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In the Madras High Court

Kumarandy Kudumban (died) and Others — APPELLANT

Vs

Venkatasubramania Aiyar and Others — RESPONDENT

Date of Decision : 13-12-1926

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1927 Mad 645 : 101 Ind. Cas. 58 : (1927) 52 MLJ 641

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The plaintiffs, who are Pallars, sue on behalf of all the Pallars of four villages for a declaration of their exclusive right to the

fishery in the Periakulam tank in Nenmeni village, Satur taluq, and for incidental reliefs. The defendants deny the plaintiffs'' right to the fishery and

contend that the pangalis of the village alone are the owners of the fishery right. Both the Lower Courts have dismissed the plaintiffs'' suit as being

barred by res judicata by reason of the decision in O.S. No. 501 of 1907 on the file of the District Munsif''s Court of Satur. The plaintiffs have

preferred this second appeal.

2. The first point for consideration is whether the plaintiffs'' suit is barred by reason of the decision in the previous suit. O.S. No. 501 of 1907 was

by the Pallars against several persons. In that case the plaintiffs set up an exclusive right of the Palla inhabitants of four villages, Perumbacheri,

Vannimadai, Kalungapatti and Pottalpacheri, to the fishery in the Periakulam tank. The averment in the plaint was that the 1st defendant, a Palla, on

the strength of the patta for fishery standing in his name mortgaged his right to the 2nd defendant, Chinnasami Goundan, and on the strength of the

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said deed the 2nd defendant and defendants 3 to 6 and several others attempted, to catch fish in the tank; and the prayer was that the right of Palla

inhabitants of the four villages be decreed and the mortgage executed by the 1st defendant be declared invalid. The present suit is for a declaration

of the Pallars'' exclusive right to fishery in the Periakulam tank. The 13th defendant was the 2nd defendant in the previous suit. The other

defendants who are Brahmans, Veltalars, Goundans, Thevans and others were not parties to the previous suit. The defence of defendants 1 to 4 is

that the fishery right belongs to 80 pangalis of the village and nobody else including the plaintiffs has any right to the fishery. Defendants 10, 11 and

12 plead that the right to the fishery belongs to all the people of the villages. Though the plaintiffs'' right is the same in both the suits, yet the right put

forward by the defendants in the present suit is not the same as the one that was put forward in the previous suit. The contention of the respondents

is that the case that is now put forward in the present suit was put forward in the previous suit and reliance is placed upon the written statement of

the 2nd defendant In that suit (Ex. I-a). Paragraph 4 of that'' statement is as follows:

The fish that are caught within the said kanmoi belong in common to the people of these six villages... and it is usual for all the people of the said

villages to catch whatever fish they can get in the ulvai of the tank and to take the fish that they respectively catch.

3. No doubt defendants 10, 11 and 12 set up the right of the people of the villages to catch fish in the tank; but defendants 1 to 4 set up the

contention that the pangalis alone are entitled to the fishery. The question is whether the same question that was in issue in the previous suit is in

issue in this suit? In order that the decision in the previous suit may operate as res judicata in the present suit, the matter now in issue should have

been strictly and substantially in issue in the previous suit between the same parties or between parties under whom they or any of them claim

litigating under the same title. In the former suit, the 2nd defendant set up the right of all the people of the villages to the fishery. In the present case

defendants 1 to 4 contend that the 80 pangalis alone are entitled to the fishery. The contention now put forward cannot be said to be the same

contention that was put forward in the previous suit and there was no decision on the right of the inhabitants to the fishery in the former suit. The

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decision in O.S. No. 501 of 1907 cannot operate as res judicata so as to har the present suit.

4. It is urged for the respondents that Explanation VI to Section 11 applies to the case. Explanation VI 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 others, all persons

interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating.

