
(1977) 10 OHC CK 0001

In the Orissa High Court

Case No : First Appeal No. 76 of 1969 and First Appeals No's. 231, 232 and 233 of 1970

Union of India (UOI)

APPELLANT

Vs

Central Coal Fields Limited and Others

RESPONDENT

Date of Decision : 31-10-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1978) 45 CLT 219

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : B.K. Pal and B. Pal, for the Appellant; M. Patra, B. Dagara, S. Patnaik, Government Advocate and Standing Counsel (Central), for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—All the four appeals are directed against the common judgment of the learned Subordinate Judge of Dhenkanal decreeing the suits of Respondent No. 1 for recovery of various sums of money collected by the Appellant-Railway Administration by way of demurrage charges in respect of different consignments. Against the common judgment there was also another first appeal carried to this Court being First Appeal No. 254 of 1970 which has not survived for disposal on merit and to which further reference would be made in the latter part of the judgment.

2. Plaintiff. National Coal Development Corporation Limited (now Central Coal Fields Limited) is a Government Company. Its registered office is located at Ranchi in the State of Bihar, but it owns several collieries in Talcher area within the jurisdiction of the Subordinate Judge of Dhenkanal. For its working, the Plaintiff-company placed orders for certain machineries and machine parts which were to be imported and it had been arranged with the Directorate of Supplies & Disposal, Shipping Section, Government of India, that on arrival of the goods,

the same would be released and despatched by rail to the Plaintiff at Talcher area. The second Defendant. M/s. Kilburn and Company Limited at Calcutta, was operating as Clearing Agent and under the arrangement, it was to clear the goods and despatch the same to the Plaintiff. The goods so received were the subject-matter of separate consignments and the same were despatched before issue of appropriate railway receipts. The consignments could not be taken delivery of at the destination station on account of non-availability of the relevant railway receipts and consequently, the Railway Administration raised demands of demurrage and demurrage was collected as a condition precedent to release of the goods. Plaintiff filed five separate suits as per the particulars given below for recovery of the demurrage collected from it on the plea that the Rail way Administration was not entitled to claim demurrage. It impleaded the Clearing Agent and the Government of India as Defendants 2 and 3 respectively.

Money Suit Numbers Date of Institution Amount claimed Connected First Appeal

8 of 1967 14-3-1967 Rs. 9583.00. 76 of 1969

7 of 1968(8/67)* 19-6-1967 Rs. 168.40 232 of 1970

8 of 1968(9/67)* 19-6-1967 Rs. 177380 254 of 1970

9 of 1968(10/67)* 19-6-1967 Rs. 631.30 231 of 1970

10 of 1968(11/67)* 19-6-1967 Rs. 293.90 233 of 1970

* The four suits were transferred from the file of the Munsif, Talcher to the file of the Subordinate Judge.

3. Each of the Defendants filed a separate written statement. The Railway Administration pleaded that the delay in issuing the railway receipt was not on account of its default, but was owing to the gross negligence of the second Defendant as also the Plaintiff. The Plaintiff had sufficient notice of despatch and arrival of the consignments and even in the absence of the railway receipts, Plaintiff could obtain release of the consignment on the basis of Indemnity bonds. The demurrage collected being in accordance with the rules, Plaintiff has no cause of action.

4. The second Defendant pleaded that it was the authorised agent of the third Defendant and was entrusted with the duty of clearance and despatch of the consignments. In due course, the second Defendant consigned the goods and posted the railway receipts to the Plaintiff. Plaintiff's representatives used to visit the office of the second Defendant and were being kept posted with the day to day position of despatches. If the railway receipts were not forthcoming, it was open to the Plaintiff on the basis of indemnity bonds to take delivery of the consignments. The second Defendant had acted promptly, bonafide and without any negligence. Therefore, it has no liability for the Plaintiffs claim.

5. The third Defendant contended that it has no liability for the suit claim. The facility of clearing the Plaintiff's consignments through the third Defendant had

been extended in consideration of the fact that the Plaintiff was a Government of India Undertaking and as the second Defendant was the clearing agent of the third Defendant and had agreed to handle the work. The claim for demurrage due to non-clearance of the consignments in time and the payment of demurrage by the Plaintiff were matters between the Railway Administration and the Plaintiff and the rejection of the claim of refund of demurrage by the Rail way Administration was no justification for foisting the liability on the Government of India.

6. Except the first of the suits referred to above, the other suits had been instituted in the Court of the Munsif at Talcher in consideration of the low valuation thereof. Those suits were in due course transferred to the Court of the Subordinate Judge of Dhenkanal to be analogously tried and all the five suits were taken up together for disposal. Common issues in all the five suits were raised and one set of evidence was also recorded. On Plaintiff's side only one witness was examined; 3 witnesses were examined for the second Defendant and one witness each had been examined for Defendant No. 1 and Defendant No. 3. Series of documents were exhibited by the parties. By his common judgment dated 30th of November, 1968, the learned Subordinate Judge decreed each of the suits against Defendant No. 1 and dismissed the same against the other two Defendants.

