Supreme Court of India
Sulochana Amma vs Narayanan Nair on 24 September, 1993
Equivalent citations: 1994 AIR 152, 1994 SCC (2) 14
Author: K Ramaswamy
Bench: Ramaswamy, K.

PETITIONER:
SULOCHANA AMMA

Vs.

RESPONDENT:
NARAYANAN NAIR

DATE OF JUDGMENT24/09/1993

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
SINGH N.P. (J)

CITATION:
1994 AIR 152 1994 SCC (2) 14
JT 1993 (5) 448 1993 SCALE (3)880

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K. RAMASWAMY, J.- Leave granted.

2. The conflict of judicial opinion among the High Courts in interpretation of Explanation VIII to Section II of the Code of Civil Procedure, as introduced by the Code of Civil Procedure (Amendment) Act, 1976, is to be resolved in this appeal. Kutty Ammna executed Udambadi (settlement deed) on May 19, 1961 giving life estate to her husband Krishnan Nair, for short K, and vested remainder in favour of the respondent. She died in the year 197 1. K alienated the property in 1972 by a registered sale deed in favour of Narayanan Nair and Chennan. Tile respondent filed O.S. No. 151 of 1972 in the District Munsif Court to restrain K from alienating the properties and committing acts of waste. Pending the suit, the appellant purchased the suit property on April 7, 1975 under Ex. B-1 from Narayanan Nair and Chennan. The trial court, by its judgment and decree, Ex. A-2, dated November 18, 1975 decreed the suit holding that K had no right to alienate the lands and permanent injunction was issued restraining him from committing acts of waste. The appeal in A.S. No. 31 of 1976 by K

was dismissed under Ex. A-4 on June 9, 1978. The appellant, being not a party to the earlier suit, when he was committing acts of waste, the respondent filed O.S. No. 237 of 1975 against K and the appellant for perpetual injunction restraining them from committing the acts of waste. The suit was decreed under Ex. A-5, on October 22, 198 1. Therein the validity of the appellant's title was left open. The respondent filed O.S. No. 61 of 1982 in the Court of Subordinate Judge for declaration of his title and possession against the appellant. The trial court by judgment and decree dated October 14, 1986, decreed the suit and granted mesne profits. On appeal, it was confirmed. The second appeal was dismissed. Thus this appeal by special leave.

3. The concurrent findings recorded by all the courts are that the appellant being successor in title and interest of K, is bound by the decrees under Exs. A-2 to A-5 and did not acquire any title tinder Ex. B-1. The transfer in his favour was only of the life estate of K and on his demise the estate of Kutty Amma stands vested in the respondent. Thus the present dispute is concluded by those judgments and decrees by the principle of res judicata.

4. The valiant effort of Shri Sukumaran, the learned senior counsel, in his effective persuasion and meticulous preparation, is that Section 11 and Explanation VIII should be read harmoniously. The Amending Act of 1976 made no attempt to delete the words "Court competent to try such" suit in the main section, which would indicate that the legislature intended to retain the distinction between judgments of the court of limited pecuniary jurisdiction, which will not operate as res judicata to a later suit laid in a court of unlimited jurisdiction, on the same issue between the same parties or persons under whom they claim title or litigating under the same title. Explanation VIII only brings within the fold of Section 11, the decree or order of the courts of special jurisdiction, like probate court, land acquisition court, rent control court, etc. The non-obstante clause incorporated in Explanation VIII would be only in relation to such decrees. The purpose of the Explanation, therefore, is only to remove that anomaly. The legislature having- been aware of the law laid down by courts, that the decree of a court of limited pecuniary jurisdiction does not operate as res judicata in a subsequent suit, did not intend to alter the law by suitable amendment to the body of Section 11. It was urged that the view of the Calcutta High Court in Nabin Majhi v. Tela Majhil and Promode Ran an Banerjee v. Nirapada Monda 12 is correct interpretation and the contra views of tile Kerala High Court in P. V.N. Devoki Amma v. P. V.N. Kunhi Raman Nair3, Orissa High Court in Kumarmoni Sa v. Himachal Salhu, U4 and C. Arum ugathicin v. S. Muthusami Naidu5 are not correct.

5. Section 11 of CPC embodies the rule of conclusiveness as evidence or bars as a plea as issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a court competent to try Such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit would operate as res judicata. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue, which directly and substantially had arisen in the former Suit between 1 AIR 1978 Cal 440: (1978) 2 Cal LJ 150: 82 CWN 1097 2 AIR 1980 Cal 181: (1980) 1 Cal LJ 203 3 AIR 1980 Ker 230: 1980 KLT 690 4 AIR 1981 Ori 177: (1981) 52 Cut LT 242 5 1991 LW 63 (Mad): (1991) 2 MLJ 538 the same parties or

their privies, been decided and became final, so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the court is saved. It is based on public policy, as well as private justice. They would apply, therefore, to all judicial proceedings whether civil or otherwise. It equally applies to quasi-judicial proceedings of the tribunals other than the civil courts.

