for the respondents to file one appeal in which they could challenge every one of the findings recorded against them.

12. On remand, the appeals were heard by another Subordinate Judge before whom the appellant,

once again and with some impropriety, pleaded the bar of res judicata; Impropriety, because the High Court having rejected that plea by its remanding judgment, the court of remand - the Subordinate Judge - was bound by the High Court's decision on the question of res judicata. Apparently, the learned Subordinate Judge was in a doubting disposition and he expressed his reaction favourably by observing that the appellants's contention of res judicata was plausible. But, very rightly, he proceeded to dispose of the matter on merits as directed by the High Court. By his judgment dated December 22, 1964 he dismissed A. S. 66 of 1958 which was filed by the respondents against the decree passed by the trial Court in the appellant's suit. Thus, the view taken in the judgment before remand stood confirmed after remand on a further consideration of evidence in the case.

13. Respondents filed Second Appeal No. 1190 of 1965 against the Subordinate Judge's judgment, which was allowed by a Division Bench of the Kerala High Court On April 8, 1971. The High Court held that the respondents had a right to the flow of water through the appellant's land not only for the purposes of agriculture but for the purposes of prawn-fishing also. Appellant raised once again the plea of res judicata but it was rejected on the ground, rightly, that the plea was concluded by its remanding judgment. In the result, the High Court dismissed the appellant's suit (No. 666 of 1954), giving rise to this appeal by special leave.

14. Learned counsel appearing on behalf of the appellant contends that the High Court exceeded its jurisdiction in interfering with the findings of fact recorded by the Subordinate Judge and that it had overlooked certain fundamental principles of law while adjudicating upon the prescriptive claim made by the respondents. It is unnecessary to go into these questions because another submission made on behalf of the appellant goes to the root of the matter and if that submission is accepted, the High Court's judgment would be impossible to sustain. The contention is that the issue as regards the respondents' right to the flow of water through the appellant's land for fishing purposes is barred by res judicata, and therefore, the High Court could not try and decide that issue in the second appeal which came before it.

15. This contention is well founded and must be accepted. By Section 11. Code of Civil Procedure, in so far as relevant, no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and has been heard and finally decided. Explanation I to the section provides that the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. The only other aspect of the rule of res judicata which on the facts before us must be borne in mind is that it is not enough to constitute a matter res judicata that it was in issue in the former suit. It is further necessary that it must have been in issue directly and substantially. And a matter cannot be said to have been "directly and substantially" in issue in a suit unless it was alleged by one party and denied or admitted, either expressly or by necessary implication, by the other.

16. In the instant case, two suits were filed in the trial court: one by the appellant and the other by the respondents. The plaintiff in the first suit was the defendant in the second suit while the defendants in the first suit were plaintiffs in the second. To particularize in the interests of clarity, appellant who was plaintiff in the earlier suit (No. 666 of 1954) was the defendant in the later suit (No. 5 of 1957). Respondents who were plaintiffs in suit No. 5 of 1957 were defendants in suit No. 666 of 1954. In the appellant's suit, the trial Court framed the following issues for decision in so far as relevant:

"1. Whether the defendants have trespassed into the north-eastern boundary of the plaint schedule property and have begun construction of a bund there as alleged in para 3 of the plaint?

2. How long has the bund on the western boundary of S. No. 672 been in existence?

3. Whether defendants 1 to 3 have acquired any right of easement over the plaint schedule properties as contended for in paras 4 and 5 of the written statement?

4. Whether the defendants enjoyed such a right against schedule properties as owners and occupiers of S. Nos. 672 and 667 openly as of right and continuously and for the prescribed period?

5. Whether defendants 1 to 3 have no out-let for water from S. Nos. 667, 672, 655, 670 and 671 other than through the plaint schedule properties?

6. Whether the right to let in and let out water for purpose of prawn fishing operation is a right of easement capable of being acquired in law?

7. Whether the plaintiff is entitled to the injunction prayed for?"

In the respondents' suit the following issues were framed:

"1. Whether the plaintiffs have got any easement right to let in and let out water from the plaint A schedule properties through B schedule property?

2. Whether the defendant can obstruct that right if any, by putting up a bund?

3. Whether the plaintiffs are entitled to the injunction prayed for?"

17. The trial Court decreed the appellant's suit partly by holding that the respondents had not acquired any right of easement over the appellant's land for the ingress and egress of water for fishing purposes but they had established such a right for agricultural purposes during the agricultural season. The trial Court issued an injunction restraining the respondents from taking or letting out water from or through the appellant's land for fishing purposes. In the respondents' suit, the trial Court recorded similar findings and issued an injunction against the appellant restraining him from interfering with the respondents' easement right limited to agricultural purposes during the agricultural season.

18. Each party being partly aggrieved by both the decrees, each filed an appeal in the District Court against the two decrees. The learned Subordinate Judge, sitting in appeal, had thus 4 appeals before him, 2 arising from each suit. He confirmed the decrees under appeal and dismissed all the appeals.

