SUPREME COURT OF INDIA

Gram Panchayat of Village Naulakha

Versus

Ujagar Singh

(M. Jagannadha Rao and K.G. Balakrishnan, JJ.)

Civil Appeal No. 5467 of 2000 (Arising out of SLP (C) No. 18973 of 1999).

27.09.2000

ORDER

M. Jagannadha Rao, J. - Leave granted.

2. This appeal is preferred by the Gram Panchayat against the judgment of the High Court of Punjab and Haryana dated 12.10.1998 in CWP No. 11569 of 1997. The appellant filed an application under Section 7 of the Village Common Lands (Regulations) Act, 1961 and an order was passed in its favour by the Collector on 12.7.1988. The Collector found that an earlier decree obtained by the respondents against the appellant for injunction on 10.6.1975 was a decree obtained by the respondents in collusion with the then Sarpanch and was not binding on the Panchayat in the present proceedings. On appeal by the respondents before the Development Commissioner, the said judgment was affirmed on 13.3.1997 upholding the plea of collusion. The respondents then moved the High Court by way of a writ petition and the writ petition was allowed by the High Court on 12.10.1998. The learned Judges of the High Court did not go into the question of collusion or the merits of the case but felt bound by a decision of a Full Bench of the Punjab and Haryana High Court in ***Gram Panchayat, Village Bathoi Kalan, Patiala v. Jagar Ram and others, AIR 1991 P&H 159*** which judgment was said to have been followed by another Division Bench on 28.1.1998. The Full bench judgment laid down that the statutory authorities under the Punjab Village Common Lands (Regulations) Act, 1961 could not ignore an earlier decree against the Panchayat on the ground of its being collusive and fraudulent, unless the Panchayat had first filed an independent suit to set aside the said decree or sought declaration that the decree was collusive or fraudulent.

3. In the present case, learned counsel for the appellant submits that admittedly the earlier suit was filed by the respondents against the Panchayat for injunction on 16.5.1975 and that the Sarpanch then conceded the case of the respondents and a decree was passed on 10.6.1995 within 24 days of the filing of the suit and that the said decree was, in the face of these facts, obviously collusive and that it was not necessary to drive the appellant to a separate suit to establish that the said decree was collusive. Learned counsel contends that the Full Bench in Jagar Ram's case has laid down a wrong principle. In order to raise a plea of collusive of an earlier suit, it is not necessary to file an independent suit and obtain another decree as a condition precedent. Counsel submits that, in the facts of this case, the collusion is obvious and the Collector and the

Appellate Authority were having the necessary jurisdiction to decide that the earlier decree was collusive. The earlier decree, being collusive, cannot operate as *res judicata*. arned counsel for the respondents who contended that the principle laid down by the Full Bench in Jagar Ram's case is correct and that the earlier judgment in the present case is binding on the basis of the principle of *res judicata*. The Panchayat cannot therefore raise a plea of collusion in the latter proceeding unless it has first filed a suit and obtained a declaration or unless it took steps to have the earlier decree set aside.

5. We may state that the view taken by the Full Bench of the Punjab and Haryana High Court in Jagar Ram's case is not correct and in fact, it runs contrary to the provisions of Section 44 of the Indian Evidence Act. That section provides that : Any party to a suit or proceeding may show that any judgment, order or decree which is relevant under Sections 40, 41, 42 and which has been delivered by a Court not competent to deliver it or was obtained by *fraud* or *collusion*. (Section 40 refers to the relevance of previous judgments which are pleaded as a bar to a second suit or trial and obviously concerns section 11 CPC).

