

(1916) 03 MAD CK 0040
In the Madras High Court

Gudimolla Rangamma and Another	APPELLANT
Vs	
Panchangam Narasimhacharyulu and Others	RESPONDENT

Date of Decision : 01-03-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11(VI)

Citation : (1916) 31 MLJ 26

Hon'ble Judges : Sadasiva Aiyar, J; Moore, J

Bench : Full Bench

Judgement

Sadasiva Aiyar, J.—The defendants 1 and 2 are the appellants. The 1st plaintiff brought the suit for recovery of possession of the plaint sites

(A) and (B) for himself and for the other Agraharamdars of the village (defendants 3 to 13) on the following allegations:--(a) That the

Agraharamdars gave the suit sites for temporary residence to one Tulasi Lakshmanacharyulu and (b) that the defendants 1 and 2 are in wrongful

possession after the death of Tulasi Lakshmanacharyulu.

2. As I said the reliefs prayed for are for ejecting the defendants 1 and 2 from the suit sites and for delivery of possession of the said suit sites

jointly to the plaintiff and to the defendants 3 to 13.

3. One of the defences raised by the defendants 1 and 2 was that the present suit is barred as res judicata by reason of the decision in a prior suit

brought by another Agraharamdar Venkatacharanacharyulu (O.S. No. 78 of 1910 of the Gudivada District Munsif" s Court). The present 1st

plaintiff was the 4th defendant in the former suit. The suit was also directed against the present defendants 1 and 2 and the prayer of that plaint was

for establishing the joint right of the plaintiff therein (along with the other

Agraharamdars) in the suit sites and his exclusive right of way over the sites and also for ejecting the defendants 1 and 2 from the suit sites and for delivery of joint possession of the entire suit sites to the plaintiff along with the defendants other than 1 and 2 and for an injunction as regards the right of way. It is thus clear to me that the substantial relief claimed in this suit was included among the reliefs prayed for in the other suit that relief being the delivery of possession of the sites to all the Agraharamdars, though the prior suit included one or two reliefs in which one of the Agraharamdars alone was interested. In the former suit, the Agraharamdars who were made defendants 3 to 16 remained ex-parte and there can be no reasonable doubt that they supported the plaintiff of that suit. That suit was dismissed on the merits and there is no allegation or suggestion in the plaint in this suit that the former suit was not litigated in good faith. In the present suit also, the other Agraharamdars (defendants 3 to 13) allowed the suit to proceed ex-parte and the defendants 1 and 2 alone were the contesting defendants., During the pendency of the present suit in the District Munsif's Court, another Agraharamdar was added as the 2nd plaintiff on the record. He is the 1st respondent before us. He ""was added after the issues were framed in the case. The learned District Munsif applied Explanation VI to Section 11, Civil Procedure Code, corresponding to Explanation 5 to old Section 13 and held that as the plaintiff in the former suit of 1910 litigated bona fide in respect of the private right claimed in common for himself and the other Agraharamdars over the plaintiff sites and as the present 1st plaintiff was one of the ex parte defendants in the former suit, the judgment in the former suit was res judicata in favour of the defendants 1 and 2 in the present suit. He therefore dismissed the suit with costs.

4. The learned Subordinate Judge on appeal held (a) that if the 1st plaintiff alone had continued on the record as the sole plaintiff, the suit would no doubt be barred as res judicata ; (b) that as the 2nd plaintiff though one of the Agraharamdars had not been made a party in the suit of 1910 was allowed to come in as the 2nd plaintiff in this suit, the bar of res judicata no longer applied and (c) that as the addition of the 2nd plaintiff as a party to the record was made by an order of the District Munsif and as it would be very hard upon the 2nd plaintiff to tell him now that he should seek

his remedy by a separate suit, the Subordinate Judge found himself obliged to decline to remove the 2nd plaintiff (appellant) from the list of the plaintiffs. On these conclusions the Subordinate Judge reversed the decree of the District Munsif and remanded the suit for disposal according to law.

5. Mr. Subramanyam Pantulu for the appellants (the defendants 1 and 2) contended before us (a) that the Subordinate Judge ought to have u/s

105 Clause 1 Civil Procedure Code, corrected the error made by the District Munsif in adding the 2nd plaintiff on the record and (b) that even if

the error was not corrected and even if the 2nd plaintiff was allowed to remain on the record, the decision in the former suit was res judicata by

explanation 6, to Section 11 of the Civil Procedure Code.

