

Vythilinga Mudaliar Vs. Ramachendra Naicker

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Court : Chennai

Decided On : Aug-02-1904

Reported in : (1904)14MLJ379

Appellant : Vythilinga Mudaliar

Respondent : Ramachendra Naicker

Judgement :

Subrahmania Aiyar, J.

1. Sowrirajaperumal temple of Tirukkannapuram in the Nannilam Taluq of the Tanjore District, was entitled to receive from the Government an annual money allowance spoken of as Mohini. This allowance used to be disbursed from the Public Treasury till 1863. In that year the Government made another arrangement with reference to the allowance. The temple itself having owned in different villages ryotwary lands liable to pay to Government a total assessment of Rs. 705-9-2, the institution was exonerated from the liability to pay this assessment and the liability of the Government to pay the allowance to the temple was from that time put an end to. With reference to the remainder of the allowance the assessment due to Government in respect of certain ryotwary lands in four villages was directed, to be paid over thereafter to the trustees of the temple. Sami Naik who was taken to be the then holder of these lands executed a Muchalika to Government undertaking to pay the assessment to the temple. The trustees of the temple also executed a

muchalika to Government agreeing to receive the assessment due upon the lands referred to in satisfaction of the claim the temple till then had on the Government. No writing passed between the trustees on the one hand and Sami Naik on the other. But ever since, payments as contemplated under the arrangement were made by Sami Naik or his successors up to the last revision of settlement in the District.

2. The present litigation is in respect of moneys claimed to be due to the temple from the defendant Kamaehandra Naik, grandson of Sami Naik, who in one of the Suits (O.S. No. 196 of 1901)] is impleaded in his character of trustee of the Enangudi Choultry (founded by Sami Naik and endowed with 10 velis and odd of land belonging to him in. one of the said four villages, while in the other (O.S. No. 198 of 1902) he is impleaded as holding in his own right part of the lands the revenue of which is alleged to have been assigned over to the temple. In the first of these suits the plaintiff claims Rs. 182-9-7 as the amount payable per annum by the choultry for 3 faslis from 1307 and in the other Rs. 219-11-8; payable per annum by Eamachandra Naik personally for the Ihree faslis from 1308. Various contentions of law and fact were raised in the written statements, but only one point has at this stage to be considered, viz., whether the trial of the contention as to the extent actually in the possession of the defendants in the respective suits out of the lands the right to the revenue whereof was granted to the temple, is barred by the decision in two previous suits (O.S. No. 370 of 1897 and O.S. No. 50 of 1899) brought on behalf of the temple against the choultry and Ramachandra Naik respectively, for the recovery of sums claimed to be due on account of three faslis prior to the periods in question in the present suits.

3. It will be sufficient to deal with the suit against the choultry, as the decision of the question in the other suit practically follows this. Mr. Krishnaswamy Aiyar on behalf of the plaintiff, if I understood him rightly, suggested that the plaintiff's claim is on a contract between the temple and the choultry under which the choultry is bound to pay to the temple a fixed sum of Rs. 182-9-7 per annum, without reference to the question of the possession of the Mohini lands by the choultry or the extent thereof actually in its hands. This suggestion is altogether unwarranted by the plant as the following extracts therefrom, which state the nature of the

claim, will show.

3. On 26th November 1863, defendant's paternal grandfather Sami Naicker executed a Muchalika to Her Majesty's Government stating that he would pay to the said (Sowriraja-perumal) temple from fasli 1273 the sum of Us. 1,117-5-8 being thethirva (exclusive of Kayal income) of 47 vetis 18 mahs 47 9/16+1/32, gulis of lands in the four villages of Pandaravadi PuKakudi & , in Nanuilam Taluk, just as he had been paying to the Sircar. Under 1 the agreement relating to charity and the partition deed, executed in the family of the said Sarni Naicker, 10 velis 18 mahs 62J gulis in Pandaravadi Puliakudy village out of the lands mentioned in the said much.ilika, has been assigned to the charity-choultry in Enangudi which was under the management of the said Sami Naicker. So long as the said Sami Naicker was living he was paying to the temple Rs. 182-9-7 theba'ance of the thirva exclusive of 5 per cent remitted for vicissitudes of season out of Rs. 192-3-5 the thirva proportionate to the said lands. After his death his son Venkatasubba Naicker was paying the said thirva to the plaintiff on account of the temple.

