

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	19.06.2019
Pronounced On	21.06.2019

CORAM

THE HONOURABLE **MR.JUSTICE C.SARAVANAN**

C.R.P.(PD).Nos.2023 & 2024 of 2015
and
M.P.No.1 of 2015

A.Sengoda Gounder

.. Petitioner
in both C.R.Ps

vs

1.P.Malliga

2.E.Palaniappan

.. Respondents
in both C.R.Ps

Common Prayer: Civil Revision Petitions filed under Article 227 of Constitution of India, to set aside the Fair & Decretal orders of the First Additional District Munsif Court at Bhavani, dated 27.02.2015 in I.A.No.21 & 20 of 2015 in O.S.No.86 of 2012.

For Petitioner : Mr.P.Valliappan in both C.R.Ps.

For Respondents : Mr.Zeenath Begum in both C.R.Ps.

COMMON ORDER

The present Civil Revision Petitions are directed against the fair and decretal orders dated 27.02.2015 in I.A.Nos.21 and 20 of

<http://www.judis.nic.in> 2015 in O.S.No.86 of 2012. After the evidence was closed the

respondents filed an application in I.A.Nos.343 and 344 of 2014 to reopen the evidence/(suit) and to cross examine DW1 namely the petitioner (defendant).

2.This was filed after the case was posted for arguments and after taking ten adjournments starting from 31.10.2014 and ending with 10.12.2014. The petitioner thereafter withdrew the said applications on 09.01.2015. Thereafter the petitioner filed another application for similar relief vide I.A.Nos.20 & 21 of 2015 on 22.01.2015. These applications were allowed by the Court.

3.Aggrieved by the same the defendant has preferred the present Civil Revision Petitions questioning the orders passed by the Court. Mr.P.Valliappan, the learned counsel for the petitioner drew my attention under Section 11 r/w Section 141 of C.P.C and stated that subsequent application was barred under law.

4.The learned counsel also submitted that the applications filed for reopening the evidence and to cross examine the petitioner (defendant) as DW1 again was barred under Order 23 of Cr.P.C in view of withdrawal of the earlier application and therefore submitted that the lower Court erred in allowing the application. The learned counsel for the petitioner drew my attention to affidavit filed in

support of I.A.Nos.20 and 21 of 2015 wherein there are no reasons given for filing the above applications except for stating that the suit was posted for arguments.

5. There are only four paragraphs in the affidavit of which paragraph (2) and (3) deal with the reasons and request of the petitioner which reads as under:

(2) The case is posted today for arguments. The documents marked as Ex.A7 in the connected case in O.S.No.294 of 2010 has to be marked on our behalf to prove our case through cross of DW1. Hence it becomes necessary to recall the respondent for the purpose of marking documents.

(3) Unless the respondent is recalled for the purpose of marking documents on our behalf, we will be put to great loss and hardship.

6. The learned counsel for the petitioner also drew my attention to the decision of this Court in the case of **S.K.Sreedhar vs R.Raghavan and another**, 2015 (2) MWN (Civil) 230 wherein the Court has deprecated the practice of filing application to reopen the evidence at the far end of the case when the case is listed for arguments.

7. In the aforesaid decision, the Court held that it has no hesitation in coming to the conclusion that the order passed by the trial Court required interference and was therefore liable to set aside. There was also a very sketchy and skeletal affidavit was filed like the one that was filed by the petitioner (plaintiff) in the present case.

8. The learned counsel for the petitioner relied on the following decisions:-

- i. **A.Thakurdas and another vs A.Venilal and others** AIR 1977 Karnataka 60.
- ii. **Anil Nahar and another vs Vijay Nahar** 2013 (4) CTC 554.
- iii. **M/s. Abdul Sakoor Umar Sahigara vs Hanachand Dey** AIR 1972 Orissa 263.
- iv. **Papinayakanahalli Venkanna and others vs Janadri Venkanna Setty (by LRs)** AIR 1985 Karnataka 166.
- v. **S.Narain Singh and another vs M/s.Ram Gopal Madan Lal and others** AIR 1981 Delhi 88.
- vi. **Patrisha Sympli vs Nandita Das** AIR 2014 Meghalaya 13.

9. In **A.Thakurdas and another vs A.Venilal and others** AIR 1977 Karnataka 60, the Court held that the concept of res judicata has its genesis in the finality of litigation. It is fairly settled

that the principle of res judicata can be invoked even in the interlocutory proceedings arising out of the same suit.

10.The division bench of this Court in **Anil Nahar and another vs Vijay Nahar** 2013 (4) CTC 554, held that it is settled position of law that the decision rendered in Interlocutory Applications would amount to *res judicata*.