5. Granting for argument''s sake that the contentions in both the cases are the same, was there bona fide contest in the previous case by persons

who claimed a private right in common for themselves and others? In Ex. I-a the 2nd ''defendant vaguely asserted the right of all the people to

catch fish in the tank. He did not purport to represent the others, nor did he ask the Court to make all the inhabitants of the villages parties to the

action. That he claimed a right in himself to catch fish appears from paragraph 12 of the written statement which says:

As these defendants have been-enjoying the fish caught in the ulvai of Periakulam aforesaid for a long time over 12 years, the plaintiffs '' are

precluded from disputing the right of these defendants,

6. The 2nd defendant did not assert a right on behalf of the others, but he claimed a right in himself along with others. He cannot therefore be said

to have represented the interests of the other inhabitants of the village in the suit. It is only when persons litigate bona fide in respect of a public right

or of a private right claimed in common for themselves and others, all the persons interested in such right shall be deemed to claim under the

persons so litigating. The facts of the cases relied upon by Mr. Krishnaswami Aiyar are distinguishable from the facts of this case. In Gudimolla

Rangamma and Another Vs. Panchangam Narasimhacharyulu and Others, . the suit was brought by the 1st plaintiff for recovery of the possession

of certain sites for himself and the other Agraharamdars. In a previous suit by another Agraharamdar the plaintiff in the subsequent suit was the 4th

defendant. The substantial relief claimed in that suit was included among the reliefs prayed for in the previous suit. Some of the Agraharamdars

remained ex parte in the previous suit. Sadasiva Aiyar, J., after an examination of the authorities held that the suit was barred by res judicata by

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reason of the decision in the previous suit, and Moore, J., concurred with Sadasiva Aiyar, J., and observed:

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.

7. In Gopalacharyulu v. Subbamma 38 MLJ 493 it was held that ""Explanation V to Section 11, C.P.C., applies not only to cases where leave of

Court has been granted under Order 1, Rule 8, but also to cases where some of the persons claiming a private right in common with others litigate

bona fide on behalf of themselves and such others."" The learned Chief Justice observes at p. 494:

The language of the Explanation may seem dangerously general and Edge, C.J., has observed in Ram Narain v. Bisshishar Prasad ILR (1888) A

411 that we should be careful in applying it, and that it should not be applied to any case which does not come within its very wording. I entirely

agree, and should certainly hesitate to hold that any litigation had been bona fide within the meaning of the Explanation, in which there had been a

substantial departure from the accepted rules as to the joinder of parties, as for instance by suing without the leave of the Court in a case properly

falling under Order 1, Rule 8 or in suits as regards public rights, without the authority prescribed in Sections 91 and 92. At the same time, I cannot

say, on the strictest construction, that the plaintiff''s litigation in the earlier suit in this case was otherwise than bona fide within the meaning of the

section., He impleaded all the other agraharamdars as defendants, including Rukmaniamma through whom The present 10th defendant claims, and

they remained ex parte. When she died after being impleaded as a respondent in the first defendant''s appeal to the District Court and before the

hearing of the appea; the failure to bring on record her legal representative was due to the default of the other side.

8. In that case all that could be done to bring the necessary parties before the Court was done. Can it be said that in O.S. No. 5Q1 of 1907 the

parties took any action to bring the necessary parties before the Court. If the 2nd defendant in that case wanted to put forward the rights of all the

people of the villages, he should have asked the Court to make the others parties so that their rights might be adjudicated upon. Where a party sets

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up his own individual right which Happens to be common to him and others, he cannot be said to be litigating on behalf of the others. It is not

necessary that in order to attract the provisions of Expl., VI the suit should be a representative suit, for if it is a representative suit under Order 1,

Rule 8 no question can arise as to the binding nature of the decision in such suit, nor is it necessary that the party should be sued in a representative

capacity. But the person litigating must put forward a right common to him and others not only on his behalf but on behalf of the others as well. If

he simply puts forward a right alleged to be common to him and others, that would not make him a representative of the others. The word ""bona

fide"" in Expl. VI could only apply to a litigation where every attempt is made to bring all the persons interested before the Court. The meaning of

due care and caution cannot be applied to one who puts forward only his own right as one of a body of persons who have equal rights with

himself.

