Narayana Prabhu Venkateswara Prabhu

Vs

Narayana Prabhu Krishna Prabhu (Dead) By L. Rs.

Civil Appeal No. 1763 of 1968

(CJI A.N. Ray, M.H. Beg, P.N. Shinghal JJ)

19.01.1977

JUDGMENT

BEG, J. –

1. This is a defendant's appeal by certificate granted by the Kerala High Court under Article 133(1)(a) of the Constitution as a matter of course before its amendment because the High Court had modified a decree in the partition suit and the subject-matter satisfied the requirements of the unamended Article 133.

2. The parties to the partition suit are descendants of Narayana Prabhu (hereinafter referred to as 'Narayana'). Krishna, the plaintiff (now dead) was the third son of Narayana. The defendant-appellant, Venkateswara, was the eldest of the four sons of Narayana. The partition suit related to 72 items mentioned in Schedule 'A' to the plaint claimed by the plaintiff to be joint family property. It appears that there was no dispute with regard to certain items, but, the defendant-appellant claimed other items as his exclusive property on the ground that they had been purchased from his personal income due to his own enterprise and exertions and ability in carrying on business. The trial Court had accepted the case of the defendant-appellant that all items, except No. 35 and a part of item No. 52 which belonged to the third defendant, were the self-acquired properties of the defendant-appellant. The High Court reversed this finding on the ground that there was "little reliable evidence on record as to the exact source of the fund with which the first defendant started the trade". The High Court rejected the submission of the defendant-appellant that, when the tobacco business under consideration was started, Narayana being the Karta of the family, the fact that the eldest son, Venkateswara, the defendant-appellant, was carrying on the business, raised a presumption that it was the separate or self-acquired business of Venkateswara. The High Court relying on certain documentary evidence, including the letter-heads showing the business as that of "P. N. Venkateswara Prabhu & Brothers" held that the business was joint family business.

3. The partition suit was filed originally in another Court but was sent to the Court of the Second Additional Sub Judge of Alleppey in 1957, and the preliminary decree was passed on August 5, 1960. The High Court allowed the appeal, modifying the decree to the extent that three-fourth share of items 4 to 72 of the schedule, except item 35 and part of 52 standing in the name of the third defendant, were held to be partible properties as part of joint family business, but it excluded assets which came into existence after the filing of the partition suit which operated as a clear unequivocal expression of intention to separate. It also left the extent of mesne profits of landed properties to be decided in proceedings for the passing of the final decree.

4. It appears that the defendant-appellant had also filed a money suit in the Court of the Munsif only

against defendant 3, one of the four brothers, but all of them were impleaded in the partition suit. The money suit was, however, transferred to the file of the Additional Sub Judge and tried together with the partition suit and was also decided by the Additional Sub Judge of Alleppey on the same date as the partition suit. The plaintiff-respondent had appealed against both the decrees in the High Court. The two appeals were heard decided together by the High Court. The High Court, after pronouncing judgment in the partition suit, proceeded to give judgment, under a new heading and number of the appeal in the money suit. It said, in this separate judgment :

> The suit that gave rise to this appeal has been instituted by the respondent against the appellant for money due on 14.10.1123 on account of tobacco delivered to the latter's shop. The defence was that the trades run by both the brothers were parts of the joint family trade, and not separate to foster such a claim by the respondent on the appellant. The Court below, having found in the other suit the shops run by the parties to belong to the concerned individuals, has decreed the suit. As we have reversed that finding in A.S. No. 843 of 1960 and found the shop standing in the name of each brother to be a branch of the joint family trade in tobacco and directed ascertainment of the assets and liabilities of the entire trade to be settled as on 2.3.1124, the date of that partition suit, this suit has to be dismissed.
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> The judgments were, therefore, two separate ones given in one continuation but under separate headings. Separate decrees were prepared in each appeal relating to a separate case.

5. As the defendant-appellant did not seek leave to file any appeal against the High Court's judgment and decree in the money suit and there is no appeal before us against the decree in the money suit, a preliminary objection is taken on the ground that the defendant's appeal now before us is barred by res judicata.

6. Learned Counsel for the defendant-appellant urges that the two suits were different in nature and were filed in different Courts originally so that the Court trying the partition suit and the Court in which the money suit was triable were not Courts of coordinate jurisdiction. It was also objected that the partition suit was earlier and the money suit having been filed sixteen days later could not be deemed to be a suit decided earlier. Furthermore, it was pointed out that the judgment was common. It was also urged that all the four brothers were parties to the partition suit but the money suit was only between two brothers.

7. It is true that the appeals against both the decrees of the trial Court were heard together in the High Court, and, although the appeal in the money suit is decided under a separate heading and the short judgment in it appears to be practically consequential on the judgment in the partition suit, yet, the judgments in the two appeals decided a common issue and resulted in two decrees.

8. It is urged that, whereas the defendant-appellant had filed an appeal on the strength of a certificate granted to him as a matter of right, following upon the modification of the decree of the trial Court by the High Court, the defendant-appellant had no such right of appeal in this Court. Hence, it was submitted that neither in law nor in equity could the defendant-appellant be barred from putting forward his objections to the decree in the partition suit.