11.The Hon'ble Orissa High Court in **M/s. Abdul Sakoor Umar Sahigara vs Hanachand Dey** AIR 1972 Orissa 263 observed that although bar of res judicata under Section 11, not applicable to all types of interlocutory orders, at the same time, it cannot be disputed that the matters which have attained finality by order at some stage of the suit of proceedings cannot be re agitated at subsequent stage on the same grounds.

12.There the Hon'ble Orissa High Court referred to the decision of the Hon'ble Supreme Court in **Arjun Singh vs Mohindra Kumar** AIR 1964 SC 993, wherein the Court held that as follows:-

"It is needless to point out that interlocutory orders are of various kinds some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the

proceedings before the Court usually take. They do not in that sense, decide in any manner the merits of the controversy in issue in the suit and do not of course, put an end to it even in part such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court”.

13.The learned counsel for the petitioner submitted that even if res judicata was not applicable, the respondent should have obtained leave under Order XXIII of CPC. In this connection he referred to the decision of Karnataka High Court in **Papinayakanahalli Venkanna and others vs Janadri Venkanna Setty (by LRs)** AIR 1985 Karnataka 166.

14.The learned counsel also referred the decision of the Hon'ble Delhi High Court in **S.Narain Singh and another vs M/s.Ram Gopal Madan Lal and others** AIR 1981 Delhi 88, wherein the application for temporary injunction was withdrawn after contest a fresh application was filed after withdrawing the earlier application. However while withdrawing the application the party had not obtained leave. Referring to specific language of

Order XXIII Rule 1 of CPC, the Court there held that in paragraph 3 as follows:-

"Under sub-rule (4) a plaintiff is precluded from instituting any fresh suit in respect of the claim withdrawn by him. Thus if a plaintiff withdraws a suit, he is not entitled to file a fresh suit on the same cause of action. **Similarly if the plaintiff files an application for the grant of a temporary injunction and after notice to the opposite party who has filed a reply and during the course of arguments the plaintiff withdraws the application for temporary injunction, it appears that the plaintiff is debarred from instituting a fresh application unless there has been change of circumstances since the date of dismissal of the previous injunction application.** Section 141 of the Code makes the procedure applicable to the suits to all proceedings in court of civil jurisdiction. The proceedings for the grant of temporary injunction are proceedings in a civil court. Thus reading together O. 23 and Section 141 of the Code it appears that the present application for temporary injunction filed on 16th April, 1980 decided by the impugned order dated 15th July, 1980 is barred under sub-rule (4) of Rule 1 of Order 23 of the Code. On this ground alone I do not find any merit in the present appeal and I hold that the application of the plaintiffs-appellants for the grant of injunction restraining the respondents from proceeding with arbitration proceedings is not maintainable. The appeal is, therefore, dismissed but with no order as to costs."

15. The decision of the Hon'ble Meghalaya High Court was referred in **Patrisha Sympli vs Nandita Das** AIR 2014 Meghalaya 13, wherein the revision petition was dismissed for want of

<http://www.judis.nic.in> permission of the court under Order XXIII Rule 1 of CPC.

16. Per contra, learned counsel for the respondent/plaintiff drew my attention to the decision of the Allahabad High Court in **President, Shri Chaturbhuji Sharma Sikshan Sansthan Mahavidyala Samiti, Oral & Ors vs Awadh Bihari Tiwari & Ors** AIR 2006 Allahabad 238, wherein it was held that an order whether interlocutory or not, which has not been passed on merits will not operate as res judicata.

17. The learned counsel for the respondent further referred to the decision of this Court in **Periyakarupa Thevar and others vs Vellai alias Ocha Thevar and others** 1963 AIR (Madras) 338: 1963(1) MLJ 376, wherein in paragraph 13 is held as follows:-

13. It is now well settled that Section 141 of the CPC does not apply to execution proceedings. There is also ample authority interpreting the word "proceeding" as relating to original matters in the nature of suits. **(ILR 54 Cal 405 : (AIR 1927 Cal 534) Sarat Krishna Bose v. Bisweswar Mitra; AIR 1921 Bom 463 (1), Jagannath Vasudev Pundit v. Maharaja of Kolhapur; ILR (1941) All 807 : (AIR 1942 All 85) Ram Gopal v. Shantilal; AIR 1926 Mad 325, Venkatanarasimharao v. Hemadri Suryanarayana; AIR 1926 Mad 654, Salar Beg Saheb v. Kotayya)**. The nature of a proceeding whether it is of a kind of original action bearing the characteristics of a suit is not always easy to determine. Probate, Guardianship and Matrimonial proceedings, initiated by applications provided for under special enactments, can readily be treated as being of the nature of original actions or suits. Interlocutory applications in a pending suit would

not fall within the class of original proceedings. We do not think that the proceedings in a civil Court under Section 146 of the Cr PC can with any propriety be called "original" in character. They are not initiated in that Court and they do not terminate their affecting the rights of parties. The proceedings transit through the civil Court and are merely a phase of a criminal proceeding in a civil jurisdiction, though, for the nonce they may assume the garb of civil proceedings. Section 141 of the CPC cannot therefore apply to such proceedings.