4. Aiter the death of the said Venkatasubba Naicker, his son and heir, the defendant, who had been conducting the said charity, has paid to the plaintiff for the temple the said thirva in full for Fasli 1303. He paid a portion for Pasli 1304 and did not pay the balance.

5. Plaintiff sued the defendant in O.S. No. 370 of 1897 in this Court in respect of the balance due for the said Fasli 1304 and the sums duo for Fasli 1305 and 1306 and on the defence of the defendant, decree was passed in favour of the plaintiff in theOriginal Suit, Appeal and Special Appeal.

6. After that he has not paid for 3 Faslis 1307, 1308 and 1309. In spite of demands defendant has been evading payment.

4. The claim set forth as above is based entirely on the effect of the arrangement made-in 1863 and what was done thereunder and it is perfectly clear from the provisions of the two muchalikas then executed that the lands the right to the revenue whereof was transferred to the temple, became Inam lands vested in the temple. Even without the opening sentences which occur in both the documents,

the conclusion as to the nature of the arrangement must, in the circumstances of the case, be as above stated and the express language of those sentences puts the matter beyond all doubt, for those passages show that the arrangement was made in accordance with official orders on the subject of relieving the Government from the duty of making money allowances to temples by the grant of land revenue as Inam in lieu thereof. This being so, the present plaint must be taken to be one for the enforcement of an alleged liability ' on the part of the choultry to pay rent to the temple upon Inam land the melvaram of which is vested in the temple while the Kudivaram is vested in the actual occupant of the land, the choultry. In this view it is obvious that the tenant is not responsible for more than the rent due upon the lands in fact held by him, there being no contract between the parties to pay otherwise. Consequently the choultry is entitled to have the question of the real extent of inam land in its possession during the respective faslis, ascertained and determined; and this would have to be done even if in the previous suit it had been found as a fact that the choultry was in possession of the whole of the extent alleged in the plaint, for such a finding relating as it did to the occupancy during the faslis then in question could not of course affect the matter of possession in any succeeding year.

5. True, it is not alleged on behalf of the choultry that between the period in question in the previous suit and that for the rent of which the present claim is made, any change in the matter of the possession of the inam lands by the choultry has taken place. But this does not preclude the choultry from showing in the present litigation, that, in spite of the conclusions, if any, on the point, arrived at in the previous suit the choultry was in possession of less land than is asserted on behalf of the temple during the years here in question. No doubt had the decision in the previous suit been to the effect that certain specific parcels constituted part of the inam, the choultry in the present suit could not, if it admitted the possession during the period in question here of those parcels, seek to make out that the parcels were not inam. Such, however, is not the nature of the contention.

6. Even if it were possible to maintain that the view discussed above is erroneous, the plea of res judicata urged on behalf of the temple must be held to fail for

reasons which I shall now proceed to notice. According to the plaint in the former suit which, except for the period for which the rent was claimed, was identical with the present, the choultry had defaulted to pay the rent due in respect of 10 velis and odd of temple inam lands in Pandaravadni Puliakudy village. In the written statement on behalf of the choultry this was in part denied, possession of 7 velis and odd alone out of the inam land being admitted. The written statement further pointed out that the difference between the plaintmentioned extent and that admitted in the written statement was held by certain individuals (specified in the written statement); that the Government in the re-settlement had treated those lands as part of the temple inam and refrained from assessing any revenue thereon on the obvious ground of the liability in respect of the rent of the same being due to the temple; and that though the choultry was in possession of 2 velis and odd of lands exclusive of the admitted 7 velis and odd of mam, the extent over the inam was assessed as ryotwary and the choultry made to pay such assessments to the Government.

7. With reference to these averments the issue which ought to have been framed was whether the choultry had possession, during the period in question, of any and what extent of temple inam land over and above that admitted in the written statement. But the issue that was actually framed (the 6th issue) ran as follows.

Whether defendant is in possession of all the land that was comprised in the endowment to the chuttram and of which thekist was assigned or only of a portion and if the latter, what is the extent of the portion in his possession in his capacity as manager of the chuttram

8. This issue was faulty in more than one respect, for, in the first place, whether the choultry was in possession of the whole of the endowment granted to it or not was foreign to the real dispute between the parties; and, secondly, it implied that the whole of such endowments were inam lands while that was a moot point. Starting, however, with such a misconceived issue, the trial proceeded and the District Munsif who tried the case purporting to give a finding only on the first part of the issue and in the affirmative, stated his reasons for the conclusion thus.

