CALCUTTA HIGH COURT

Chintaharan Ghose

Vs.

Gujaraddi Sheik

A.F.A.D. No. 1934 of 1945

(R.P. Mookerjee, J.)

02.09.1949

JUDGMENT

R.P. Mookerjee, J.

1. This is a pltfs. appeal in a representative suit brought under Rule 8 of Order 1, Civil P. C, on behalf of the Hindus of the village of Alampur against the Muslims of the same village for a declaration that the suit land is one in which the public has got the right of use as playground or grazing ground etc., and for an injunction to restrain the Defendant from using the land as a burial ground.

2. The pltfs.' case is that in Khatian No. 159/1 of Mouza Alampur covering an area of 3 bighas and 1 cottah, 1 bigha and 2 cottahs was a graveyard of the Muslims of that village and the remaining 1 bigha and 19 cottah was used by the villagers as a football ground. This football ground is also claimed to be used as a grazing ground for the cattle of the villagers. There had been a previous litigation in respect of this property in 1928 when a representative suit was brought on behalf of the Muslims of that village for a declaration that the lands covered by the entire Khatian were burial ground. A consent decree was passed in that suit and the representatives of the two communities, as impleaded in that suit, agreed that in 1 bigha, 19 cottahs the public had the right of use as a playground including 1 cottah as Bhagar and that the rest of it, that is, 1 bigha and 2 cottahs was a burial ground. A decree was passed accordingly. The pltfs.' case is that since 1928 up to the time when the present suit was filed, there had not been any difficulty or dispute, as the two separate portions were being used for the purposes, as agreed upon in the previous suit, until an attempt was made by some members of the public to use a portion of the playground to bury dead bodies in the suit land. That was the occasion for the filing of the present suit.

3. The Defendant were also impleaded in their representative capacity. Of those, Defendant 11 and 25 contested the suit denying the allegation made in the plaint claiming inter alia that the entire 3 bighas and 1 cottah plot formed the burial ground of the Muslims and also pleading that the previous decision on compromise was not binding on the public.

4. Various issues were raised and they may be put in two broad heads, (1) whether the previous decree in Title Suit No. 619 of 1928 was binding on the parties and was a bar to the claim put forward by the Defendant; and (2) irrespective of the legal effect of the earlier decision, whether, as a matter of fact, the pltfs. have proved their alleged right, title and interest in 1 bigha, 19 cottahs of land, the subject-matter of the suit, to be used as a playground etc.

5. The learned Munsif found that the previous decree binds the parties and that the Defendant had failed to prove that the lands were Pirottar lands and the plaintiffs had been able to prove a right of easement as claimed by long user for more than 20 years. The suit was accordingly decreed.

6. On appeal before the learned Subordinate Judge by the Defendant he held that the previous suit having been disposed of on compromise, the members of the public are not bound thereby. As regards the merits, it has been held that there could be no question of any acquisition of easement right by the pltfs. in the suit land. The pltfs. had also failed to establish their title in the suit land. The appeal was accordingly allowed and the suit dismissed. Hence this second appeal on behalf of the pltfs.

7. The first question for consideration is as regards the effect of the previous decree in Title Suit No. 619/28. We have, in the first instance, to consider whether a representative suit brought under the provisions of Rule 8 of Order 1, Civil Procedure Code may be settled by the parties and also whether a compromise decree may be pleaded as raising a bar of res judicata against the parties or their representatives in that suit.

8. There had been some difference of opinion at one stage as to whether Section 11, Civil Procedure Code, was attracted, if the previous decree is one not passed on contest but on settlement between the parties. It has, however, been held now, that even when a limited owner like a widow compromises a suit, such a decision against a widow is binding on the succeeding heirs, though not by virtue of rule of res judicata as introduced by Section 11, Civil Procedure Code but on general principles of res judicata: vide, *Risal Singh v. Balwant Singh*[1], In a later decision the Judicial Committee reiterated this principle in the case of *Ram Sum Ran v. Mt. Shyam Kumari*[2], approving a decision of this Ct. in the case of *Mohendra Nath v. Shamsunnessa Khatun*[3], that a compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioners quite as much as a decree on contest. Only if a compromise is shown to be either collusive or not fairly obtained that the same is not binding in a future litigation : vide : *Ram Sarup v. Ram Dei*[4], and *Janak Keshori v. Debi Prasad*[5],