6. The words "competent to try such subsequent suit" have been interpreted that it must refer to the pecuniary jurisdiction of the earlier court to try the subsequent suit at the time when the first suit was brought. Mere competency to try the issue raised in the subsequent suit is not enough. A decree in a previous suit will not operate as res judicata, unless the Judge by whom it was made, had jurisdiction to try and decide, not that particular suit, but also the subsequent suit itself in which the issue is subsequently raised. This interpretation had consistently been adopted before the introduction of Explanation VIII. So the earlier decree of the court of a limited pecuniary jurisdiction would not operate as res judicata when the same issue is directly and substantially in issue in a later suit filed in a court of unlimited jurisdiction, vide P.M. Kavade v. A.B. Bokil 6. It had, therefore, become necessary to bring in the statute Explanation VIII. To cull out its scope and ambit, it must be read along with Section 11, to find the purpose it seeks to serve. The Law Commission in its report recommended to remove the anomaly and bring within its fold the conclusiveness of an issue in a former suit decided by any court, be it either of limited pecuniary jurisdiction or of special jurisdiction, like insolvency court, probate court, land acquisition court, Rent Controller, Revenue Tribunal, etc. No doubt main body of Section 11 was not amended, yet the expression "the court of limited jurisdiction" in Explanation VIII is wide enough to include a court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies. This question is no longer res integra. In Rai Ba rang Bahadur Singh v. Rai Beni Madho Rakesh Singh7 the facts were that under U.P. Land Revenue Act 3 of 1901, the consolidation and partition of the lands were effected and became final. Thereafter, one of the landowners claimed title in a civil suit for a declaration that he was the superior landholder. In view of Section 233(k) of the Land Revenue Act, on a divergence of opinion among Oudh Chief Court 6 (1971) 3 SCC 530: AIR 1971 SC 2228 7 AIR 1938 PC 210, 214: 65 IA 314: (1938) 2 MLJ 596 and Allahabad High Court, the judicial committee held at p. 214 that if a question of title affecting the partition, which might have been raised in the partition proceedings, was not raised and the partition was completed, Section 233(k) debars parties to the partition from raising the question of title subsequently in a civil court. The revenue court is a court of special jurisdiction. In Daryao v. State of U.P.8 this Court held that tile doctrine of res judicata is in the interest of public at large and a finality should be attached to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. In Gulam Abbas v. State of U.P.9 this Court held that the principle of res judicata though technical in nature, is founded on considerations of public policy. The technical

aspect, for instance, pecuniary or subject-wise competence of the earlier forum to adjudicate the subject-matter or to grant reliefs sought in the subsequent litigation, should be immaterial when the general doctrine of res judicata is to be invoked. Explanation VIII, inserted by the Amending Act of 1976, was Intended to serve this purpose and to clarify this position. It, therefore, has to be held that the decree of the District Munsif, though of limited pecuniary jurisdiction, would operate as res judicata in the subsequent suit between the same parties.

7. The Calcutta High Court took a very narrow view limiting the scope of Explanation VIII to the decisions of the courts of special jurisdiction like probate, insolvency, land acquisition courts, Rent Controller, Land Revenue Tribunal etc. The Kerala, Orissa and Madras High Courts have taken a broader view, which view now stands approved by this Court in the aforesaid decision. Take an instance, if the scope of Explanation VIII is confined to the order and decree of an insolvency court, the scope of enlarging Explanation VIII would be defeated and the decree of civil courts of limited pecuniary jurisdiction shall stand excluded, while that of the former would be attracted. Such an anomalous situation must be avoided. The tribunal whose decisions were not operating as res judicata, would be brought within the ambit of Section 11, while the decree of the civil court of limited pecuniary Jurisdiction which is accustomed to the doctrine of res judicata, shall stand excluded from its operation. Take for instance, now the decree of a Rent Controller shall operate as res judicata, but a decree of a District Munsif (Civil Judge) Junior Division, according to the stand of the appellant, will not operate as res judicata, though the same officer might have decided both the cases. To keep the litigation unending, successive suits could be filed in the first instance in the court of limited pecuniary jurisdiction and later in a court of higher jurisdiction, and the same issue shall be subject of trial again, leading to conflict of decisions. It is obvious from the objects underlying Explanation VIII, that by operation of the non-obstante clause finality is attached to a decree of civil court of limited 8 (1962) 1 SCR 574,582: AIR 1961 SC 1457 9 (1982) 1 SCC 71, 90: 1982 SCC (Cri) 82 pecuniary jurisdiction also to put an end to the vexatious litigation and to accord conclusiveness to the issue tried by a competent court, when the same issue is directly and substantially in issue in a later suit between the same parties or their privies by operation of Section 11. The parties are precluded from raising once over the same issue for trial.

