
(1988) 09 KL CK 0039
In the High Court Of Kerala
Case No : S.A. No. 468 of 1980 G

Odukkattil Cheeru and Others

APPELLANT

Vs

M. Choyunni and Others

RESPONDENT

Date of Decision : 28-09-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Kerala Court Fees and Suits Valuation Act, 1959 — Section 27

Citation : (1988) 2 KLJ 658

Hon'ble Judges : Shamsuddin, J; Kochu Thommen, J

Bench : Division Bench

Advocate : Joseph Franklin, for the Appellant; P. Ramakrishnan Nair, for the Respondent

Final Decision : Allowed

Judgement

Kochu Thommen, J.—The Defendants in O.S. No. 444 of 1975 which is a suit for recovery of possession on the strength of title are the Appellants. The suit was decreed by both the Courts. The Defendants' contention that the suit was barred by reason of res judicata was rejected by the lower appellate Court. They had contended before that Court that the Plaintiff had earlier instituted O.S. No. 349 of 1973 against the present Defendants for injunction in which a specific issue on title was raised by the Court on the pleadings of the parties. That issue was found against the Plaintiff. The Court found that the Plaintiff was not entitled to restrain the Defendants from plucking coconuts from trees standing on the property in dispute. That decree became final.

2. The dispute relates to the boundary lying between the adjoining properties respectively owned and possessed by the Plaintiff and the Defendants. There is no dispute as regards the possession or ownership of either property except in regard to the narrow strip separating the two properties and on which stand four coconut trees. The Defendants put up a fence enclosing the boundary and separating it from the property of the Plaintiff.

3. One of the main contentions of the Defendants before the lower appellate Court was that the present suit was barred by res judicata by reason of the decree in O.S. No. 349 of 1973. No such contention had, however, been taken in the trial Court. The lower appellate Court rejected the contention stating that the issue on title decided in the earlier suit for injunction was unnecessary for the final determination of that suit, for the only issue, according to the Court, which was necessary for consideration was as regards the rival claim of possession.

4. Counsel for the Appellants Shri Joseph Franklin submits that the lower appellate Court misunderstood the scope and ambit of the rule of res judicata as embodied in Section 11 of the Code of Civil Procedure, 1908 and as enunciated by a long catena of decisions. Referring to AIR 1932 50 (Privy Council) counsel submits that even if an issue does not arise from the pleadings of the parties, but was raised by the Court and the parties went to trial of that issue willingly, the decision of the Court, unless duly challenged, becomes final and therefore constitutes res judicata. He refers to the decisions of the Supreme Court in Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others, ; Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai, Gangappa v. Rachawa AIR 1971 S.C. 448 and to the decisions in Kishori Lal Potdar Vs. Debi Prasad Kejriwal and Another, (F.B.) (F. B.) and Annamalai Chettiar Vs. Lakshmanan Chettiar, .

5. Shri P. Ramakrishnan Nair appearing for the Respondents, who are the legal representatives of the Plaintiff, submits that the decision in AIR 1932 50 (Privy Council) must be understood in the light of the subsequent decisions of the Supreme Court, and counsel relies on the very same decisions, cited on the other side.

6. It has been stated in AIR 1932 50 (Privy Council) that even where a point has not been properly raised by the plaintiff, but both parties have without protest joined issue upon that point, the decision on the point operates as res judicata between the parties. The judicial Committee observed:

Now it is perfectly clear that the only real question raised by the above recited prayer is the question whether the Plaintiff was entitled to have the rent in kind instead of money rent. But when the case got before the Temporary Subordinate Judge he framed issues which strayed far beyond that simple question and these issues were adopted by the District Judge before whom the case came to depend.... But as has already been shown, the District Judge fixed issues which strayed into other matters, and evidence was led upon these points as raised by issues 5 and 6. The District Judge, notwithstanding that he dismissed the suit, held that the Respondents had not proved occupancy rights. This finding was reversed by the High Court, who held that the Respondents had occupancy rights, but that the settlement by the Court of Wards of 1869 was not a permanent settlement. They therefore dismissed the appeal and the suit was dismissed.

So stating the facts, the Judicial Committee held:

As their Lordships have pointed out, all this inquiry about occupancy rights and as to whether the settlement of 1869 was a permanent one, was not properly raised by the plaintiff but as both parties have without protest chosen to join issue upon these points, their Lordships see no reason why these matters in dispute should not be res judicata between them....

7. In *Annamalai Chettiar Vs. Lakshmanan Chettiar*, it was held by the Madras High Court:

Where in a case in which two points are raised, there is a definite decision on both of them, the decision on one of them cannot legitimately be described as obiter dictum merely because the other point which was taken first was itself sufficient to dispose of the case.

(Head Notes)

In *Kishori Lal Potdar Vs. Debi Prasad Kejriwal and Another*, the Patna High Court stated:

When a Court bases its decision, upon a point which it has to decide, upon two separate grounds, it cannot be said that the decision upon one of those grounds is obiter merely because the decision upon the other ground would be itself sufficient

Citing these two decisions with approval, the Supreme Court in *Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai*, 388 stated:

It is well settled that if the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point-Each of which by itself would be sufficient for the ultimate decision-the decision on each of these points operates as res judicata between, the parties, [vide *Kishori Lal v. Debi Prasad* AIR 1950 Pat. 60 (F.B.), *Annamalai Chettiar Vs. Lakshmanan Chettiar*,].

This principle was restated by the Supreme Court in *Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others*, . In *Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others*, , 37 the Supreme Court had observed:

In order successfully to establish a plea of res judicata or estoppel by record it is necessary to show that in a previous case a Court, having jurisdiction to try the question, came to a decision necessarily and substantially involving the determination of the matter in issue in the later case....

So stating the Supreme Court quoted with approval the following observation of the Privy Council, in *Ramachandra Rao v. Ramachandra Rao* 49 IA 129.

The High Court appears only to have regarded the matter as concluded to the extent of the compensation money, but that is not the true view of what occurred, for as pointed in *Badar Bee v. Habi Merican Neordin* (1909) A.C.C. 623, it is not competent for the Court, in the case of the same question arising

between the same parties, to review a previous decision no longer open to appeal, given by another Court" having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time....

8. By the nature of this suit and on the basis of the pleadings, although the relief sought was confined to injunction, the issue on title was relevant in so far as the dispute related to, a narrow strip of land lying between properties admittedly in the respective ownership and possession of the Plaintiff and the Defendants. Both the parties without protest went to trial on all the issues, including the issue relating to title. A decision was rendered on that issue and that decision remained unchallenged. The principle embodied in Section 11 of the CPC applied to the facts of this case. The subsequent suit was thus barred by res judicata. That in a suit for injunction the issue on title may become relevant is also clear, from Section 27 of the Kerala Court Fees and Suits Valuation Act, 1959.

9. We are accordingly of the view that the judgment under appeal on the point is incorrect. The appeal is allowed. We make no order as to costs.