7. Five appeals were filed against the common judgment and the separate decrees one in this Court being First Appeal No. 76 of 1969 and the remaining four in the Court of the Additional District Judge at Dhenkanal. Those four were, however, directed to be transferred to this Court to be heard analogously with First Appeal No. 76 of 1969 and were in due course registered as first appeals in this Court. The appeal which came to be registered as First Appeal No. 254 of 1970 on transfer had been filed beyond the period of limitation and in this Court an order was made on 1-12-1971 for condonation of the delay on condition that the Appellant-Railway Administration paid Rs. 350/- as costs to the Plaintiff-Respondent No. 1 within two months. The direction not being complied with the said first appeal has been dismissed in due course as barred by limitation. That is how, the remaining four appeals have now come to be heard on merits.

8. A preliminary objection has been raised at the hearing by Mr. Patra for Respondent No. 1, namely First Appeal No. 254 of 1970 having been dismissed and the judgment and the decree of the learned Subordinate Judge having become final, the said decision operates as res judicata and the present appeals are no more maintainable. Strong reliance in support of this plea is placed on the decision of the Supreme Court In the case of Sheodan Singh Vs. Smt. Daryao Kunwar, . Mr. Pal for the Appellant on the other hand contends that the provisions of Section 11 of the CPC are not satisfied and the bar of res judicata does not arise at all. Mr. Pal for the Appellant takes the stand that the suits having been disposed of analogously by a common judgment, the judgment of the trial Court in First Appeal No. 254 of 1970 cannot be said to have been rendered in a former

suit. He also contends that there has been no final adjudication when the First Appeal was dismissed as being barred by limitation. According to Mr. Pal, when four appeals have been carried against the same judgment, the entire judgment has been out into jeopardy and it cannot be said that there has been any element of finality so as to bring in the bar of res judicata.

9. Admittedly, the issues in all the five suits were common and on the pleadings of the parties, the Trial Judge has struck the ninth issue thus:

Is the Defendant No. 1 justified in transporting the goods in question to its destination without issue of Railway Receipt and invoice and is the Defendant No. 1 justified in the circumstances to realise demurrage from the Plaintiff ?

The trial Court considered this to be the most important issue and examined it first and held:

... Hence, from the evidence on record and in absence of any specific rule authorising the Defendant No. 1 to transport goods without issue of Railway Receipt, I hold that the Defendant No. 1 was not justified in transporting or despatching the wagons carrying the consignments to their destination without issue of Railway Receipts and Invoice and in the circumstances, the Defendant No. 1 was not justified to realise demurrage charges from the Plaintiff specially when Rule 149 of Goods Tariff Rules does not entitle the Plaintiff to take delivery on Indemnity before issue of Railway Receipts....

10. Section 11 of the CPC provides:

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.

The first Explanation defines the term former suit. It has been the consistent view of Courts in India including the Supreme Court that the provisions of Section 11 of the Code are not exhaustive and the general doctrine of res judicata covers a wider field. In the present case, however, it is not necessary to travel beyond the ambit of the statutory provision as the preliminary objection is grounded on the Statute. It has been indicated in *Sheodan Singh Vs. Smt. Daryao Kunwar*, :

A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely

(I) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(III) The former suit must have been a suit between the same parties or

between parties under whom they or any of them claim;

(III) The parties must have litigated under the same title in the former suit;

(IV) The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.

Further Explanation I shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier....

The Court referred to a series of authorities and ultimately came to decide by saying:

A consideration of the cases cited on behalf of the Appellant therefore shows that most of them are not exactly in point so far as the facts of the present case are concerned. Our conclusion on the question of res judicata raised in the present appeals is this. Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be res judicata and the appeal Court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits, and if that is so the decision of the appeal Court will be res judicata whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal Court does not result in the confirmation of the decision of the trial Court given on the merits, as for example, where the appeal Court holds that the trial Court had no jurisdiction and dismisses the appeal, even though the trial Court might have dismissed the suit on the merits....

After summarizing the position thus, the Court came to uphold the preliminary objection and held that the remaining appeals were no more maintainable. The facts of Sheodan Singh Vs. Smt. Daryao Kunwar, are almost similar. There, of the several appeals before the High Court, one had been dismissed as barred by limitation and the other had been dismissed on account of failure of the Appellant to take steps to make the appeal ready for hearing. This decision of the Supreme Court holds the field.

There have been occasions when an attempt to distinguish the case has been made, as in the case of Jai Narain Har Narain and Another Vs. L. Bulaqi Das, . The judgment of the majority stated:

... The result of consolidating the two suits was to combine the controversies in the two suits into a single controversy and to make the proceedings of the suits a single proceeding. That controversy and that proceeding was concluded by

means of the judgment dated 30-4-1957 and inasmuch as that judgment has been put in jeopardy, it (that judgment, cannot operate as res judicata. Be fore Section 11, CPC can apply, the matter in controversy must have been "finally decided". Inasmuch as the decision is sub-judice in appeal, it cannot be said that the matter has been finally decided.

x x x

If the Appellants in the instant appeal had also appealed against the decree passed in Suit No 599 of 1956, and in that appeal the judgment passed by the trial Court had been confirmed by this Court then it could be contended that the instant appeal was barred by res judicata because in that case the decision of the trial Court would stand affirmed by this Court and the case would have been similar to Sheodan Singh Vs. Smt. Daryao Kunwar, . In the present case no appeal had been filed against the decree passed in Suit No. 599 of 1956 and this Court has not affirmed the judgment dated 30-4-1957. It is, therefore, difficult to see as to how there is a bar of res judicata in this case.

