

(1984) 08 KAR CK 0015
In the Karnataka High Court
Case No : Writ Petition No. 6709 of 1984

Mohammad Ismail

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 02-08-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1985 Kar 123

Hon'ble Judges : K.S. Puttaswamy, J

Bench : Single Bench

Advocate : G. Balakrishna Shastry, for the Appellant; V. Gopalagowda, for the Respondent

Judgement

1. An otherwise simple case, has unnecessarily become complicated by the inapt way in which the wife of the petitioner approached this court on an earlier occasion and the inapt way in which this Court also dealt with that case. But, notwithstanding the same, that in order to appreciate at least one of the important questions of law that arises in this case, it is necessary to notice the facts, in some details, in the first instance.

2. Lands bearing Sy. Nos. 143 and 144 measuring 4 acres 30 guntas and 5 acres respectively of Marinakayanahalli village, Chinthamani taluk, Kolar Dist. were indisputably Government lands. Sometime in 1951-52 the said lands were granted to respondent-3 by the competent revenue authority functioning under the then Mysore and Revenue Act that was then in force and the Rules made thereunder subject to a restriction on the power of alienation by him for certain period. On 27-12-1966 respondent sold the said lands to the petitioner for valuable consideration and delivered their possession also to him, who continued to be in possession from that date.

3. On 28-12-1978 an Act called the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Alienation of certain Lands) Act of 1978 (Karnataka Act 2 of 1979) (hereinafter referred to as the Act) was enacted by the Karnataka

Legislature to nullify certain alienations made by members of scheduled castes and scheduled tribes in contravention of the grants made to them, restore their possession to the original grantees or their legal representatives or in their absence to the State. The said Act was challenged before this Court in a large number of cases.

4. On 15-4-1980 Smt. Zahedunnisa, the wife of the petitioner approached this Court in Writ petition No. 6300 of 1980 challenging the Act and seeking for stay of the operation of the order made by the Assistant Commissioner, Chikkaballapur Sub-Division, Chikkaballapur (hereinafter referred to as the AC in case No. LND. CR. SC/ST (Chi) 7/79-80 dt.14-1-1980 (Annexure-A) against the petitioner. On 18-4-1980, this court without noticing the locus standi of Zahedunnisa, issued rule nisi and stayed the operation of the order made by the AC, which also continued to be in force till the disposal of that writ petition.

5. In *S. V. Krishnappa v. State of Karnataka* ILR (1984) Kant 1310 a Division Bench of this Court upheld the validity of the Act and in conformity with the same on 28-1-1983, Writ Petition No. 6300 of 1980 filed by Zahedunnisa was disposed of by me along with many other cases in which I have rejected the challenge to the Act and the very impugned order made by the AC as if that order had been challenged in that writ petition. In this writ petition presented on 11-4-1984, the petitioner who is the husband of Smt. Zahedunnisa has challenged the Act and the order made by the AC.

6. The decision of this Court in *Krishnappa's* case has since been upheld by the Supreme Court on 17-4-1984 in *Manche Gowda v. State of Karnataka* ILR (1984) Kant 1. Hence the challenge to the Act is liable to be rejected without any further discussion.

7. The petitioner has challenged the order made by the AC on the grounds (i) that he had no notice of the proceedings under the Act (ii) that the order made by the AC on the basis of the inquiry held by the Tahsildar was not a speaking order and (iii) that respondent 3 was not a member of a Scheduled tribe to claim the benefits of the Act.

8. In resisting this petition, respondent-3 while denying the pleas and contentions urged by the petitioner, has contended that the order made by this Court in Writ Petn. No. 6300 of 1980 operates as *res judicata* on which ground alone this petition has to be thrown out without even examining the merits. As this contention urged by respondent-3 goes to the root of the matter, it is necessary to examine and, decide the same first and then the other question if they become necessary.

9. *Sri v. Gopalagowda*, learned counsel for respondent-3 strenuously contends that the order made by this Court in Writ Petn. No. 6300 of 1980 operates as *res judicata*. In support of his contention, Sri Gowda strongly relies on the rulings of the Supreme Court in *N.K. Mohammad Sulaiman Vs. N.C. Mohammad Ismail and Others*, , *Godde Venkateswara Rao Vs. Government of Andhra Pradesh* and

Others, , P.D. Sharma Vs. State Bank of India, , Union of India (UOI) Vs. Nanak Singh, , Amritsagar Gupta and Others Vs. Sudesh Beharilal and Others, , Lonankutty Vs. Thomman and Another, , Pandit Ishwardas Vs. State of Madhya Pradesh and Others, and a ruling of the Kerala High Court in Krishna Pillai Raghavan Pillai and Another Vs. Karthiayani Amma Sarasamma and Others, .