6. Explanation 6 to Section 11 is as follows:--""Where persons litigate bona fide in respect of a public right or of a private right claimed in common

for themselves and Ors., all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so

litigating."" It seems to me that on the plain words of the explanation, the two plaintiffs (including the 2nd plaintiff) cannot be allowed to reopen the

right of the Agraharamdars which was negatived in the former suit.

7. Mr. Ramadoss for the respondents contended on three different grounds that the Judgment in the former suit was not res judicata. Those three

grounds are, (1) Explanation 6 to Section 11 makes the decision in the first suit res judicata only if the first suit was a representative suit brought

after permission obtained from the Court under Order 1. Rule 6 (old Section 30).

(2.) The former suit in 1910 was brought by the then plaintiff not

in the interest of all the Agraharamdars but only in the interest of himself solely and the reliefs in the two suits being different, explanation 6 did not

apply. (3) The expression ""private right claimed in common"" found with explanation VI can be applied only to cases of private right claimed on

behalf of the undivided members of a joint Hindu family or on behalf of the members of a Malabar Tarwad and not in respect of a right claimed in

common by Agraharamdars who have distinct shares in the village sites.

8. As regards the first ground, there are no doubt observations in a Calcutta case that explanation 5 to old Section 13 should be read with Section

30 of the old code and that if permission was not obtained u/s 30, the decision in

the first suit will not be res judicata where the 2nd suit is brought by another co-sharer (See Baiju Lal Parbatia v. Bulak Lal Pathuk ILR (1897) C 385 at the bottom of page 389 and top of page 390). There is also a casual observation of Shephard, J., in Srinivasa Chariar v. Raghava Chariar ILR (1897) M. 28 7 M.L.J. 281 that if Section 30 had not been followed, the judgment did not bind the persons whose names were not on the record. But it seems to me that the weight of authority in Madras is in favour of giving a liberal construction to the provisions of the CPC embodied in Explanation 5 to Section 13 of the former Code (now re-produced in Explanation 6 to Section 11. The intention of the legislature to give a liberal construction is further indicated by the fact that while explanation 5 to Section 13 of the old Code confined itself to ""Private"" rigts, the present explanation 6 to Section 11 includes public rights also. In Varanakot Narayanan Nambudri v. Varanakot Narayanan Nambudri ILR (1880) M. 828 it was distinctly held that explanation 5 to Section 13, Civil Procedure Code, was not limited to the cases of suits brought with the permission of the Court u/s 30 and though the decision in that case was doubted as regards certain other points decided in it, this particular dictum seems not to have been overruled in any subsequent case. In Madhavan v. Keshavan ILR (1887) M. 191 it was held that where one of five trustees brought a suit to set aside an alienation of trust property and failed, another trustee who was not a party to the former suit was barred by Section 13, explanation 5 of the old Code from again litigating the right of the trust. This case again has never been overruled. In Chandu v. Kunhamed ILR (1891) M. 324 : 1 M.L.J. 529 it was held that explanation 5 to Section 13 barred other co-sharers when one co-sharer had failed in a former suit. This case in Chandu v. Kunhamed ILR (1891) M. 324 : 1 M.L.J. 529 was no doubt dissented from in the Full Bench case in Somasundara Mudali v. Kulandavelu Pillei ILR (1901) M. 457 : 14 M.L.J. 404 on another point, namely, that if the former suit by one of the sharers was confined to the relief in respect of his own individual share, the other co-sharers were not bound so far as their shares were concerned from litigating the same matters. But in Somasundar a Mudali v. Kulandavelu ILR (1901) M. 457 : 14 M.L.J. 404 though Mr. T.V. Seshagiri Aiyar (now Mr. Justice Seshagiri Aiyar) argued for the appellant (see

page 459) that explanation 5 to Section 13 should be confined to cases where u/s 30 of the Code, leave to sue had been obtained, the judgment of

the Full Bench makes no reference to this contention but the case was decided on the other contention, namely, that where in the first suit, the

whole relief common to all the sharers was not the subject-matter of the litigation, the other co-sharers will not be barred by explanation 5 to

Section 13. Explanation 6 to Section 11 makes no reference to Order 1 Rule 8 and I therefore overrule the first contention of Mr. Ramadoss.

