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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL Nos.4768-4771 OF 2011

IN THE MATTER OF:

Bhagwan Sri Ram Virajman Rep.By Next
Friend Trilokinath Pandey and others ... Appellants

-Versus-

Rajendra Singh & others ... Respondents

COMPILATION

SUBMISSIONS ON RES JUDICATA ON BEHALF OF
SRI K. PARASARAN, SENIOR ADVOCATE

(PAPER BOOK)
(KINDLY SEE INDEX INSIDE)

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A. INTRODUCTION

1. It is submitted that the suit instituted by Mahant Raghubar Das in 1885 before the Munsif Court does not operate as res judicata in the present proceedings for the reason that the parties are different, the property is different, and the issues and reliefs prayed for are different.

2. A brief overview of the 1885 suit is given below.

    a. On 19.01.1885, one Mahant Raghubar Das describing himself as 'Mahant, Janmasthan, Ayodhya' instituted a suit (No. 61/280) against the Secretary of State for India in the Session of Council, for the grant of permission for construction of Mandir on the 'chabootra–Janmasthan' situated at Ayodhya which was alleged to be in possession of the plaintiff.

    b. The dimensions of the said chabootra Janmasthan are described as 17 feet by 21 feet.

    c. Thereafter, one Mohd. Asghar claiming to be the Mutawalli of the Babri Mosque, filed an impleadment application which was allowed and he was impleaded as Defendant No. 2.

    d. The suit was dismissed by the Trial Court on 24.12.1885, against which Civil Appeal No. 27 of 1886 was filed by Mahant Raghubar Das before the District Judge, Faizabad.

    e. The District Judge dismissed the appeal *vide* judgment dated 18.03.1886.

f. Second Civil Appeal No.122 of 1886 was filed by Mahant Raghubar Das against the judgment of the District Judge, which was also dismissed by the Court of Judicial Commissioner, Oudh on 01.11.1886.

B. PARTIES ARE DIFFERENT

3. It is submitted that neither the plaintiff deities nor the Sunni Wakf Board were party to the 1885 suit.

4. In the present case, Suit 4 is instituted by the Sunni Wakf Board and Suit 5 is instituted by the plaintiff deities.

C. 1885 SUIT NOT IN REPRESENTATIVE CAPACITY

5. It is further submitted that the suit was not filed by Mahant Raghubar Das in representative capacity on behalf of all Hindus, but was filed in his personal capacity and asserting a personal right, seeking permission to construct a temple on the chabootra–Janmasthan. It is an admitted position that no application under Order I, Rule 8 (corresponding to Section 30 of the Code of Civil Procedure, 1882 which was in force when the 1885 suit was instituted), was filed by the parties to the 1885 suit. Neither the deities (who are plaintiffs in Suit-5) nor the Hindu public was claiming any right through Mahant Raghubar Das in 1885 and there is nothing to record to substantiate such a position.

6. In the present case, *vide* order dated 08.08.1962 passed in Suit 4, the plaintiffs sued in their representative capacity on behalf of the Muslims, and Defendant

Nos 1 to 4 were permitted to be sued in their representative capacity on behalf of the Hindus.

7. In any event, even assuming without conceding that the 1885 suit was filed by the Mahant Raghubar Das on behalf of all Hindus, the plaintiff deities in Suit 5 are not bound by its outcome. See the judgment of this Hon'ble Court in ***Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi***, (1960) 1 SCR 773 @ 802-803, wherein it has been held as follows:

> *"The appellant raised a special argument in respect of certain properties, which, he stated, were private. He relied upon the observations of the learned Judges of the High Court that they were inclined to hold that these properties were private but refrained from giving a declaration in view of the fact that the deity had not been joined. These properties are jat inams, recently built properties, namely, the Balaji temple and the "Shree Theatre", and an allowance which goes in the name of Kulkarni commutation amounting to Rs 24 per year. The difficulty in the way of the appellant is real. He refrained from joining the deity, if not as a necessary, at least as a proper party to the suit. If he had joined the deity and the deity was represented by a disinterested guardian, necessary pleas against his contention could have been raised by the guardian, and it is likely that some evidence would also have been given. The appellant seeks to cover up his default by saying that the suit was one under Order 1 Rule 8 of the Code of Civil Procedure, and that the Hindu public was joined and the deity was adequately represented. In a suit of this character, it is incumbent to have all necessary parties, so that the declaration may be effective and binding. It is obvious enough that a declaration given against the interests of the deity will not bind the deity, even though the Hindu Community as such may be bound. The appellant would have avoided circuity of action, if he had acceded to the very proper request of the respondents to bring on record the deity as a party. He stoutly opposed such a move, but at a very late stage in this Court he has made an application that the deity be joined. It is too late now to follow the course adopted by the Privy Council in Pramatha Nath Mullick v. Pradyumna Kumar Mullick [(1925) LR 52 IA 245] and Kanhaiya Lal v.*