10. Sri G. Balakrishna Shastry, learned counsel for the petitioner refuting the contention of Sri Gowda, contends that the order made in Writ Petition No. 6300 of 1980 does not operate as res judicata. In support of his contention, Sri Shastry strongly relies on a Division Bench ruling of the Andhra Pradesh High Court in Jujjuvarapu Kotamma Vs. Pappala Simhachalam and Others, .

11. In his petition, the petitioner has referred to Writ Petition No.6300 of 1980, filed by Zahedunnisa who is indisputably his wife. In the order made on 28-1-1983 in that case, this Court has upheld the Act and the very order made by the AC, though the same had not been specifically challenged by Zahedunnisa. On these facts there is no dispute at all.

12. The petitioner was not a party to the previous writ petition filed by his wife and therefore, the inapt final order made by me in that case cannot bind the petitioner. In this view itself, the order made in W. P. No. 6300 of 1980 cannot operate as res judicata.

13. Whatever be the relationship of the petitioner with Zahedunnisa, he is not claiming title to the property from the latter. Admittedly, the petitioner as purchaser from respondent-3 claims his title on the basis of the sale effected in his favour. In this view also, the previous order made in writ Petn No. 6300 of 1980 cannot operate as res judicata against the petitioner.

14. In Jujjuvarapu Kotamma Vs. Pappala Simhachalam and Others, Kumarayya, J. (as he then was) of the Andhra Pradesh High Court had occasion to deal with some what a similar situation in a civil suit, though not among Mohammodens but among Hindus. On a very careful analysis of the principles and a review of all the important rulings of the" Supreme Court and the Privy Council, Kumarayya, J. (as he then was) speaking for the Bench dealing with every one of the contentions urged before me in the present case, expressed thus

"5. As we have stated at the very outset the only question that can be properly decided in this appeal, having regard to the state of the record is the question of res judicata. We are concerned not so much with the general principles of this doctrine as with the specific provisions of S. 11 C.P.C. which governs the case. Learned Counsel, Mr. K. Ramachandrarao, has rightly argued that though the general principles of res judicata based, as they are on the avowed policy of law that no one should be vexed twice over in respect of the same matter and that there should be finality to the decisions of Court's and consequent end to litigation, are wider than the provisions in that behalf contained in S. 11 C.P.C. and are applicable to cases which do not come within the four corners of the said section. It is well settled that where a case does fall within the terms of S. 11

C.P.C. the conditions laid down therein must be strictly complied with. If the conditions prescribed therein under which the decision in a suit can be res judicata are not satisfied it is not permissible to resort to general principles of res judicata. This argument gains sufficient strength also by reason of the compelling authority of the Supreme Court in Janakirama Iyer v. Nilakantha Iyer 1962 SC 633 at 1). 641. There Gajendragadkar, J. (as he then was) speaking for the Court observed thus: -

"Where S. 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of res judicata. We are dealing with a suit and the only ground on which res judicata can be urged against such a suit can be the provisions of S. 11 and no other. In our opinion, therefore, there is no substance in the ground that the present suit is barred by res judicata

Thus the question raised has to be decided strictly on the provisions of S. 11 C.P.C. and no other. The said section so far as is material for our purpose reads thus: -

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation I, II, III, IV, V

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Explanation VI - 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 purpose of this section, be deemed to claim under the persons so litigating".

The contention is that the present case governed though as it is by S. 11 does not satisfy the conditions of S. 11 as the plaintiff in the present suit was neither a party to the former suit nor can she be held to be a person claiming under any of the parties to that suit. The section refers to "the same parties or parties under whom they or any of them claim". The expression same parties is self-explanatory. It means the same persons as in the former suit who were parties to that suit. For purposes of S. 11 CPC it may be borne in mind that a party is a person whose name appears on the record at the time of the decision. In case his name is struck off at any stage of the suit or he is discharged from the suit or his name was introduced by fraud or without knowledge or he was a minor on record unrepresented by a guardian he cannot be said to be a party to the litigation. Similar is the case with the person who applied in vain to be brought on record. There may be other cases besides. It is difficult to give an exhaustive list of the same. It is sufficient to bear in mind that the person must be in fact a

party to the former litigation at the time of the decision of the case.