9. Certain decisions were relied upon by learned Counsel for the defendant-appellant Venkateswara in support of the contention that the plea of res judicata is not available as a preliminary objection to

the respondent to the hearing of the appeal before us in the circumstances of this case. We proceed to consider these cases.

10. Narhari v. Shankar (1950 SCR 754 : AIR 1953 SC 419) is no doubt the judgment of the Supreme Court of India, although it was, if one may so put it, "the Hyderabad Wing" of it in a transitional period when a learned Judge of this Court, Mr. Justice Mehr Chand Mahajan, presided over a bench of which the other two members were formerly members of His Exalted Highness the Nizam's Judicial Committee. technically, however, it was this Court's judgment. In that case, Naik, J. had followed a decision of the Judicial Committee of the Hyderabad State and held that, when there was only one suit and the appeals had been disposed of by the same judgment, it was not necessary to file two separate appeals. It elaborated the ratio of the decision as follows (at p. 757-758) :

> It is now well settled that where there has been one trial, one finding, and one decisions, there need not be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand, J. in his learned judgment in Mst. Lachmi v. Mst. Bhuli (AIR 1927 Lah 289) mentioned above, the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment cannot remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one.
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> It seems to us that to be fair to confine the ratio decidendi of the Hyderabad case to cases where there is only one suit. In the case now before us, not only were the decrees different but the suits were different. The mere fact that the judgment in the two suits were given together or in continuation did not matter. In fact, even in form, the judgment in the appeal relating to the money suit was separate from the rest of the judgment. And, in any case, there were two separate decrees.

11. We think that Section 11 Civil Procedure Code enables the party to raise the statutory plea of res judicata if the conditions given therein are fulfilled. The principle embodied in the statute is not so much the principle of "estoppel by record", which the British Courts apply, as one of public policy, based on two maxims derived from Roman jurisprudence : firstly, interest reipublicae ut sit finis litium - it concerns the State that there be an end to law suits; and, secondly, nemo debet bis verxari pro una et eadem cause - no man should be vexed twice over for the same cause.

12. Sir Lawrence Jenkins pointed out, in Sheoprasan Singh v. Ramanandan Prasad Narayan Sing (AIR 1916 PC 78 : 43 IA 91 : 43 Cal 694), that the rule of res judicata "while founded on ancient precedent, is dictated by a wisdom which is for all time". Litigation which has no end or finality defeats its very object. This object is decision of disputes or an end to each litigation. But, if there is no finality to it, the dispute cannot be said to be really decided at all. It is the duty of the State to see that disputes brought before its judicial organs by citizens are decided finally as early as possible. Hence, Section 11 of our Civil Procedure Code contains in statutory form, with illuminating

explanations, a very salutary principle of public policy. An "estoppel", even if it be "by record", rests on somewhat different grounds. Even such a estoppel savours of an equity or justice created by actions of parties the results of which have become recorded formally behind which they are not allowed to go.

13. Reliance was also placed on Govind Bin Lakshmanshet Anjorlekar v. Dhondba 'Ra' 'V' Bin Ganba 'Ra' 'V' 'Ta' Mbye (ILR Vol. XV Bombay 104), on behalf of the appellant. Here, it was held that decisions in previous suits of the nature of small cause suits in which there was no right of second appeal could not operate as res judicata in suits before Courts in which questions were elaborately litigated and decided in cases which could go to the High Court in second appeal. We were also referred to a Full Bench decision of the Madras High Court in Avanasi Gounden v. Nachammal (ILR 29 Madras 195 : 17 MLJ 374), where it was similarly held that : "A decision in a previous suit of a small cause nature, in which no second appeal is allowed by law, is no bar to a subsequent suit, in the same Court, which, not being of a small cause nature, is open to second appeal". We have to remember that Small Cause jurisdiction is a limited one exercisable only in specified matters. Decisions given beyond jurisdiction to try an issue cannot operate as res judicata.

14. Our attention was drawn to Explanation II of Section 11, on behalf of the respondents. It reads :

> Explanation II. - For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to a right of appeal from the decision of such Court.

15. It seems to us that Section 11 itself refers to a Court which actually tries the two suits. We think that, in the circumstances of the case before us, the incompetence of the Court, in which the money suit was initially filed, to try the partition suit did not matter when the actual hearing of both the cases took place in the same Court. That Court was, obviously, competent to try both the suits. After the money suit had been transferred from the Court of the Munsif, the Second Additional Sub Judge actually tried and decided both of them. This was enough to make the difference in the jurisdictions of the Courts, in which the suits were initially filed, quite immaterial. Similarly, the High Court was competent to hear appeals from judgments in both. It heard and decided the two appeals together.

