(1958) 06 KL CK 0023

High Court Of Kerala

Case No: S.A. No. 138 of 1956 (E)

Mathai		APPELLANT
	Vs	
Abdulkadir Kunju		RESPONDENT

Date of Decision: June 6, 1958

Citation: (1958) KLJ 803

Hon'ble Judges: Vaidialingam, J; Kumara Pillai, J

Bench: Division Bench

Advocate: K.K. Mathew, for the Appellant; G. Velu Pillai, for the Respondent

Final Decision: Allowed

Judgement

Kumara Pillai, J.

Two questions arise for decision in this second appeal, namely, whether the suit, out of which it arises is barred by res judicata on account of the decision, Ext. I, and whether it is barred by limitation. On the first question, namely, the question of res judicata, the findings of the lower courts are concurrent; and on the second they are divergent. The lower appellate court found that there was no bar of limitation. But, in spite of that finding, it had to confirm the decision of the trial court dismissing the suit as it concurred with the trial court''s finding that Ext. I operated as res judicata. The suit was for recovery of Rs. 1,500/- due under a hypothecation bond, Ext. A, Rs. 1,000/- being the principal and Rs. 500/- arrears of interest. Plaintiff was a subscriber in a chitty, and on prizing his ticket he drew the prize amount executing a chitty hypothecation bond in favour of the foreman jointly with defendant I. The properties hypothecated under the chitty hypothecation bond belonged to defendant 1, and they were hypothecated presumably because the plaintiff had no property of his own to be given as security to the foreman. After receiving the prize amount, which came to Rs. 954-10 Chs-11 Cash, plaintiff gave that amount and a further sum of Rs. 45-17 Chs.-5 cash, making the total amount of Rs. 1,000, to defendant 1 and took from him Ext. A chitty hypothecation bond. The suit was for the recovery of the amount due under Ext. A. The rate of interest stipulated for in

Ext. A was 12 per cent per annum and, under its provisions, defendant 1 had to pay the future subscriptions for the chitty with that interest. There were two drawings each year and for each drawing the subscription was Rs. 60/-. Thus, the annual interest payable under Ext. A was sufficient for the payment of the subscriptions for the two drawings every year in the chitty. After receiving the amount under Ext. A defendant 1 paid the subscriptions in the chitty only for a few instalments and then defaulted to pay further subscriptions, and so, the foreman filed a suit against him and the plaintiff for arrears of subscriptions due under the chitty hypothecation bond, and the judgment in that suit is Ext. 1, In Ext. 1 suit this plaintiff, who was defendant 1 therein, remained exparte, and that suit was contested only by defendant 2 therein who is the present defendant 1. He contended inter alia, in Ext. I suit that there was a special agreement between him and the present plaintiff as regards the manner of the discharge of the liability under the chitty hypothecation bond, that on account of the present plaintiff''s default in the matter of that agreement he had to get damages from him, and so in any event, he should not be made liable both under the chitty hypothecation bond and under Ext. A. Except in regard to the last contention the findings in Ext. I were against him. So far as the last contention was concerned the direction in Ext. I was: "The first defendant (i.e., the present plaintiff) is not entitled to realise Rs. 954-10 and interest thereon due under the hypothecation bond (Ext. A) in his favour executed by the second defendant in the circumstances of this case." It is this direction in Ext. I that was relied upon by defendant 1 as constituting res judicata in the present suit. As stated already, the lower courts upheld this contention.

2. As regards what would constitute res judicata between co-defendants it has been laid down by the Privy Council in AIR 1931 231 (Privy Council) :

For a decision to operate as res judicata as between co-defendants three conditions are requisite: (1) there must be a conflict of interest between the defendants concerned; (2) It must be necessary to decide the conflict in order to give the plaintiff the relief he claims and (3) the question between the defendants must have been finally decided.

It cannot be denied that conditions (1) and (3) in the passage extracted above are satisfied in the present case, but we are decidedly of the opinion that condition (2) has not been satisfied. The nature of that condition is explained in the passage from Cottingham v. Earl of Shrewsbury, (1843) 3 Hare 627, quoted with approval in AIR 1931 114 (Privy Council) . The passage which their Lordships have quoted reads as follows :

If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide that case, and the co-defendants will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each of them by any proceeding which may be necessary only to the decree the

plaintiff obtains.

Judged in the light of this canon there can be no doubt of the fact that it was wholly unnecessary to consider the dispute between the present plaintiff and defendant 1 in Ext. I suit. Whether there was a special agreement between defendant 1 and the plaintiff as to the manner of the discharge of the liability under the chitty hypothecation bond, both of them, having executed that hypothecation bond and undertaken to discharge the liability thereunder, were clearly liable to discharge the liability there under as between the plaintiff in Ext. I suit on the one hand and they on the other. Therefore, it was not necessary to go into that question in Ext. I suit and give a decision as to whether the plaintiff in the present suit could recover the amount of Rs. 954-10 Chs., i.e., the prize amount which formed part of the principal under Ext. A from defendant 1. We, therefore, hold that the courts below were wrong in holding that Ext. 1 operates as res judicata in the present suit and dismissing the suit on that basis.

3. Defendant 1 has filed a cross appeal against the finding of the lower appellate court that the suit is not barred by limitation. There is no substance in this cross appeal, for, the agreement under Ext. A, which is a registered hypothecation bond, was that defendant 1 was to keep the amount until the termination of the chitty and pay the subscriptions down to the last instalment with the interest which he had to pay on Ext. A amount. Both sides admit that the chitty terminated only on 5-2-1114. The present suit has been brought within twelve years of that date, namely on 17-2-1950 (6-7-1125). The lower appellate court was, therefore, right in holding that there was no bar of limitation. Since all other questions arising on the pleadings of the parties have been decided by the lower courts in the plaintiff''s favour, it follows that the second appeal has to be allowed and the suit decreed in terms of the plaint. The decree of the lower courts are therefore set aside, and the suit is decreed in terms of the plaint with costs throughout. The second appeal is allowed, as above.