

OSMAN UMAR
v.
MALAL ALIBHAI NATHU AND ORS. .

FEBRUARY 7, 1996

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

Doctrine of Res judicata :

Suit dismissed for non-prosecution—Subsequent suit based upon a fresh cause of action—Decision in the earlier suit not affected by the subsequent suit proceedings and not to operate as Res judicata.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 419(N) of 1978.

From the Judgment and Order dated 12.2.76 of the Gujarat High Court in L.P.A. No 67 of 1974.

Yashank Adhyaru and Vimal Dave for the Appellant.

S.K. Dholakia and H.A. Raichura for the Respondents.

The Following Order of the Court was delivered :

This appeal by special leave arises from the judgment and order of the Division Bench of the Gujarat High Court made on February 12, 1976 in LPA No. 67/74. In Jamnagar alias Nawanagar in Saurashtra Region of the Gujarat State, there are four sets of muslims by name, Gujarati, Aab, Sidi and Patni. The appellant representing Patni Jamat made an application on 12.11.1951 to the Mamlatdar for grant of occupancy certificate in support of Survey Nos. 314 and 316 of the land for use of Kabristan etc. The Mamlatdar granted the certificate. Subsequently, on representation made by other Jamats, their names also came to be included and that had given rise to the endless litigation culminating in this case. The trial Court in Suit No. 151/66 decreed the suit granting declaration that all the Jamats are jointly entitled to use the property for Kabristan etc. Perpetual injunction was granted against the appellant for interfering with the common use. On appeal and second appeal, the trial Court decree stood reversed. In LPA, the Division Bench under the impugned judgment, restored the

A decree of the trial Court. Thus, this controversy.

It is contended that the civil Court has no jurisdiction over the matters on which the Mamlatdar had power to grant occupancy certificates and that, therefore, the Division Bench was not right in reversing the decree of the appellate Court and that of the learned single Judge and restoring the decree of the trial Judge. The High Court has noted thus :

"We, however, do not propose to go to the extent of declaring that the occupancy certificate granted to the defendant-Jamat in respect of the suit lands was void because the suit lands were not governed by the Saurashtra Barkhali Abolition Act, 1951. It is sufficient for the purpose of the present case to say that the three Jamats whom the plaintiffs represent were not parties to the occupancy certificate proceedings and that, therefore, the occupancy certificate does not bind them nor does it in any manner whatsoever injure, harm or adversely affect their rights to the suit lands."

In view of this finding the necessary conclusion is that the occupancy certificate issued on the application dated November 12, 1951 does not bind the respondent. It is not in dispute that in 1947 the application was moved jointly by all the Jamats and sanad was given by the erstwhile Maharaja for common use by all the four Jamats. In that view of the matter, the finding recorded by the High Court, as referred to earlier, is perfectly legal and does not call for interference.

The High Court further held that :

"Firstly, the plaint filed in the earlier suit, Ex. 43, was based upon the plaintiffs' joint title to the suit lands which they derived from the Sanad granted to the plaintiffs and the defendant by the Maharaja of Navanagar on 14th April, 1928. That is what has been stated in that plaint. The present suit is not based upon that Sanad. It is based upon the subsequent Sanad which the Maharaja of Navanagar granted to the plaintiffs and the defendant on 10th July, 1947. We are of the view that the Sanad Ex. 37, conferred upon the parties a fresh title to the suit lands on 10th July 1947 and that, therefore, what had happened earlier was completely obliterated.

The joint title to the suit lands following from the Sanad, Ex. 37,

commenced on a clean slate with effect from 10th July, 1947 when the Sanad Ex. 37, was granted, the earlier suit was instituted on 17th June, 1943, that is to say, prior to the grant of the present Sanad Ex. 37. The plaintiffs' cause of action for the present suit is based upon the Sanad Ex. 37 which represents fresh acquisition of joint title to the suit lands for them. What happened in the earlier suit, therefore, cannot affect in any manner whatsoever the joint title which was conferred upon the plaintiff."

In the light of the above finding, the contention that the earlier suit which was to be allowed but had been dismissed for non-prosecution operate as a *res judicata*, bears title force. Thus, we hold that the doctrine of *res judicata* does not apply to the facts of this case.

There is no illegality committed by the High Court warranting interference. The appeal is accordingly dismissed. No costs.

G.N.

Appeal dismissed.