7. ** * It is defendant's case that prior to the recent settlement there was no correspondence between putta and enjoyment, that some lands included in his putta as manager of the chuttram were in the actual enjoyment of other persons and vice versa, that nevertheless he paid kist for lands included in his putta though not in his actual enjoyment, as Government did not levy additional kist from him for the lands in his enjoyment but not included in his putta and that this anomaly was removed by the recent settlement with the result that he is called upon to pay kist not only for the ten velis and odd in his actual enjoyment as manager of the chuttram but also for some lands which prior to the settlement were included in his putta but were not in his actual enjoyment. In fact defendant complains that this is the result of plaintiff insisting on going according to the state of things which prevailed before the settlement and Government, according to the new state of things created by the recent settlement. There seems to be some force in defendant's contention that the statu quo ante has been altered since the recent settlement. It is in evidence that defendant is now in possession as manager of the chuttram of the same lands that were in 1865 given as an endowment to it and that his grandfather was in possession of in 1863 when the assignment of revenue was made. His family has not since those years parted with any of them, nor have they acquired any new lands beyond a small accretion of 15 mahs and odd. Exhibit I which is the putta granted to the chuttram before the recent settlement shows that the chuttram paid kist to Government for only these 15 mahs and odd ***. Exhibit II a putta granted to the chuttram subsequent to the settlement shows that it pays kist to Government for 30 acres 85 cents of land * **. The state of things disclosed by Exhibits I and II is also supported by the evidence of defendant and of the kurnam. It also appears from the evidence that some persons are in possession of lands in Puliakudy and that they have not after the recent settlement, been paying assessment on them either to the temple or to Government.***The total extent of such lands appears from defendant's evidence to be about 22 acres. These are probably the lands which defendant says were, prior to the settlement, included in his putta as manager of the chuttram but not in his actual enjoyment. The difference between 15 Mahs and odd for which as seen from Exhibit I defendant paid kist to Government before the settlement and 30 acres 85 cents for which as seen from Exhibit II defendant now pays kist to

Government comes to very nearly 22 acres. It would thus appear that if plaintiff's claim for the kist of 10 velis and odd were allowed defendant would have to pay kist for 22 acres twice over. Plaintiff has not been able to suggest any reason for this state of things other than that assigned by defendant viz., want of correspondence between putta and enjoyment before the settlement. Defendant has thus a real grievance to complain of. But it seems to me that inasmuch as the arrangement evidenced by Exhibits A and B was made by the Government with the trustees of the temple and Sami JSJaicker on the supposed correspondence of all the lands in Saini Naicker's putta for the village of Puliakudy with those in his actual enjoyment, the present trustee of the temple has no right to insist upon defendant's adherence to that arrangement till it is recast by Government in the light of the facts disclosed in the recent survey and settlement. It is for defendant as manager of the chuttram to move the Government.

9. So far as I am able to understand the District Munsif's meaning, his conclusion seems to have been not that the choultry was in possession of the extent of inam land which it contended it had not possession of, but that the choultry, having till prior to the re-settlement been making payments on the footing that it had, the temple was entitled to insist upon the choultry continuing to pay on the same footing until matters were set right by Government whose settlement proceedings had, as he said, the effect of making the choultry pay twice over in respect thereof that is to say, to the temple on the one hand and to the Government on the other. This conclusion is of course absolutely beside not only the real issue in the case pointed out above but also the issue which was raised. It is impossible to understand how anything done in the re-settlement could have affected the rights and liabilities of the institutions, the temple and the choultry, inter se and how those rights and liabilities could be treated as in any way dependent on the action to be taken by the Government in the matter. If the land held by the choultry over and above the admitted 7 and odd velis were the inam of the temple, that institution could not possibly be prejudiced by the Government erroneously classifying it as ryotwary and the choultry would be bound to pay the temple the assessment thereon in spite of such erroneous classification. If, on the contrary, those lands were not part of the inam but really ryotwary, the claim of the temple was unsustainable. And in either view there was nothing the Government could do

which would touch the relations between the two institutions consequent' on the arrangement of 1,863. This manifest aspect of the question was somehow completely ignored by the District Munsif.