9. The case in Meyyappan Servai v. Meyyappan Ambalam (1923) 46 MLJ 471. to which I was a party, does not apply to the present case.

There the father was sued as representing the joint family. In that case I observed at p. 478:

That if by mistake or oversight persons who have an interest in the property in dispute are not joined as parties, but a person or persons who could

represent the interest of such persons are made parties, the decision would""bind all those who have an interest in the property.

10. It cannot be said that in the previous suit any attempt was made to bring before the Court all the persons who were in terested in the fishery

right in order to.contest the claim put forward by the plaintiffs. On a careful consideration of the whole case I hold that the decision in the previous

suit does not operate as a bar to the present suit.

11. The next point is whether the appellants have acquired a right by prescription. The learned Advocate-General''s contention is that subsequent

to the date of the plaint in the previous suit the plaintiffs have acquired a right by prescription to the fishery. This point was raised before the

Subordinate Judge, but he disallowed it on the ground that the plaintiffs could not have acquired a prescriptive right between the date of the

disposal of the second appeal and the date of the institution of the present suit.

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The contention of the appellants now is that the plaintiffs were in

enjoyment of the fishery right adversely to the other inhabitants during the pendency of the previous suit and they have acquired a title by

prescription. This is a question of fact which has not been tried. Mr. Krishnaswami Aiyar for the respondents contends that a communitylike the

PaMars could not acquire a prescriptive title to the fishery right for the Pallars are a fluctuating,body and the public or a portion of the public

cannot acquire a prescriptive right to fishery or to any Immovable property. Reliance is placed upon Neill v. Duke of Devonshire (1882) 8 AC

135. and Harris v. Chesterfield (Earl) as supporting the respondents'' contention. In Neill v. Duke of Devonshire (1882) 8 AC 135. it was held

that ""the public cannot in law prescribe for a profit a prendre in alieno solo, nor acquire any right adversely to the owner under any statute of

limitation; and an incorporeal hereditament such as a several fishery, which can only pass by deecl, cannot be abandoned."" In Harris v. Chesterfield

(Earl) (1911) AC 623. there was a difference of opinion between the learned Lords who decided that case. The minority including Lord Loreburn,

L. C, held that a lawful origin for the exercise of the freeholders'' claim ought to be presumed. In that case the freeholders of certain parishes

claimed a right to fish in the river Wye. Lord Loreburn, L. C, observed at p. 628:

Accordingly I come to the crucial inquiry, Is it in reason possible (that there may have been a lawful origin for the right here claimed, that is to say,

a right in freeholders of the five parishes adjoining the river Wye on its right bank from Blackwell''s Ditch as far as Gorse Acre to fish and sell their

catch by themselves and their domestic servants? That it must be subject to all Acts of Parliament and other valid regulations goes without saying

and is indeed said, if it were needed, in the ancient records of the claim. But can such a thing here have been ever created?

12. Now it appears to me that this question should be answered in the affirmative.

13. The plaintiffs in this case claimed to have acquired the right to fishery by reason of the villagers granting them) that right more than a hundred

years ago for a certain consideration, namely, the undertaking of the Pallars to do what is known as kudimaramath, that is, repair of the channel

and the tank. Whatever may be the English Law on the subject, a village

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community in India can acquire a customary right and the Pallars who are

cultivators of the soil may be granted a right to the fishery in a tank. It is not possible to express any decided opinion on this point without knowing

what the case of the plaintiffs is. The case has not been tried, and it is only after it has been tried, and the facts made clear that the law on the point

could be applied to the facts found.

14. In the result I set aside the decrees of the Lower Courts and direct the Subordinate Judge of Ramnad at Madura to restore the suit to file and

dispose of the same according to law. Costs of this appeal and the appeal to the Lower Court will abide the result. The Court-fee may be

refunded.

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