9. The legal position, therefore, is that merely because a decree was passed on compromise, it will not be sufficient to rule out the principle of res judicata, but it may be questioned only on the ground that the previous decree was either collusive or was not fairly obtained. No such case was made on the present occasion and does not appear to have been urged in either of the Cts. below. We have therefore to examine whether on the

[1]45 i. a. 168 : AIR 1918 PC 87
[2]49 I. A. 342 : (AIR 1922 PC 356)
[3]21 C. L. J. 157 :(AIR 1915 Cal 629)
[4]29 ALL. 239 at p. 242 : (4 A. L. J. 160), Rama v. Daji, 43 Bom. 249 at p. 253 : (AIR 1918 Bom 85)
[5]2 Pat. L. J. 370 at p. 376 : (AIR 1917 Pat 490)

facts of the present case the rule of res judicata can reasonably be attracted. We have to remember in this connection the observations made by Sir Lawrence Jenkins in the case of *Sheo Parsan Singh v. Ram Nandan*[6],

> "The rule while founded on ancient precedent is dictated by a wisdom which is for all time.

His Lordship quotes from Lord Coke :

> "It has been well said; interest reipublicae ut sit finis litium, otherwise great oppression might be done under colour and pretence of law." 6 Coke, 9a.

This rule though traced to an English source was pointed out to be a doctrine which was in force in all countries and is to be found even in ancient texts in India.
His Lordship concluded :

> "And so the application of the rule by the Cts. in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law."

Remembering these principles, I now proceed to consider the established facts.

10. It is argued that in a representative suit brought by a number of persons they might not to be allowed on principle to settle the dispute not through the intervention of the Ct. but by terms agreed upon by them. Reference in this connection is made to the case of *Jenkins v. Robertson*[7], and Div. 117 and to certain observations by the Judicial Committee in the case of *Abdul Rahim v. Mahomed Barkat Ali*[8], The nature of the proceedings under Order 1, Rule 8, Civil Procedure Code was discussed at great length by Lord Blanesburgh in the case of *Kumaravelu Chettiar v. Ramaswami Ayyar*[9], It is pointed out that even before the introduction of the relevant provisions of the Code there was a practice prevalent in India following the rules of Chancery Practice in England authorising certain persons to represent a large number of persons - recognising the maintainability of a representative suit. Once specific provisions were made in the successive Codes of the Civil Procedure, there was a fundamental difference introduced in the Code which ought to be noticed (sic). Under the Indian law, certain persons, although allowed to represent the public or a larger number of persons, are allowed by the Ct. to maintain a suit of representative nature: that does not take away the right of other members of the public or of that community to apply to be impleaded in the suit and be represented at any stage. It has been repeatedly held that the prayer by other member of the group who are represented by the pltfs. either during the trial of the suit in the original Ct. or any appellate stage may be made for bringing them on the record. When we consider the effect of the decisions of the English Cts. this difference has to be borne in mind. The decision in the case reported in *Kumaravelu v. Ramaswami*[10], is not a direct authority on the question as to whether the parties may compromise the points of difference and get a decree passed by the Ct. The question which arose for decision was whether a suit brought by certain persons as representatives

[6]43 i. A. 91: (AIR 1916 PC 78) [8]55 i. a. 96 at pp. 105 to 106 : (AIR 1928 PC 16)
[7](1867) l. R. 1 S.C [9]56 Mad. 657 : (AIR 1933 PC 183) [10]56 Mad. 657 : (AIR 1933 PC 183)

but without obtaining permission of the Ct. or after issuing the public notice as required under the rule, the decision is to be considered as a decision binding on all the members of the public. It was held that if such a suit is instituted without the permission of the Ct. and was not conducted as a representative suit as laid down in Section 30 of the Code of 1877. Now Order 1, Rule 8 of the Code of 1908, a decision in such a suit is not to be treated as res judicata when the next suit is brought. It was held that even if such a litigation is conducted *bona fide*, that will not excuse the neglect of relevant statutory conditions about the issuing of notice and obtaining permission from the Ct.