16. So far as the question of appeal to this Court is concerned, it is true that no appeal lay as a matter of right against the judgment in the appeal in the money suit, but, we think that the learned Counsel for the respondents is correct in submitting that the question whether there is a bar of res judicata does not depend on the existence of a right of appeal of the same nature against each of the two decisions but on the question whether the same issue, under the circumstances given in Section 11, has been heard and finally decided. That was certainly purported to be done by the High Court in both the appeals before it subject, of course, to the rights of parties to appeal. The mere fact that the defendant-appellant could come up to this Court in appeal as of right by means of a certificate of fitness of the case under the unamended Article 133(1)(c) in the partition suit, could not take away the finality of the decision so far as the High Court had determined the money suit and no attempt of any sort was made to question to the correctness or finality of that decision even by means of an application for special leave to appeal.

17. Learned Counsel for the respondents appears to us to have rightly relied upon Bhugwanbutti Chowdhrani v. A. H. Forbes (ILR 28 Cal 78 : 5 CWN 483), where it was held that "in order to make a matter res judicata it is not necessary that the two suits must be open to appeal in the same way." He also relied on Lonankutty v. Thomman ([1976] 3 SCC 528), a recent decision of three Judges of

this Court, where Chandrachud, J. observed (at p. 534, para 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 respondent's suit became final and conclusive.

It was also observed there (para 19) :

> 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.

18. The expression "former suit", according to Explanation I of Section 11, Civil Procedure Code, makes it clear that, if a decision is given before the institution of the proceeding which is sought to be barred by res judicata, and that decision is allowed to become final or becomes final by operation of law, a bar of res judicata would emerge. This, as learned Counsel for the respondents rightly submits, follows from the decision of this Court in Lonankutty's case.

19. The only other point which we need consider is whether the fact that the money suit was only between the defendant-appellant and one of his brothers, who was also a respondent in the partition suit makes any difference to the applicability of the principle of res judicata in this case. Learned Counsel for the appellant submits that the defendant-appellant could not come within the ambit of Explanation VI of Section 11, Civil Procedure Code which provides as follows :

> Where person litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
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> On the other hand, learned Counsel for the respondent submits that the case of the respondents is fully covered by this explanation and relies on Kumaravelu Chettiar v. T. P. Ramaswami Ayyar (AIR 1933 PC 183 : 60 IA 278 : 143 IC 665) where it was held :
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> Explanation 6 is not confined to cases covered by Order 1, Rule 8 but extends to include any litigation in which, apart from the Rule altogether, parties are entitled to represent interested persons other than themselves.

20. We think that the submission made by the learned Counsel for the respondents is sound. In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided we do not see why the others making the same claim cannot be held to be claiming a right "in common for themselves and others". Each of them can be deemed, by reason of Explanation VI, to represent all those the nature of whose claims and interest are common or identical. If we were to hold otherwise, it would necessarily mean that there would be two inconsistent decrees. One of the tests in deciding whether the doctrine of res judicata applies to a

particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. We think this will be the case here.

21. We need not deal with other cases of this Court cited, including Sheodan Singh v. Smt. Daryao Kunwar ([1966] 3 SCR 300 : AIR 1966 SC 1332) which supports the respondents' submissions, and Raj Lakshmi Dasi v. Banamali Sen (1953 SCR 154 : AIR 1953 SC 33) which is not directly applicable inasmuch as that was a case in which the general principles of res judicata, and not Section 11 Civil Procedure Code, were applied. The preliminary objection in the case before us is fully supported, for the reasons given above, by Section 11, Civil Procedure Code read in the light of the explanations mentioned above. Consequently, the preliminary objection must prevail.

22. Learned Counsel for the appellant, conscious of the difficulties in his way, filed, after the hearing of the appeal was begun before us, an application for condonation of delay in applying for leave to appeal against the judgment of the High Court in the money suit. He submits that, in view of the uncertain position in law, we should try to extend equities as much as possible in his client's favour. On the other hand, learned Counsel for the respondents points out that the objection based on the bar of res judicata was taken as long ago as 1968 by the respondents. It seems to us that the delay in waking up to the existence of the bar on the part of the appellant is much too long to be condoned. Moreover, we also find that the judgment of the High Court, based on the admissions of the appellant, does not disclose any error of law so as to deserve grant of special leave to appeal. Indeed, in so far as we could express any opinion at all upon the merits of the judgment of the High Court, based as it is upon documents containing admissions of the defendant-appellant, it seems to us that the appellant would have a very uphill task indeed in arguing his appeal even in the partition suit. We may mention here that the partition suit was instituted as long ago as 1947 and was only given a new number in 1957. If there is a case in which the principle that litigation should have an end ought to be applied, it is this on the face of facts of the case apparent to us. We, therefore, reject the Civil Miscellaneous Petition 8585 of 1976, the application for condonation of delay in the filing the Special Leave Petition. We dimiss the Civil Miscellaneous Petition 8586 of 1976 as well as the over-delayed Special Leave Petition 2816 of 1976.

23. The result is that this appeal must be and is hereby dismissed, but, in the circumstances of the case, the parties will bear their own costs.

ORDER

24. Allowed.

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