6. It appears from commentary in Sarkar's Evidence Act (13th Ed., reprint) (at p. 509) on section 44 that it is the view of the Allahabad, Calcutta, Patna, Bombay High Courts that before such a contention is raised in the latter suit or proceeding, it is not necessary to file an independent suit. The passage from Sarkar's Evidence which refers to various decisions reads as follows :

"Under Section 44 a party can, in a collateral proceeding in which fraud may be set up as a defence, show that a decree or order obtained by the opposite party against him was passed by a court without jurisdiction or was obtained by fraud or *collusion* and *it is not necessary to bring an independent suit for setting it aside* (***Bansi v. Dhapo, ILR 24 All 242; Rajib v. Lekhan, ILR 17 Cal. 11; Parbati v. Gajraj, AIR 1937 All 28; Prayag v. Siva, AIR 1926 Cal. 1; Hare Krishna v. Umesh, AIR 1921 Pat. 193; Aswini v. Banamali, 21 CWN 594; Machharam v. Kalidas, ILR 19 Bom. 821; Ranganath v. Govind, ILR 28 Bom. 639; Jamiruddin v. Khadejanessa, AIR 1929 Ca. 685; Bhagwandas v. Patel and Co., AIR 1940 Bon. 131; Bishunath v. Mirchi, AIR 1955 Pat. 66; Vijaya v. Padmanabham, AIR 1955 AP 112).***"

Thus, in order to contend in a latter suit or proceeding that an earlier judgment was obtained by collusion, it is not necessary to file an independent suit as stated in Jagar Ram's case for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided. We do not agree with the decision of the Full Bench of the Punjab and Haryana High Court in Jagar Ram's case. The Full Bench has not referred to section 44 of the Evidence Act nor to any other precedents of other Courts or to any basic legal principle.

7. The law in England also appears to be the same, that no independent suit is necessary. In *Spencer-Bower and Turner on Res Judicata* (2nd Ed., 1969) it is stated (para 369) that there are exceptions to the principle of *res judicata*. If the party setting up *res judicata* as an estoppel has alleged all the elements of an estoppel (i.e. ingredients of *res judicata*), it is still open to the latter (the opposite party) to defeat the

estoppel by setting up and establishing certain affirmative answers. Of these there are four main classes - fraud, cross-estoppel, contract and public policy. The author clearly says that *no active proceedings for `rescission'* of the earlier judgment *are necessary*. They state (para 370) as follows :

"The avoidance of a judicial act on the ground of *fraud* or *collusion* is effected *not only by active proceedings for rescission.*..... but also by setting up the fraud as a defence to an action on the decision, or as an answer to any case which, whether by way of estoppel or otherwise, depends for its success on the decision being treated as incontrovertible."

Thus, the law is well settled that no independent suit as a condition precedent is necessary.

8. Collusion, say Spencer-Bower and Turner (para 378), is essentially play-acting by two or more persons for one common purpose - a concerted performance of a *fabula* disguised as a *judicium* - an unreal and fictitious presence of a contest by confederates whose game is the same. As stated by Lord Selborne L/C in ***Boswell v. Coaks, 1894(6) Rep. 167***, there is no Judge; but a person divested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him, there is no party litigating.... no real interest brought into question and to use the words of a very sensible civilian on this point, *fabula non judicium, hoc est; in scena, non in foro, res agitur*. That, in our view, is the true meaning of the word `collusion' as applied to a judicial proceeding.

9. Further property of a public institution cannot be allowed to be jeopardised by persons who, at an earlier point of time, might have represented it and who were expected to effectively defend public interest and community property. Persons representing public bodies are expected to discharge their functions faithfully and in keeping with the trust reposed in them.

10. We may also add one other important reason which frequently arises under Section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection ***Sajjadanashin Sayed v. Musa Ddabhai Ummer, 2000(3) SCC 350*** where this Court, on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or preceding where title is directly in question, unless it is established that it was `necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case.

11. Thus, it was open to the statutory authorities under the 1911 Act to go into the collusive nature of the suit in the proceedings under Section 7 of the 1911 Act as stated above. The High Court has not gone into the merits of the decision of the Collector and the Appellate Authority but has allowed the writ petition solely based on the Full Bench decision in Jagar Ram. We have now overruled the Full Bench decision. We, therefore,

set aside the judgment of the High Court and remit the writ petition to the High Court for disposal in accordance with law, in the light of the above observations.

The appeal is allowed and disposed of accordingly. There shall be no order as to costs.

Appeal allowed.