> "If the litigation be not *bona fide*, the most complete observance of these conditions will not give the decree the force of res judicata."

An inference may be drawn from various observations in this case that if the conditions laid down in Rule 8, Order 1 are fulfilled there will be no bar to the application of the rule of res judicata provided no mala fides are proved.

11. I may now consider the effect of the decision in the case of *Jenkins v. Robertson*[11], referred to above. To appreciate the decision in this case, it will be necessary to refer at some length to the facts on which that decision was based. Certain Councillors of a Burgh instituted an action in the Ct. of Sessions in Scotland on behalf of the inhabitants of a particular locality for a declaration that there existed a public right of way along the bank of a river. A decree was passed in favour of the pltfs. and thereafter a Rule being obtained by the Defendant for a new trial, it was allowed; at this stage a compromise was effected between the pltfs. who had previously got the verdict in their favour, and the Defendant that the suit be dismissed and that the pltfs. do pay to the Defendant two hundred pounds as costs for expenses incurred. Thereupon a new action was started by certain other persons for the same relief as in the previous suit. The Scottish Ct. held that the compromise in the previous action concluded the matter in dispute under the rule of res judicata. The House of Lords revsd. that judgment. Reference will have to be made to the observations of the three Lords: Lord Chancellor observed generally that a compromise would not be admitted as res judicata and he also had expressed a doubt whether any person may arrogate to himself the position of a representative of the public so as to preclude an action by other persons at a later stage. Lord Romilli observed that according to Scotch law an action of declaration could be maintained by some individuals only and thereby bind all members of the public and to that extent the question was res judicata. Lord Colonsay observed that there was a material distinction between the law of Scotland and the law of England in regard to the right of individual member of the community to institute an action for declaration of the public right. An individual had no such right in England, though it was recognised under the Scotch law. He was not prepared to lay down any general rule of law that a compromise decree in such an action would not be binding on the community. It is important to note that he agreed with the Lord Chancellor on the ground that the compromise in the particular case was not a *bona fide* one but a corrupt one.

12. The view is some time expressed that the decision in this case, particularly the

[11](1867 L. R. 1 S. C. and Div 117)

observations of the Lord Chancellor and Lord Romilli, was an authority for the proposition that it

was not competent for the pltfs. in a representative suit to settle the dispute and a decree passed on such settlement could not be res judicata in a subsequent suit. I need only refer to *In re South American and Mexican*[12], where the Ct. of Appeal laid down that a judgment by consent is as effective an estoppel between the parties as a judgment whereby the Ct. exercises its mind on a contested case.

13. One material point which has to be considered in connection with these English and Scotch cases is that the law as contained in Order 1, Rule 8 of the Code is not exactly the same as in the other cases. I have not been able to find out whether according to Scotch law, the other members of the public are given the right to intervene at any stage. If the law was that they had not that right, it would certainly be neither proper nor reasonable to make a decree passed on compromise binding on the entire community, though a contested decree might be so held. As pointed out already, the right of intervention exists even during the pendency of an appeal : vide *Srinivasa Aiyangar v. Srinivasa Aiyangar*[13], As observed by the Madras H. C. in the case of *Sundarambal Ammal v. Yogavanagurukkal*[14], and in the case of *Sivagurunatha Chettiar v. Ramaswamy Iyengar*[15], the absent members of the class by not intervening in the suit must be constituted as parties eo nomine and they must take the consequence of their being so :

> "If they are entitled to the advantage of any such judgment baaed on consent in the action they must equally suffer any disadvantage arising from it and there can be no difference in principle in this respect between a decree passed on contest and one passed by consent of their representative. They can of course avoid any adjudication or compromise which is the result of fraud on the part of their representatives and a compromise which is unreasonable and unjustifiable may also possibly be avoided on the same principle."