6. Judged thus, it cannot be postulated that the plaintiff was a party to the former suit. Indeed she was in no way a party to the suit. She was not sought to be brought on record even though defendant-5 set up her title for the period before he himself acquired right by virtue of the sale deed executed by her. After she had sold her right she may not concern herself with any dispute in relation to that land until it becomes necessary for her to do so which could happen only in the event of success of the plaintiffs in that case when she may be called upon the 5th defendant to discharge her obligation under the sale deed. By reason of such interest or conditional obligation, she cannot be deemed to be a party to the former suit. Nor was it incumbent on her to make herself a party to the said suit. If the plaintiffs wanted to bind her they could make her party as soon as they came to know of her in the same manner as the plaintiff in this suit, notwithstanding their transfer of right, in favour of defendant-4 who is in possession, has made them parties to the litigation. As held in *Narhar v. Narain* AIR 1920 Nag 184 at p. 186 the person merely interested in the litigation cannot be said to be a party to the suit. Such a person is neither bound to make himself a party; nor can he be bound by the result of the litigation. It must be noted that the provision refers to the same parties and does not introduce any fiction in that behalf. It follows that the plaintiff who was not *eo nomine* party cannot come within the description of party to the former suit. So the dispute between defendants 1 to 3 and plaintiff cannot be said to be a dispute between the same parties within the meaning of S. 11 C.P.C.

7. Then the next question is whether she is a person claiming under a party to the former suit. The expression used in S. 11 is between parties under whom they or any of them claim. The underlying policy seems to be that a decision obtained in a property constituted proceeding will bind not only the parties but all persons on whom title right or interest may devolve. A person is said to claim under another when he derives his title through that other by assignment or otherwise. The right claimed by him must be attributable to the party in the former suit and further this right must have been acquired subsequent to the commencement of the said suit. As a privy or representative-in-interest he would then be bound by the decision reached against his predecessor in interest. It is unnecessary to detail here the various aspects of this question. Suffice it to say that plaintiff is not claiming any right under the 5th defendant. In fact she acquired no right from him which she may set up the case. On the other hand it was she who had conferred on him right in the property by executing a sale deed. If at all it is defendant-5 who can be said to possibly claim under the plaintiff but not vice versa. S. 11 does not contemplate a case of a person who is a predecessor-in-interest of a party to the former suit. The expression "under whom" is inconsistent with any such theory. If she set up any claim in this case, it is in her own right and not at any rate under defendant-5 who was a party to the former suit.

Learned counsel contends that defendant-5 had thus enjoyed the privity of estate and hence could bind the plaintiff. Reliance is placed on Ahmedbhoy Hibibhoy v. Vulleebhoy Cassumbhoy ILR(1881) 6 Bom 703 at p. 709. That case is of little assistance to the respondents. On the other hand it goes against them. There Latham, J., at page 709 divided the persons other than parties to a suit in which a decree or judgment has been obtained into 3 classes with reference to their position as effected by the judgment. The first category is of persons who under the old S. 13, C.P.C. claim under the parties to the former suit. The learned Judge says that in the language of English Law they are privies to those parties and such privies according to Lord Coke are of three kinds: - (1) privies in blood, (2) privies in estate and (3) privies in law. Learned Judge refers to a six fold division according to Wharton's Law Lexicon, page 764. He however expresses that he was unable to discover any original authority for such division. Therein " he refers also to privies in representation such as the executor or administrator to his testator or intestate. The second main division is of persons who though not claiming under the parties to the former suit were represented by them. Such persons are the persons interested in the estate of a testator and shareholders in a company etc. In India members of a joint undivided family also are such persons as held in Jogendro Deb Roy v. Funindro Deb (1873) 14 Moo Ind App 367 at p. 376 (PC). The third category is of strangers which are neither privies to nor represented by the parties to the former suit. Whereas category Nos. 1 and 2 may be bound by the judgments in the former suit, category No. 3 will not be affected by judgment inter parties which is not a judgment in rem. There is nothing in the statement of the learned Judge (based mostly as it is on English Law) which can support the contention of the learned counsel. It cannot be accepted on the basis of the said decision that the plaintiff was a privy to or was represented by any party to the former suit. We are not concerned, for the purposes of this suit with the general principles of res judicata which are much wider than S. 11 C.P.C."

