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Court : Mumbai

Decided On : Nov-14-1991

Reported in : 1993ACJ528

Judge : V.A. Mohta and ;G.D. Patil, JJ.

Appeal No. : F.A. No. 9 of 1982

Appellant : Anusayabai and ors.

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : K.A. Ghatpande and ;S.C. Mehadia, Adv.

Advocate for Pet/Ap. : Arundhati Patil, Adv.

Disposition : Appeal allowed

Judgement :

V.A. Mohta, J.

1. See, where our procedural legal system has landed the appellants.
2. The story-pathetic as it is-shorn of minor details can be told thus:

The appellants-the old mother, the widow, two unmarried minor daughters and a minor son-were dependants and are the legal heirs of deceased Phalhad Landed

a village school teacher-who met with an instantaneous accidental death on 10th April, 1973, as a result of collision at the unprotected railway crossing between a railway engine and a public transport bus, in which he was travelling. They filed in forma pauperis a civil suit for recovery of damages to the tune of Rs. 60,000/- against the Union of India and the Maharashtra State Road Transport Corporation (MSRTC) in the Court of Civil Judge, Senior Division, Khamgaon, on 14th October, 1973. Both the major appellants are illiterate villagers, residents of Sakhli Buzruk. Tahsil Chikhali, District Buldana. They were permitted to sue in forma pauperis vide order dated 21st September, 1976 and the action was registered as Special Civil Suit No. 19 of 1976.

The allegations of negligence/contributory negligence were denied by the defendants by two separate written statements throwing the blame on each other and denying the liability. They raised a preliminary objection to the effect that in view of the constitution of the Accidents Claims Tribunal under Section 110-F of the Motor Vehicles Act, 1939 (the M.V. Act) with effect from 1st December, 1977, the civil court had ceased to have jurisdiction to try the suit. By order dated 25th October, 1978, the preliminary objections of the defendants were upheld and the plaint was returned for presentation to the proper court. On the very next day, the appellants presented the petition before the Tribunal (the District and Sessions Judge, Buldana). There the defendants raised a preliminary objection that since the suit was filed before constitution of the Tribunal and Section 110-F did not apply retrospectively, it had no jurisdiction to entertain the petition. This preliminary objection was upheld and vide order dated 18th September, 1979, the Tribunal returned the petition for presentation to the proper court. On that very day, the appellants promptly filed the plaint once again in the Court of Civil Judge, Senior Division, Khamgaon. The said suit was registered as Special Civil Suit No. 2 of 1979. The defendants now raised a third preliminary objection to the effect that the order dated 25th October, 1978, passed in the civil suit had become final, operated as res judicata and hence the suit was liable to be dismissed. This objection was upheld and the suit was dismissed on that preliminary point on 27th June, 1980. This appeal arises out of these proceedings.

3. It is not fairly disputed before us by the learned Counsel for the respondents that the correct legal position is and has always been that Section 110-F of the M.V. Act had no retrospective operation and hence it could not apply to pending matters and that the order dated 25th October, 1978, is plainly unsustainable and unsupportable. The language employed in Section 110-F is absolutely clear and the point also stood concluded by a decision of this Court in the case of *Manibai Lallu Kika Rathod v. Rajkumar Harpal Deo* 1966 ACJ 107. In this background, it is absolutely surprising and shocking that public authorities like the Union of India and MSRTC should have taken such a wholly untenable objection and the trial court should have upheld the same. It is also unfortunate that the appellants were not advised to challenge the said order.

4. Miss Patil, learned Counsel for the appellants, contended, in the first place, that having regard to the above undisputed basic background, the patently illegal order dated 25th October, 1978, pertaining purely to jurisdiction cannot operate as res judicata specially when the defendants simultaneously blew hot and cold by taking contrary stands and making the poor, illiterate and helpless appellants remediless. It is next contended that in case it is necessary to do so, there should not be any hitch, even in setting aside in this appeal the order dated 25th October, 1978, which no one is in a position to support. It seems to us that the appellants are right and way has to be found to open the door of a forum to adjudicate upon their claim, since what has happened shocks the judicial conscience.

5. Now, the trial court has relied upon the decision of the Supreme Court in the case of *Avtar Singh v. Jagjit Singh* : [1980]1SCR122 , in holding that the order dated 25th October, 1978, operates as res judicata. That was a case where the civil court, upon objection of the defendants there, had held that it had no jurisdiction to try the suit and directed the return of the plaint for presentation to the revenue court. The revenue court returned the petition on the ground that it had no jurisdiction. The plaintiff again instituted a suit in the civil court. The Supreme Court held that since the plaintiffs did not challenge the earlier order of the civil court and did not follow the matter by taking it further before the higher authorities, the order operated as res judicata.

6. There are variety of reasons as to why the said decision cannot be held against the appellants. In the first place, that was not a case where the defendants took contradictory stands and attempted to approbate and reprobate. Secondly, the point involved in that decision pertained to a mixed question of law and fact and not to jurisdiction simpliciter. Moreover, there are several other decisions of the Supreme Court-some later of coordinate Benches and one rendered by a larger Bench-taking a view that wrong decision purely on jurisdiction cannot operate as res judicata.