8. It is settled law that explanation to a section is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the section or clarify certain ambiguities or clear them up. It becomes a part and parcel of the enactment. Its meaning must depend upon its terms. Sometimes it would be added to include something within it or to exclude from the ambit of the main provision or some condition or words occurring in it. Therefore, the explanation normally should be so read as to harmonise with and to clear up any ambiguity in the same section.

9. Shri Sukumaran further contended that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata. In this case, when the right and interest of the respondent were

questioned in his suit against K, the validity of the settlement deed and the terms thereof were gone into. The civil court found, at K acquired life estate under the settlement deed executed by his wife conferring vested remainder in the respondent and on its basis the respondent was declared entitled to an Injunction against K who was prohibited not only from committing acts of waste, but also from alienating the properties in favour of third parties. The later suit of injunction to which the appellant was a party also binds the appellant. Therefore, even the decree founded on equitable relief in which the issue was directly and substantially in issue and decided, and attained finality, would operate as res judicata in a subsequent suit based on title where the same issue directly and substantially arises between the parties. As the appellant is deriving title from K who was a party in the former suit is also hit by the doctrine of lis pendens under Section 52 of the Transfer of Property Act.

10. Accordingly, we hold that the view of the Calcutta High Court is not good law and contra view is upheld. The judgments and decrees under Exs. A-2 to A-5 operate as res judicata against the appellant, who derives his title from K. The appeal is accordingly dismissed. The parties are directed to bear their own costs in this appeal.

CITY & INDUSTRIAL DEVL. CORPN. OF MAHARASHTRA v. MOTIRAM BUDHARMAL (Mohan, J.) The Judgment of the Court was delivered by MOHAN, J.- Leave granted.

2. The appellant is a government company being wholly owned by the Government of Maharashtra. Respondent 1 M/s Motiram Budharmal is a + From the Judgment and Order dated June 14, 1993 of the Bombay High Court of Judicature in Arbitration Petition No. 78 of 1993 partnership firm carrying on business as builders and contractors. Respondent 3 is a Chief Engineer of the appellant company.

3. On February 8, 1982, the appellant firm issued work order to the first respondent for construction of 'E' type building in Sector 10, Vashi, New Bombay. It was stipulated that the work should be completed by August 7, 1983. The work was not completed by the first respondent within that date. On June 30, 1984, the work was completed. On June 29, 1987, the first respondent wrote to the appellant's Executive Engineer alleging breach on the part of the appellant. He also put forth various claims. The first respondent invoked the arbitration clause in the agreement. It was contested by second respondent stating that claims put forth were not arbitrable. Thereafter, the first respondent by a letter dated October 15, 1987 protested and alleged bias against Respondent 3. He also prayed for removal of Respondent 3 as arbitrator. After a gap of nearly 2-1/2 years on May 15, 1990, the first respondent issued notice requesting Respondent 3 to proceed with the arbitration alleging that if this was not done, proceedings for revocation of his authority and/or for his removal would be adopted.

4. The first respondent filed Arbitration Petition No. 125 of 1990 in the Bombay High Court. In that proceeding, he prayed for removal of Respondent 3 as arbitrator and for revocation of his authority. It was directed that Respondent 3 should decide on the question whether the claims are arbitrable or not and to render a decision on the claims on merits by December 31, 1992. In view of this direction, the third respondent wrote to the parties intimating that he proposed to enter upon the reference and fixed the meeting for that purpose. However, the letter erroneously stated that the

meeting was to take place on February 17, 1992. On receipt of this letter, the first respondent stated that since the letter was received only on May 15, 1992, it was not possible to attend the meeting. Therefore, on April 15, 1993, the first respondent filed another Arbitration Petition No. 78 of 1993 seeking the removal of the third respondent as sole arbitrator. On this petition, the High Court passed the impugned order on June 14, 1993 directing the removal of third respondent as sole arbitrator and appointed an Advocate of the High Court as arbitrator in his place. It is the correctness of this order, which has been questioned in this appeal.