19. Respondents did not file any further appeal against the decree passed by the District Court in the appeals arising out of their suit. They filed a second appeal in the High Court only as against the decree passed by the District Court in A. S. 66 of 1958 which arose out of the decree passed by the trial Court in the appellant's suit. Thus, the decision of the District Court rendered in the appeal arising out of the respondents' suit became final and conclusive. That decision, not having been appealed against, could not be re-opened in the second appeal arising out of the appellant's suit. The issue whether respondents had the easementary right to the flow of water through the appellant's land for fishing purposes was directly and substantially in issue in the respondents' suit. That issue was heard and finally decided by the District Court in a proceeding between the same parties and the decision was rendered before the High Court decided the second appeal. The decision of the District Court was given in an appeal arising out of a suit, which though instituted subsequently, stood finally decided before the High Court disposed of the second appeal. The decision was therefore one in a "former suit" within the meaning of Section 11, Explanation I, Civil Procedure Code. Accordingly, the High Court was in error in deciding an issue which was heard and finally decided in a "former suit" and was therefore barred by res judicata.

20. The High Court, in its judgment dated April 8, 1971 assumed wrongly that suit No. 666 of 1954 filed by the appellant and suit No. 5 of 1954 filed by the respondents were "originally disposed of by a common judgment." They were not. The appellant's suit was disposed of by a judgment dated September 20, 1957 while the respondents' suit was disposed of by a judgment dated October 11, 1958. Naturally, 2 separate decrees were drawn in the 2 suits and those decrees gave rise to 4 cross-appeals, 2 from each suit.

21. In its remanding judgment dated July 8, 1964 by which the plea of res judicata was repelled, the High Court relied principally on the decision of this Court in Narahari v. Shanker, 1950 SCR 754. That decision is in our opinion distinguishable because in that case only one suit was filed giving rise to 2 appeals. A filed a suit against B and C which was decree B and C preferred separate appeals which were allowed, by a common judgment, but the appellate court drew 2 separate decrees. A preferred an appeal against one of the decrees only and after the period of limitation was over, he preferred an appeal against the other decree on insufficient court-fee. The High Court held that A should have filed 2 separate appeals and since one of the appeals was time-barred, the appeal filed within time was barred by res judicata. This Court held that "there is no question of the application of the principle of res judicata", because "when there is only one suit, the question of res judicata does not arise at all." This was put on the ground that "where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up." In our case, there were 2 suits and since the appellate decree in one of the suits had become final, the issues decided therein could not be re-opened in the second appeal filed against the decree passed in an appeal arising out of another suit. This precisely is the ground on which Narhari's case was distinguished by this Court in Sheodan Singh v. Smt. Daryao Kunwar, (1966) 3 SCR 300 = (AIR 1966 SC 1332). It was held therein that where the trial Court has decided 2 suits having common issues on the merits and there are two appeals therefrom the decision in one appeal will operate as res judicata in the other appeal.

22. The circumstance that the District Court disposed of the 4 appeals by a common judgment cannot affect the application of Sec. 11 because as observed in Badri Narayan Singh v. Kamdeo Prasad Singh, (1962) 3 SCR 759 = (AIR 1962 SC 338), even where 2 appeals arise out of one proceeding and even if the appeals are disposed of by a common judgment, the decision in that judgment may amount to 2 decisions and not to one if the subject-matter of each appeal is different. The case before us is stronger still for the application of Section 11 because the appeals filed in the District Court arose not out of one proceeding but out of 2 different suits, one by the appellant and the other by the respondents. The failure of the respondents to challenge the decision of the District Court in so far as it pertained to their suit attracts the application of Section 11 because to the extent to which the District Court decided issues arising in the respondents' suit against them, that decision would operate as res judicata since it was not appealed against.

23. It is necessary to add that the decision rendered by the High Court by its judgment of remand dated July 8, 1964 in Second Appeal No. 1149 of 1950 that the contention raised by the respondents is not barred by res judicata can be re-opened in this appeal against the final judgment of the High Court. The decision of this Court in Satyadhyan Ghosal v. Sm. Deorajin Debi, (1960) 3 SCR 590 = (AIR 1960 SC 941) is directly in point on this question. Relying upon certain decisions of the Privy Council it was held by this Court that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. Accordingly, the circumstance that the remanding judgment of the High Court was not appealed against, assuming that an appeal lay therefrom, cannot preclude the appellant from challenging the correctness of the view taken by the High Court in that judgment.

24. In view of our decision that the contention raised by the respondents is barred by res judicata, it must be held that the High Court was in error in allowing the respondents' appeal and accepting his contention. Accordingly, we allow this appeal, set aside the judgment of the High Court and restore that of the District Court. In the circumstances, there will be no order as to costs.

25. We would like to state by way of clarification that our judgment will not affect the respondents' right to the flow of water through the appellant's land for agricultural purposes from 15th Meenam to 15th Vrischigam every year.

Appeal allowed.