As a direct decision on the point reference may be made to the case of *Krishnamachariar v. Chinnammal*[16], where it was held, while considering the rights of the pltfs. in suit under section 30 of the Code (Act XIV [14] of 1882) corresponding to Order 1, Rule 8, Civil Procedure Code, 1908, that they have power to enter into a compromise so as to bind those whom they represent provided the compromise was not unreasonable, fraudulent or dishonest.

14. Unless the interpretation put by the reaps, on the case reported in *Abdur Rahim v. Mohd. Barkat Ali*[17], be a correct interpretation of the provisions contained in Order 1, Rule 8, it must be held that the pltfs. in a representative suit have the right to compromise subject to the conditions that the suit had been properly filed in terms of the provisions of that rule and the settlement entered into was a *bona fide* one. In the case referred to in *Abdur Rahim v. Mohd. Barkat Ali*[18], the facts as also the points which arose for decision were altogether different. The first question which the Judicial Committee decided was whether on the facts, section 92, Civil P. C, was a bar to the maintainability of the suit or not. The other question was whether that suit was barred by the rule of res judicata that is, whether the compromise decree in an earlier suit precluded the present pltfs. from

[12](1895) 1 Ch. 37 : (64 L. J. ch. 189)
[13]33 Mad. 483 : (6 I. C. 229)
[16]24 M. L. J. 192 : (18 I. C. 369)
[17]55 I.A. 96 : AIR 1928 PC 16
[14]26 M. L. J. 315: AIR 1915 Mad 561
[15]15 I.C. 399: (11 M.L.T. 257)
[18]55 I. A. 96 : (AIR 1928 PC 16)

bringing this suit. The earlier suit was one instituted under the provisions of section 92 of the

Code with the sanction of the Advocate-General and it was pleaded that that suit became a representative one and the decree in such a suit whether by adjudication of the Ct. or by consent of parties was binding upon that section of the public which was represented by the pltfs. in that suit. Explanation 6 of section 11 of the Code was attracted thereby. The learned Judges of the H.C. had held that the previous consent decree could not be questioned. After stating this their Lordships proceeded :

> "It is extremely doubtful whether the decree passed under the circumstances of this case can be held to be res judicata as against any persons other than those who consented to that decree. The case of *Jenkins v. Robertson*[19], and Div. 117 (reported above) was based on Scottish law and as explained in the case of *In re South American and Mexican*[20], (reported above), it appears to have laid down broadly that persons instituting a suit on behalf of the public have no right to bind the public by a compromise decree, though a decree passed against them on contest would bind the public. It is not necessary for the purpose of this case to decide whether the law in India under Section 11 of the Code is the same as so explained. Their Lordships consider that, in so far as the nature of the suit was changed by the amendments, mentioned, namely, by adding strangers to the trust as Defendant and by praying for relief not covered by Section 92 the suit ceased to be one of representative character and the decree, based on the compromise such as it was, namely, by 6 out of 7 pltfs. in the suit, however binding as against the consenting parties, cannot bind the rest of the public. Section 11, Expl. 6 has no application to such a case."

The decision by their Lordships of the Judicial Committee, therefore, was that on the amendments the suit ceased to be a representative one and further all the pltfs. had not joined in the compromise. The question, therefore, whether the pltfs. in a representative suit can at all compromise the matter in dispute or not was not before the Ct. at all. A doubt was expressed only as to whether a decree "passed under the circumstances of this case" should be held to be res judicata as against any persons other than those who consented to that decree. This case, therefore, is no authority for the very wide and general proposition that it is not competent for the pltfs. in a representative suit to settle the difference with the Defendant The observations of the Judicial Committee as already noted in *Kumaravelu v. Ramaswami*[21], rather strengthens the position.

15. In my view, therefore, it is competent for the pltfs. in a representative suit to settle their difference.

16. Even if it be found that the parties have not the right to settle their difference in the earlier suit so as to bind all the members of the public, on the merits also, as I shall indicate immediately, the pltfs. are entitled to a decree in the present suit. (The rest of the judgment is not material for the report.)

Appeal allowed.

[19]1867 L. R. 1 s. C

[20](1895-1 Ch. 37 : 64 L. J. Ch. 189)

[21]56 Mad. 657: AIR 1933 PC 183