Hamid Ali [(1933) LR 66 IA 263] , in view of the attitude adopted by the appellant himself and the warning which the trial Judge had issued to him in his order." [Emphasis supplied]

D. ISSUES AND RELIEFS ARE DIFFERENT

8. In the 1885 suit, the relief sought for was against the Secretary of State for India, for permission to construct a temple with the pleading that *"it is the duty of fair and just government to protect its subjects and provide assistance to them in availing their rights and making suitable bandobast for maintenance of law and order."*

9. In the present proceedings, the reliefs sought for pertain to the very character of the suit property – whether a public mosque or a place of public worship for Hindus.

10. Further, in Suit 5, the very existence of Asthan Sri Ram Janmabhoomi as a juridical person is an issue, which goes far beyond the relief of construction of a temple sought for in 1885.

E. SUIT PROPERTIES ARE DIFFERENT

11. In the 1885 suit, the subject matter of the suit (or suit property) was only the chabootra–Janmasthan measuring 17 x 21 feet and it was alleged that the said chabootra was in possession of the plaintiff therein. A map showing the subject-matter of the 1885 suit can be found at page 4 of the Compilation of Proceedings in Case No. 61/280, Year 1885.

12. In the present proceedings, the suit-property in both Suits 4 and 5 comprises of the inner and outer courtyard. It is submitted that the relief sought for in Suit-5 is for *"a declaration that the entire premises of Sri Ram Janma Bhumi at Ayodhya, as described and delineated in Annexures I, II and III belong to the plaintiff deities."* Annexures I, II and III have been described at para 2 of the plaint as *"two site plans of the building premises and of the adjacent area known as Sri Rama Janma Bhumi, prepared by Shiv Shankar Lal pleader ... along with his Report dated 25.05.1950, are being annexed to this plaint and made part of it as Annexures I, II and III, respectively."* The said Annexures may be found at pages 2885, 2887 and 4218 of Volume 3 of the judgment, respectively.

13. Only after the judgment of this Hon'ble Court in ***Ismail Faruqui v. Union of India*** (1994) 6 SCC 360, the scope of the dispute was limited to the area comprising the inner and outer courtyard alone (referable to Annexure I) and the High Court proceeded to adjudicate the revived suits accordingly. See the observations of Hon'ble Justice Khan at page 55, Volume 1. See also, the observations of Hon'ble Justice Agarwal at page 1553, para 2716.

14. Despite the narrowing down of the scope of the dispute, the suit-property in the present proceedings is much larger than the 17 x 21 chabootra-Janmasthan referred to in the 1885 suit. In this regard, the judgment of this Hon'ble Court in ***V. Rajeshwari v. T.C. Saravanabava***, (2004) 1 SCC 551 is relevant. In that case, the plaintiff (appellant) filed a suit in 1984 for declaration of title and recovery of possession of suit property admeasuring 1817 sq. feet. Prior to that, in the year 1965, one of the predecessors-in-title of the plaintiff had filed a suit for

declaration of title and for possession of over 240 sq ft area (situated on the upper floor of the building standing over the suit property) against the respondent. When the matter travelled in appeal, the High Court held that the issue as to title and possession over the suit property was already decided in the suit filed by the predecessor-in-title of the plaintiff and therefore the present suit was barred by the principle of *res judicata*. Reversing the judgment of the High Court, this Hon'ble Court held, inter alia, as under (at page 558):

> *"15. Reverting back to the facts of the present case, admittedly, the plea as to res judicata was not taken in the trial court and the first appellate court by raising necessary pleadings. In the first appellate court the plaintiff sought to bring on record the judgment and decree in the previous suit, wherein his predecessor-in-title was a party, as a piece of evidence. He wanted to urge that not only he had succeeded in proving his title to the suit property by the series of documents but the previous judgment which related to a part of this very suit property had also upheld his predecessor's title which emboldened his case. The respondent thereat, apprised of the documents, still did not choose to raise the plea of res judicata. The High Court should not have entered into the misadventure of speculating what was the matter in issue and what was heard and decided in the previous suit. <u>The fact remains that the earlier suit was confined to a small portion of the entire property now in suit and a decision as to a specified part of the property could not have necessarily constituted res judicata for the entire property, which was now the subject-matter of litigation.</u>"* [Emphasis Supplied]