10. Turning next to the findings of the Subordinate Judge who heard the case in appeal, curiously enough it was neither the 6th issue as framed nor the issue which ought properly to have been raised in the suit, that he proceeded to consider. The points for determination were stated by him to be.

Whether defendant is entitled to be relieved from paying the revenue on lands which he says he is not in possession of, and if so, how much is to be remitted.

11. Paragraphs 9 and 10 of his judgment which are directly devoted to the discussion of the points so raised are as follows.

9. All that the defendant's family owned in the village having been endowed to the chuttrum and the revenue on the whole having been undertaken to be paid and paid up to 1898 it lies upon defendant to show how the enjoyment of two velis and odd passed to the other persons named by him and there is not a particle of evidence on this head. The defendant's vakil cannot explain the same at the hearing. The JCurnam examined as defendant's 1st witness confesses that he does not know how enjoyment passed to the others and that two crops assessment, on the whole ten velis and odd together with road-cess on the whole is levied from defendant alone. He is a Kurnatn of about 11 years standing. It may therefore, not be the concern of the trustee to take cognizance of the arrangement, if any, that defendant has made in respect of enjoyment of portions behind his back and without his express or implied concurrence.

10. It is said that defendant holds 7 velis and odd of the chuttrum land and 30 acres 85 cents of other lands for which he pays revenue to Government and that if he pays to the pagoda for a larger extent than 7 velis and odd he would be paying both to the pagoda and to the Government for the difference. The hardship is not real for the simple reason that the portion which he says he has not got is not what the Court will recognise.

12. The reasoning of the Subordinate Judge is to my mind so deficient in clearness and coherence as to make it impossible for me to say with confidence what precisely he meant to lay down. The ninth paragraph would seem to imply that the choultry having admitted that prior to the resettlement it actually held ten and odd velis of inam land and having failed, to show that two and odd velis thereof got out of its possession the presumption was that the same state of things continued. This would have been somewhat pertinent had he raised as the point for determination the question of fact whether the choultry was in possession of two and odd velis of inam land which it denied it had. But as framed by him the question was apparently one of law--whether the choultry could be allowed to aver non-possession as a ground for exoneration in respect of the rent thereof and his answer to this question in the negative would seem to be contained in the passage.

That portion which the defendant says he has not got is not what the Court will recognise.

13. The reason for this refusal to 'recognise' that the choultry had not, as it asserted, 2 and odd velis of temple inam land in addition to what it admitted it had, was, that prior to the resettlement it had continued to make payments on a contrary footing. Surely such a conclusion was on the very face of it wrong since however much the previous payment may have been evidence in relation to the question whether the two and odd velis of land in the possession of the choultry was or was not inam, it was incapable of being treated as anything more than an admission by conduct and could not have barred the choultry's right to show the truth.

14. Be this as it may, it is sufficient to note that the ground on which the Subordinate Judge decreed the claim was different from that adopted by the District Munsif and inconsistent with it, since according to the Munsif the liability of the choultry was subject to alteration by what the Government was supposed to be entitled to do on the application of the choultry while according to the Subordinate Judge the choultry was precluded from claiming exoneration under any circumstances.

15. The case then went on second appeal and that appeal was dismissed., the High Courts observing simply ' we see no reason to differ from the Court below.' The findings and conclusions of the Courts below having been different and inconsistent with each other, it could not be taken that this Court meant to express concurrence with such contradictory decisions. The proper view is that the decree in which both the Courts concurred was accepted as right. Being the final decision in the case, from its very nature it cannot operate as an estoppel with reference to the question now in issue, assuming that it was also treated in this Court as in issue then and was discussed before it. The reason is that the decision is wanting in that certainty which is an essential element in the case of every estoppel, the uncertainty consisting in that it does not appear and in the circumstances, cannot be made to appear, what the precise ground or grounds were on which the affirmation of the decree was in this Court rested whether that assigned by the District Munsif or that taken by the Subordinate Judge or the High Court's own conclusion (if any such were possible at that stage) on the question of fact referred to its properly arising between the parties. The observations of Field, J., who delivered the opinion of the Supreme Court of the United States in *Russell v. Place* 94 U.S., p. 606 at p. 608 are here so pertinent that I quote them at some length. He said.