5. The learned counsel for the appellant would urge that having regard to the terms of arbitration clause where there is a named arbitrator namely, the Chief Engineer, it is not open to the court to appoint an advocate arbitrator. If the intention of the parties was that the dispute being technical in nature, it should be decided by a person with technical expertise, appointment of an advocate will not remedy the situation.

6. In order to invoke Section 8 of the Arbitration Act (hereinafter referred to as 'the Act'), it has to be decided first whether the parties intended to supply the vacancy. When the arbitration agreement evinces an intention not to supply the vacancy, the court will have no power under Section 8(1)(b) of the Act. This is not a case where the contract is silent about supplying the vacancy.

7. The High Court, it is urged, had failed to take into account the conduct of the first respondent, the party applying for removal. Such a conduct clearly shows that he was not interested in proceeding with the arbitration. After writing the letter dated May 18, 1992, no step, whatever, was taken by the first respondent. When the first respondent was not interested, the High Court should have held that the arbitration agreement eased to have effect. A declaration to that effect ought to have been made; that would have been in consonance with Section 12 of the Act.

8. In opposition to this, the learned counsel for the respondents would urge that this is a case in which the arbitration agreement stipulated only the Chief Engineer to be the arbitrator. The parties did not intend not to supply the vacancy. Therefore, the High Court was fully competent to appoint another arbitrator after the removal of named arbitrator. Such a power is available to High Court under Section 12(2)(a) of the Act. In support of this argument, reliance is placed on Chief Engineer, Rural Engineering Organisation v. R.C. Sahul. The present case falls under Sections 11 and 12 of the Act.

9. If the agreement is silent as regards supplying the vacancy, the law, it is urged, presumes that the parties intended to supply the vacancy. Where,therefore the court is moved under Section 8 of the Act to appoint an arbitrator, it was well within its jurisdiction to appoint another arbitrator. Reliance is placed on Prabhat General Agencies v. Union of India2.

10. The arbitrator named in the agreement was removed because he failed to use all reasonable dispatch in proceeding with the reference and making an award. Therefore, no exception could be taken to the impugned order.

11. Before we go into the question of law, a factual analysis may be highly necessary in this case to determine the applicability of Section 8 of the Act.

12. When on October 7, 1987, the third respondent wrote a letter in answer to the first respondent that the claims put forth were not arbitrable, what the first respondent did was to write a reply on October 15, 1987. In that letter, he alleged bias against the third respondent. On that score, he should be removed. After this letter, no action was taken for more than 2 1/2 years by the first respondent. It was only on July 9, 1990, he filed an arbitration petition for removal of the arbitrator. But the learned Single Judge dismissed the petition on January 6, 1992 and directed the third respondent to hold a preliminary meeting on the question as to whether the claims are arbitrable. The third respondent informed the parties that he proposes to enter upon reference and fixed the meeting on February 17, 1992. No doubt, 1 (1980) 49 CLT 259 (Ori) 2 (1971) 1 SCC 79: AIR 1971 SC 2298 the date men as February 17, 1992 was a mistake. But after writing the letter on May 18 1992 the first respondent, took no step whatever, for almost a year. All these facts will clearly point out the remiss on the part of first respondent. If really the third respondent did not fix a meeting, nothing prevented the first respondent to call upon him to fix the meeting. In the context of unexplained delay of first respondent from October 7, 1987 to May 10, 1990, from May 15, 1992 to April 15, 1993, the delay on the part of the arbitrator from May 1992 to December 1992 was not such as to warrant the removal nor could it be said that there was a lack of such dispatch on his part warranting removal. Therefore, we find it difficult to appreciate when the learned Single Judge in his impugned order dated June 14, 1993 held that on May 18, 1992, first respondent addressed a letter to Respondent 3 regarding convening of meeting but respondent 3 did nothing and that he did not fix any meeting for conducting tile arbitration.

13. Hence, this is not a case which would fail under Section 11 of the Act. Accordingly, the exercise of the power by the High Court under the order appealed against cannot be upheld. Once, we reach this conclusion, it is unnecessary to go into the legal aspect and decide whether the parties intended that the vacancy should not be supplied and, therefore, a new arbitrator should not have been appointed. Besides, this is a case in which the parties intended that Respondent 3, Chief Engineer, alone should be the arbitrator, having regard to the facts that he is possessed of technical expertise, the dispute itself being of technical nature in relation to building construction. Therefore, the appointment of advocate arbitrator will not be effectual. Respondent 3, Chief Engineer is directed to enter upon arbitration and shall complete the proceedings before March 31, 1994 after due notice to parties.

14. With the result, the impugned order is set aside and the appeal is allowed.