The Full Bench decision of the Allahabad High Court was dealing with a case of different type i. e. where there were two cross-suits and only one appeal had been carried. In paragraph 32 of the judgment, reference was made to an earlier Full Bench decision of the Court in the case of Bhagwan Sahai Vs. Daryao Kunwar and Another, , which on facts was similar to the principle indicated in Sheodan Singh Vs. Smt. Daryao Kunwar, . On facts, the ratio of the earlier Full Bench decision was distinguished, but it was no where indicated that the judgment was wrong. The latter Allahabad Full Bench decision Jai Narain Har Narain and Another Vs. L. Bulaqi Das, therefore, does not support Mr. Pal's stand.

11. The same question was recently examined by a Full Bench of the Kerala High Court in the case of Janardhanan Pillai v. Kochunarayani Amma 1976 K.L.T. 279. It has been stated:

If there are two suits in which the matter directly and substantially in issue are the same that the earlier decision in one of the suits bars a fresh decision in the other suit is evident from the provisions in Section 11 of the Code of Civil Procedure. Therefore, when there are two suits in which substantially the same question arises for decision and they are decided by a common judgment the same question arises for decision and they are decided by a common judgment or by judgment in the main case that being incorporated in the second case and when only one of the judgments is subjected to appeal what would be the effect of the failure to appeal against the other judgment? Could it be said that these two judgments, having been rendered at the same time, one cannot be said to be the decision in a former suit? It is true that the party has right of appeal against the decision in both the suits and if such right of appeal is exercised in regard to only one of the decisions, does the other decision become final so as to debar an independent consideration of the appeal so taken? These are the questions which call for examination in these Second Appeals.

In cases where two or more suits between the same parties relating substantially to the same matter are decided and only one of them is challenged by way of appeal, we fail to see how it can be said that the decisions are simultaneous and hence there can be no bar of res judicata. If the party takes up in appeal only one of the decisions, the others become final. The question, then, for consideration would be whether these decisions which have become final operate as res judicata. The question of res judicata would arise for determination only when the appeal against the connected decision is taken up for consideration. That will necessarily be at a subsequent point of time. At that moment there would be earlier decisions which have become final. The question whether the decision from which appeal has been filed and the decisions which have become final were rendered simultaneously would then be really irrelevant. Within the meaning of Explanation I of Section 11 of the Code of CPC the decision which becomes final by being not appealed against becomes an earlier decision in a matter directly and substantially in issue in the former suit and operates as res judicata. This is notwithstanding the very serious consequences that the party who has filed appeal against one only of the two decrees may have to face. It is not as if his right of appeal becomes unavailable to him because of the bar of res judicata. He has the right to have his appeal taken up and considered, but he cannot get relief to the extent the question in issue which calls for decision in the appeal cannot be considered on the merits by reason of the bar of res judicata. The very rule of res judicata is a technical rule; which precludes a party who may have a case from prosecuting his case with a view to obtain relief. It serves the larger interest of public policy by promoting the rule that there must be an end to litigation and a security to the litigant. No man should be vexed twice over the same cause is a rule founded on ancient precedents dictated by wisdom. If the party to the decree would be bound by the decree if he does not challenge the decree he must face the consequences of his failure to appeal against it, such consequence being the finality thereof. Such finality would debar a decision afresh on the question even if it be in an appeal against a simultaneous decision. We do not see justification to import any rule of expediency to the context.

In the case before us, five suits had been disposed of by a common judgment and the Issues in all the suits were examined. Issue No. 9, as already indicated, was the most relevant one for purpose of disposing of the dispute. Defendant No. 1 who had lost in the trial Court had carried five separate appeals. One of these appeals was dismissed as being barred by limitation in February, 1972. On the ratio of Sheodan Singh's case¹, when the judgment of the trial Court stood affirmed by dismissal of the appeal in this Court, the first appeal must be deemed to have been disposed of on merit and in terms of the Explanation-I to Section 11 of the Code of Civil Procedure, the decision of this Court in First Appeal No 254 of 1970 became a decision of the Court in a former suit. Thus, the bar of res judicata is fully attracted. The preliminary objection raised by the Plaintiff-Respondent No. 1 must be sustained in these circumstances and we would, therefore, dismiss the remaining four appeals without entering into merits

thereof.

12. All the four appeals are accordingly dismissed. Parties are, however, directed to bear their own costs in this Court.

K.B. Panda, J.

13. I agree.

Application dismissed.