It is undoubtedly settled law that a judgment of a Court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record--as for example if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have been passed without indicating which of them was thus litigated and upon which the judgment was rendered--the whole subject matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

Thus in the case of the Washington Alexandria &c.;, Steam Packet v. Sickles 24 Howard a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration containing a special count upon a contract and the common counts, was held by this Court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

When the same case was before this Court the second time, Packet Co. v. 5 Wallace, 580 the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used, in pleading, as an estoppel, or is relied upon as evidence, was stated to be substantially this : that, to render the judgment conclusive, it must appear by the record, of the prior suit that the particular matter sought to be concluded was necessarily tried or determined, that is, that the verdict in the suit could not have been rendered without deciding that matter : or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter* * *.

The record is not unlike a record in an action for money had and received, to the plaintiff's use. It would be impossible to affirm from such a record, with certainty, for what moneys thus received the action was brought, without extrinsic evidence showing the fact; and, of course, without such evidence the verdict and judgment would conclude nothing, except as to the amount of indebtedness established.

According to Coke, an estoppel must ' be certain to every intent and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded; and nothing conclusive in it when offered as evidence. See Aiken v. Peck 25 Vermont 260 and Hooker v. Hubbard 122 Mass. 245. Mira Lall v. Ganesha Pershad and Ors. L.R., 91. A. p. 64 is another high authority on the point. There S.B. and M. had sold a taluka to. G reserving to themselves a certain portion of that taluka subject to the agreement that they were to pay no rent for the portion reserved nor the Government

revenue, but that the Government revenue was to be paid by the vendee. The original vendors sold a part of the reserved property to the plaintiff in the action and the defendants were the vendees from G's widow of what had been sold to G. The plaintiff ought to establish that the agreement, between the original vendors and the original vendee was binding on the defendants and that they were bound to indemnify him in respect of the payment of the Government revenue on the reserved property or such portion thereof as he possessed. A judgment which had been previously obtained by the original vendors against the widow of G for possession of the reserved land exempt from the payment of revenue, was relied on as an estoppel. The Judicial Committee rejected this contention and Sir Robert P. Collier who delivered the judgment said.

The plaintiff is right in contending that this was a suit between the same parties in estate, relating in a great degree to the same subject matter and in relying on it as far as he can as an estoppel. It remains to ascertain what the real effect of the judgment in that suit was. The claim was 'for a declaration of right and proprietary possession exempt from the payment of the rateable rent (by prohibiting the defendant from demanding the rateable revenue)'. And the point decided in the Sudder Court is thus stated :--?' The Court for the above reasons reverse the decision of the Principal Sudder Ameen and decree in favour of the appellants for possession of the land exempt from the payment of revenue and requital to the amount claimed by them.

It appears to their Lordships that this judgment is ambiguous in one or two respects. It does not appear definitely on the face of it whether it was adjudged that the claim to be indemnified for the payment of Government revenue related to the then impending revenue settlement which the parties may perhaps be assumed to have had in contemplation when they entered into the agreement or whether it related to the next settlement or to any subsequent settlement. The judgment might be consistent with either view. Farther it does not appear whether the effect of the judgment is simply to render the defendant Mussamat Dulham Begum, liable to indemnify the plaintiffs in respect of the reserved rent, or whether the contract of indemnity is to be taken to run with the land and to bind all persons who may be hereafter in possession of it under any title whatever. Mussamat

Dulham Begum would seem to be the widow of (x and thus to have been a representative of the purchaser bound by his undertakings but it would by no means follow that the land is to be bound in whosoever hands it may hereafter come by purchase or otherwise. The judgment thus ambiguous is applied almost wholly to the construction of the inarnamah which the Court did not look at. If this ikrainamuh had been produced in the present suit their Lordships might by applying the judgment to the terms of it have been able to determine the effect of that judgment; but in the absence of the ikrarnamah which the plaintiff has not produced and the non-production of which he has not accounted for, their Lordships are unable to construe the judgment in the sense in which the plaintiff seeks to have it construed.

16. To sum up, my conclusion is, that there was no determination in the previous suit of the question whether the choultry held more of the temple inam land than it admitted then and admits now, secondly, that the decision of this Court owing to the uncertainty as to the ground thereof cannot be availed of as an estoppel in the matter; and thirdly, that even assuming it were possible to show that the question referred to was determined in favour of the appellants with reference to the rent for the period to which that suit related, that would not bar the respondent from raising it again with reference to the period to which the present suit relates

17. I would therefore dismiss the appeals with costs.

Sankaran Nair, J.

18. I concur.