9. Coming to the second head of his contention, I have read the plaint and the judgment in the former suit carefully and though the plaintiff in that

case also sued for his individual right in respect of a right of way, so far as possession of the sites and the establishment of the right to the sites are

concerned, he clearly litigated bona fide in the interests of all the Agraharamdars and if he (as Mr. Ramadoss argues) did not pay proper Court

fees on the value of the entire rights of the Agraharamdars, that circumstance would not (in my opinion) prevent his suit from being one brought in

respect of a right common to him and the other Agraharamdars, so long as the relief claimed included the common rights. The addition of an

individual claim to a right of way cannot prevent the decision as to the right claimed on behalf of all the Agraharamdars (which is also the right

claimed in the present suit) from being res judicata in the present suit. The relief claimed in the former suit in respect of the recovery of the sites

was not the relief of a partition of the sites and possession of the plaintiff's individual share alone but it was the relief of possession to be given to

the plaintiff and all the other Agraharamdars jointly which relief is identical with the relief claimed in the present suit.

10. Coming to the third ground of contention, there seems to me to be nothing in it. Mr. Ramadoss's attempt to confine explanation 6 to Section

11 to the rights of a Joint Hindu family, to the rights, of a Malabar Tarwad (rights), to joint trusteeship, rights, etc., is not supported either by the

plain words of the explanation or by the decided cases, many of which are cases of co-sharers. I would therefore allow the appeal and setting

aside the order of the learned Subordinate Judge restore the decree of the District Munsif dismissing the suit with costs in all courts payable to the

defendants 1 and 2.

Moore, J.

11. I agree.

12. The Subordinate Judge was I think wrong in holding that the decision in the former suit O.S. No. 78 of 1910 did not operate as *res judicata*,

as the plaintiff in that suit was not suing in a representative character as provided under Order 1, Rule 8 of the CPC but only in his own right.

13. Explanation VI to Section 11 of the CPC provides that Where persons litigate bona fide in respect of a public right or a private right claimed in

common for themselves and others, all persons interested in such right shall for the purposes of the section, be deemed to claim under the persons

so litigating.

14. The conditions under which the decision in such a suit may constitute *res judicata* against persons not expressly named in that suit are,

1. that there must be a right claimed by the persons litigating in common for themselves and the parties not expressly named in the suit;

2. that the parties not expressly named in the suit must be interested in such right if right to relief can be said to be claimed ""in common"" only

between parties who would be benefited by such relief if granted, or who have such an interest in the right claimed that they could join as co-

plaintiffs. *Somasundara Mudali v. Kulandaivelu Pillai* ILR (1904) M. 457 14 M.L.J. 404.

15. The 2nd plaintiff who is one of the *Agraharamdars* is clearly a person interested in the right claimed on behalf of all the *Agraharamdars*. A

reference to the plaint in O.S. No. 78 of 1910 shows, that, although the plaintiff asked for a permanent injunction restraining defendants 1 and 2

from interfering with his exclusive right of way for his carts, cattle and men over the site to his field, he also sued to establish his joint right to the

plaint site and to recover joint possession along with defendants 3 to 16 by ejecting Defendants 1 and 2.

16. The joint right which the plaintiff claimed is identical with the relief sought for in the present suit and he was clearly litigating bona fide in the

interests of all the *Agraharamdars*.

17. I am unable to agree with the Subordinate Judge that explanation 6 to Section 11 of the CPC must be treated as confined to cases in which

permission to sue in a representative character is obtained under Order 1, Rule 8

of the Civil Procedure Code.

18. In some of the cases which arise under the Code of 1882 the opinion was expressed that explanation 5 to Section 13 of the CPC was

confined to cases where leave to sue had been obtained u/s 30 of the Civil Procedure Code. See *Thanakoti v. Muniappa* ILR (1885) M. 496.

19. On the other hand, as pointed out by my learned brother, the decisions in *Varanakot Narayanan Nambudri v. Varanakot Narayanan*

Nambudri ILR (1880) M 328 where it was held that explanation 5 to Section 11 was not limited to the case of a suit u/s 30 of the CPC and

Madhavan v. Keshavan ILR (1887) M. 191 have not been overruled. In *Somasundara Mudali v. Kulandaivelu Pillai* ILR (1904) M. 457 on which

the Subordinate Judge relies the learned Judges did not express any opinion on the question whether explanation 5 to Section 13 of the CPC must

be confined to cases where leave to sue has been obtained u/s 30 of the Civil Procedure Code, but based their decision on the ground that the

relief ""claimed in the former suit if granted would not have benefited the plaintiff in the later suit and it could not therefore be said to have been

claimed ""in common"" under, explanation 6 of Section 11 of the Civil Procedure Code.