7. We will first take up the decision rendered by larger Bench, Mathura Prasad v. Dossibai : [1970]3SCR830 , wherein it is held that a pure question relating to jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of that court between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise. Reasons are (paras 9 and 10):

A question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of the court. If by an erroneous interpretation of the statute the court holds that it has no jurisdiction the question would not, in our judgment, operate as res judicata. Similarly, by an erroneous decision if the court assumes jurisdiction which it does not possess under the statute the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

It is true that in determining the application of the rule of res judicata the court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e., the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression 'the matter in

issue' in Section 11, Code of Civil Procedure, means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the court or a decision of the court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of the order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

The above principle has been followed by subsequent decisions of the Supreme Court in the cases of Jai Singh v. Mamam Chand : [1980]3SCR224 and Supreme Court Employees' Welfare Association v. Union of India : (1989)IILLJ506SC . In the later decision it is observed (para 24):

Thus, a decision on an abstract question of law unrelated to facts which give rise to a right cannot operate as res judicata. Nor also can a decision on the question of jurisdiction be res judicata in a subsequent suit or proceeding. But, if the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as res judicata between the parties in a subsequent suit or proceeding, if the cause of action is the same.

8. Assuming that there is a conflict between Avtar Singh : [1980]1SCR122 , on one hand and Mathura Prasad : [1970]3SCR830 , Jai Singh : [1980]3SCR224 and Supreme Court Employees' Welfare Association : (1989)IILLJ506SC , on the other, we would be bound by a decision rendered by a larger Bench- Mathura Prasad (supra)- though it is earlier and later decisions rendered by Benches of coordinate strength-Jai Singh (supra) and Supreme Court Employees' Welfare Association (supra).

9. There are certain basic legal principles which have always to be kept in view in dealing with situation like this where a party is made remediless and is likely to suffer not for his mistake but for the mistake of the court. After all, procedural laws are only a means to do justice/remove injustice and is not an end in itself. Attitude of court towards procedural law is increasingly changing as will be demonstrated by a majority decision of the Constitution Bench of Supreme Court, in the leading

case of A.R. Antulay v. R.S. Nayak : 1988 CriLJ1661 . The majority view is that a party should not suffer on account of direction of a court based upon error leading to confirmation of jurisdiction and that the doctrine of 'per incuriam' can in an appropriate case apply even to the same proceedings.

10. This takes us to the second point pertaining to the validity of order dated 25th October, 1978, which the appellants have urged before us with our leave and notice to the other side. That objections raised and the order passed thereupon are clearly unsupportable is an admitted position before us. Thus, legally the order cannot stand. Are we procedurally powerless to quash it in this appeal? We do not think so. The said order is appealable under Order 43, Rule 1, Civil Procedure Code and appeal lies to the High Court. Limitation for filing appeal against an order is 90 days and quite obviously challenge to the said order is much beyond that period. But, the court can always condone the delay where Section 5 of the Limitation Act, 1963, applies. It is true that there is no regular written application for condonation of delay before us. But that facet by itself cannot come in the way of condoning the delay in case circumstances so warrant. Section 5 does not mandate making a written application though that is the practice which is and must normally be insisted upon. But there is no bar to consider even the oral prayer in exceptional cases. The course which the appellants want us to adopt is not unknown. There have been precedents where this has been done, e.g., the case of Mahabir Singh v. Chief of Army Staff 1990 SCC 625.

11. Turning to the basic facts in this case, can there be any doubt that these unfortunate, poor and illiterate villagers have been bona fide prosecuting the remedies to secure damages for the loss of their sole bread-earner? It is obvious that they have done what they were advised to do. It is true that the appellants should have challenged the order dated 25th October, 1978, but they cannot be punished so heavily for the mistake of relying upon legal advice.

12. The original record is here. Filing of certified copy can also be dispensed with. Under the circumstances, we see no difficulty in condoning the delay to the challenge to the order dated 25th October, 1978 and on merits quashing the same in this appeal without subjecting the appellants to further injustice of calling upon

them to file separate appeal before appropriate Bench.

13. Under the circumstances, this appeal is allowed. The impugned order dated 25th October, 1978 and the impugned judgment and decree dated 27th June, 1980, are quashed and set aside and the matter is remanded to the Civil Judge, Senior Division, Khamgaon, for trial of the original civil suit in accordance with law.

14. More than 18 years have gone by and the matter has yet not reached the stage of trial. Having regard to the whole background, we direct the trial court to give top priority to this matter and to dispose it of on or before 30th June, 1992. In case for any unavoidable reason the matter cannot be disposed of as directed, the trial court shall submit a detailed report explaining the reasons for non-compliance with the time schedule. By consent of parties, we fix 9th December, 1991, as the date for appearance before the trial court by which time the office is directed to see that the complete record reaches the trial court.

15. What about costs? is the next question. The defendants-respondents' attitude, to say the least, has been very unfair in the trial courts subjecting the appellants to immeasurable misery and driving them to this wholly avoidable litigation. We, therefore, direct the two respondents to pay costs of Rs. 2,500/- each, payable on or before 31st December, 1991.

16. Learned counsel for the MSRTC wanted us to defer this judgment, to enable settlement of claim. The suggestion for settlement is good, but there is no point in deferring the judgment. Nothing prevents settlement in the trial court. We do hope and trust that at least now the respondents will be fair enough to settle the claim on some reasonable basis.

Steno copies of this judgment be supplied to the parties out of turn and free of charges.