F. RES JUDICATA UNDER CODE OF CIVIL PROCEDURE, 1882 AND CODE OF CIVIL PROCEDURE, 1908

15. It is submitted that the 1885 suit was filed when Code of Civil Procedure, 1882 (hereinafter referred to as the 1882 CPC) was in force. The 1882 CPC was then replaced by the present Code of 1908 (hereinafter referred to as the 1908 CPC). The Preamble to the present 1908 CPC is as under:

"Whereas it is expedient to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature; It is hereby enacted as follows:"

16. In the 1882 CPC, the provision pertaining to res judicata is Section 13 whereas in the 1908 CPC, it is Section 11. Explanation V to Section 13 corresponds to Explanation VI to Section 11 and the provisions read as under:

Explanation V – Where persons litigate bonafide in respect of a <u>private right</u> 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.	***Explanation VI*** – Where persons litigate bonafide in respect of a <u>public right or of a private right</u> 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.

17. It is submitted that the old Specific Relief Act was of the year 1877, even before the 1882 CPC. As held by this Hon'ble Court in ***Razia Begum v. Sahebzadi Anwar Begum***, 1959 SCR 1111 @ 1130, Sections 42 and 43 of the Specific Relief Act, 1877 (corresponding to Sections 34 and 35 of the Specific Relief Act, 1963) provide that the declaration given by the court operates only *in personam* and not *in rem*, but such declaration binds not only the parties to the suit but also their privies, or the persons claiming through them.

18. The words 'public right' were added to Explanation VI in view of Section 91 of the 1908 CPC, for which no corresponding provision existed in the 1882 CPC. See in this regard, Code of Civil Procedure by Sarkar, 12th Edition, Vol. 1 @ pg. 170. Thus, it is in view of Section 91 of the 1908 CPC, which provides for suits

relating to public matters (in cases of general public nuisance), that Section 11 of CPC Explanation 6 takes into its ambit both private and public rights.

19. The provisions of the CPC are procedural as well as substantive. See the judgment of this Hon'ble Court in ***Sharma v. Jayshree*** (2008) 9 SCC 648 @ 665, para 49. For instance, the right to file an appeal from a judgment is a substantive right, and hence, the law to be applied is as on the date of filing of the suit. The question arose in ***Garikapati Veeraya v. N. Subbiah Choudhry*** 1957 SCR 488 as to whether the right to appeal would be governed by the law prevailing on the date of the institution of the suit. This Hon'ble Court held, at page 515, as under:

> *"(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.*
>
> *(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.*
>
> *(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."*

This Hon'ble Court further held (at pages 533-534) that Article 133 of the Constitution does not operate retrospectively, and the vested right of appeal is governed by the conditions laid down in the Code of Civil Procedure which were in force previous to the adaptation thereof.

20. Res judicata, if it is held to be procedural right cannot take away the vested rights. If it is held to be substantive right, it has no retrospective operation.

21. In the 1885 suit, only a private right was sought to be enforced by Mahant Raghubar Das whereas in the present proceedings, a public right (to worship) is sought to be enforced. The issue as to res judicata has been decided in favour of the plaintiffs in Suit-5. See observations of Hon'ble Justice Khan @ 90, Hon'ble Justice Agarwal @ para 1063, pg. 829 and Hon'ble Justice Sharma @ pg. 3515 read with pg. 3035.

22. It may be noted that at para 892, pg. 779, Hon'ble Justice Agarwal holds that:

> "*The plea of res judicata is an inhibition against the Court and a finding in favour of a party on the plea of res judicata would oust the jurisdiction of the Court to try the subsequent suit or the suit in which such issue has been raised, which has been heard and finally decided in the former suit ... Since, it restrains the Court to try the subsequent suit or an issue raised subsequently, we have no manner of doubt that for the purpose of present case, it is the provision contained in Section 11 of Act 5 of 1908, which will govern the matter and not the earlier one. ... However, we would like to clarify here itself that we may not be understood as observing that the principle of res judicata is confined to Section 11 of the Act 5 of 1908. As we have already held, the principle of res judicata was well recognized in the ancient legal systems also and it has consistently been held as not limited to the specific words of the Code for its application."*

23. It is submitted that even if the 1882 CPC was to be applied, which prevailed as on the date of filing of the Suit to the extent right is a substantive right, 1885 suit would not operate as res judicata inasmuch as it sought to enforce only a private right, whereas the nature of the right involved in the present proceedings is a public one.