I am in respectful agreement with these views. Mulla's classic treatise on C.P.C. 14th Edition, edited by Sri J. M. Shelat, a former Judge of the Supreme Court also expresses the same view. On these principles it is not possible to hold that the order in writ petition No. 6300 of 1980 operates as res; judicata against the petitioner.

15. In N.K. Mohammad Sulaiman Vs. N.C. Mohammad Ismail and Others, , on which very, strong reliance was placed by Sri Gowda, the question that really arose for consideration before Court was whether as to who can represent the estate of a deceased person and whether any such representation would bind persons who were not parties to that proceedings. But, that is not the question that arises for determination in this case and, therefore, the ratio in that case does not really bear on the point. So also the ratio in all the other cases relied on by Sri Gowda does not really bear on the point.

16. In her verification affidavit filed in support of her writ petition, Zahedunnisa had stated that she was representing the petitioner. On this slender statement Sri Gowda contends that the order in Writ Petition No. 6300 of, 1980 operates as res judicata against the petitioner. In my view, this is too slender a ground to hold that the order made in Writ Petn. No. 6300 of 1980 operates as res judicata.

17. On the above discussion, I hold that the order made in Writ Petn. No. 6300 of 1980 does not operate as res judicata against the petitioner.

18. Sri Gowda has urged that there was a delay of more than 4 years in the petitioner challenging the order of the DC which is not even explained and on that ground this Court should decline to exercise its extraordinary jurisdiction even if the order is otherwise illegal.

19. In his petition, the petitioner has not given any explanation for the delay. But, at the hearing Sri Shastri gave more than one explanation.

20. After all it is well settled that the delay is one of the grounds that can properly be taken into consideration by this Court to decline to exercise its jurisdiction but is not an absolute condition to examine the merits. In the light of the contentions urged on merits and the serious consequences that will ensue to the petitioner, if this Court were to decline to exercise its jurisdiction, I consider it proper not to throw out this petition on the ground of delay. I, therefore, reject this objection of Sri Gowda and proceed to examine the merits of the case without reference to the earlier inapt order- made by me in Writ Petition No. 6300 of 1980.

21. Sri Shastri contends that the order made by the AC without notice to the petitioner, holding an inquiry and determining whether respondent-3 was a member of a scheduled tribe or not, the date and terms of the grant and the violations, if any, thereto is manifestly illegal.

22. Sri Gowda sought to support the order of the AC.

23. In this order, the AC has not specified the date of grant, the terms and conditions of the grant and the violations if any. He has not also found whether respondent-3 was or was not a member of a scheduled tribe to claim the benefit of the Act. Without determining all these questions, the AC cannot invalidate and nullify a sale under the Act.

24. An examination of the order made by the. AC shows that he had blindly accepted the report of the Tahsildar, who must have held the inquiry without notice to the petitioner. All these and other illegalities are so manifest that the impugned order calls for my interference.

25. In the very nature of things, the case has to be re-examined by the AC after due notice to the petitioner and respondent-3 and if necessary by recording evidence on all or any of the questions that arise for, determination before him.

26. As to who is in possession of the lands on which there is serious dispute

between the parties, is not a matter on which this court should concern itself in deciding the validity of the order. In any event, the petitioner is now entitled for restitution, if he has been dispossessed as asserted by respondent-3 till the former is dispossessed under the Act.

27. The general rule is that costs follow the event and the successful party gets his costs from the unsuccessful party cannot be properly followed on the facts and circumstances of this case. Without any doubt, the petitioner and his wife have been instrumental in harassing respondent-3 in more than one legal proceeding. With due regard to all the facts and circumstances of the case, this is one of those rare cases in which I should direct the petitioner to pay costs and exemplary costs which I assess at Rs.500/- to respondent 3.

28. In the light of my above discussion, I make the following orders and directions

(a) I dismiss this writ petition in so far as it challenges the validity of the, Act.

(b) I quash the impugned order made by the AC and direct him to restore the proceeding to its original file and dispose of the same in accordance with law and in the light of the observations made in this order.

(c) I award a sum of Rs.500/m as costs payable by the petitioner to respondent-3. I further direct the petitioner to deposit the costs awarded with respondent-2 on or before 31-8-1984 who on such deposit is directed to pay the same to respondent-3.

29. Writ petition is disposed of in the above terms with costs of respondent-3. Advocate's fee Rs.500/-.

30. Order accordingly.