18. After referring the above paragraph and to several other decisions rendered in context of execution proceedings, it was held that Section 141 of CPC was merely procedural.

19. The court referred to another decision of this Court in **Anantharaju Shetty vs Appu Hegade** 37 Mad LJ 162: AIR 1919 Madras 244 wherein the following opinion was expressed.

"It was next argued that Section 141 of the CPC is indicative of a general enunciation of principle by the legislature that to all the judicial proceedings, the Civil Procedure Code is applicable. The section only empowers the Judge to regulate judicial trials by rules as to summoning of witnesses, etc. which are to be found in the Code and not that the Code is to be applied in its entirety to such proceedings, including power of appeal and of review."

20. I have considered the rival submissions of the parties. The

<http://www.judis.nic.in> question of invocation of *res judicata* would not be applied. There

was no final determination as an earlier application vide I.A.No.343 & 344 of 2014 were filed and thereafter withdrawn.

21.The rule of *res judicata* applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court. The Court further held that the principle underlying Rule 1 of Order 23 of the Code has been extended in the interest of administration of justice to cases of withdrawal of writ petition also though not on the ground of *res judicata* but on the ground of public policy. सत्यमेव जयते

22.In the case of **Daryao vs State of U.P.**, 1961 DGLS 134: (1962) SCR 574: AIR 1961 SC 1457, it was observed as follows:-

*"If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a **case there has been no decision on the merits by the Court.** We wish to make it clear that the*

conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other."

23. The Supreme Court in the case of **Sarguja Transport Service v. State Transport Appellate Tribunal**, (1987) 1 SCC 5: AIR 1987 SC 88, observed as under :-

"The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever waives or abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above Rule is founded on public policy, but it is not the same as the rule of *res judicata* contained in section 11 of the Code which provides that no Court shall try any suit or issue in which the matter directly or substantially in issue has been directly or 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."

24. Thus, res-judicata is not applicable. However, the question to be answered is whether the principle contained in Order XXIII Rule 1 of CPC can be applied to interlocutory applications as Order XXIII Rule 1 of CPC applies only to a suit. In my view, the issue has to be examined from the point of view to prevent a litigant from abusing the process of the Court by instituting fresh application after withdrawing the earlier application for the very same interlocutory relief.

25. Section 141 of CPC also permits the court to allow procedures for suits to be followed in all proceedings. Applying the same to the facts of the case it is evident that all principle enshrined in Order XXIII Rule 1 of CPC can be applied to the 2nd application.

26. Only exception to Order XXIII is Order XXII Rule 4 is qua execution proceedings.

27. In the case of **Ranen Roy vs Prakash Mitra**, (1998) 9 SCC 689 it was held as follows:-

"3. As would be seen from the above statement it was unqualified and no reservation had been made. Order XXIII sub-rule (4) of Rule 1 of the Code of Civil Procedure provides that where the plaintiff either abandons any suit or part of a claim under sub-rule (1) or withdraws from a suit or part of a claim without seeking any liberty to

institute a fresh suit in respect of the subject-matter of such suit or part of the claim, he shall be precluded from instituting any fresh suit in respect of that subject-matter or that part of the claim.”

28. In any event, it appears the petitioner was cross examined by the respondents on 09.10.2014 and on 16.10.2014 on Ex.A7. There is no necessity to allow the further cross examination. It is evident, I.A.Nos.343 & 344 of 2014 in O.S.No.86 of 2012 were earlier filed to drag on the proceedings. After withdrawing the I.A.Nos.343 & 344 of 2014, the respondent filed I.A.Nos.20 & 21 of 2015 for the same relief. Therefore, I am of the view that the present Civil Revision Petitions are liable to be allowed.

29. The suit is of the year 2012. The lower Court is therefore directed to dispose the suit within a period of six months from the date of receipt of a copy of this order.

30. The present Civil Revision Petitions stand allowed with the above observation. No costs. Consequently connected Miscellaneous Petition is closed.

21.06.2019

Index : Yes/No
Internet : Yes/No
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C. SARAVANAN J.,

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To

- 1.The Principal District Munsif Court,
Bhavani.
- 2.I Additional District Munsif Court,
Bhavani.
- 3.The Section Officer,
V.R.Section, High Court, Madras.



Pre-Delivery common order
in

C.R.P.(PD).Nos.2023
& 2024 of 2015
and
M.P.No.1 of 2015

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