GURR v. SO'OALO PO

HIGH COURT. 1925. 2, June. WOODWARD C.J.

Estoppel - claim for possession of land - prior judgment given thereon - effect of judgment of German Imperial District Court - German rules of procedure.

This was an action brought by the plaintiff claiming possession of a certain area of land known as "Avele", which land was the subject of a judgment of the German Imperial District Court on 11 March 1913. In that judgment, it was held that a certain agreement dated 28 December 1896 by which one Seumanutafa had transferred to one Mrs Gurr the said land, was null and void. The reasons for the judgment were (a) that the General Act of the Berlin Conference debarred Europeans from purchasing the land of Samoans and (b) that the land in question was such land and that Mrs Gurr belonged to the debarred class. It was the contention of the plaintiff, however, based on the rules of the German Civil Process Ordnung, that, firstly, while bound by the said judgment, he was not bound by or estopped from disputing any of the findings of fact contained in the "reasons for the decision" upon which the judgment was based and, secondly, that the judgment itself was of an interim or partial nature in that it did not decide the claim for possession of the land but dealt solely with the agreement which was only one of the grounds on which the claim for possession was based.

HELD: (1) That in accordance with German law, and German rules of procedure, the defendant Mrs Gurr in the earlier case (and her assigns) was, in favour of So'oalo Tolo and his assigns, estopped not only from claiming that the agreement of 28 December 1896 was valid, but also from denying that the status of Mrs Gurr and the character of the land were as decided in the judgment of 11 March 1913.

(2) The plaintiff Mr Gurr was the assignee of Mrs Gurr, and the defendant So'oalo Po was the assignee of So'oalo Tolo, so that the estoppel operated between the parties to the action.

(3) The judgment of 11 March 1913 being given under either paragraph 301 or paragraph 304 of the German Civil Process Ordnung became at one subject to appeal and in the absence of appeal had become conclusive with the result that the estoppel was final.

ACTION claiming possession of land.

Plaintiff in person, with Baxter.
Crown Solicitor and Klinkmuller, for defendant.

Cur. adv. vult.

WOODWARD C.J.: The question upon which, by agreement of the parties, my decision is now asked is indicated in the written ruling of 3rd February last. The present decision should be read with that. The question now for decision is, in brief, whether the plaintiff is estopped in his claim for possession of the land "Avele" by the judgment of the German Imperial

District Court of 11 March 1913 in case No. 39/11 and, if so, to what extent.

The judgment of 11 March 1913 is set out in three parts. First, what may be called the judgment proper; secondly the "facts of the case" which consist of a resume of the allegations made and the arguments advanced on both sides; and thirdly the "reasons for the decision". A translation of the judgment proper reads as follows:-

> "It is held that the agreement dated 28th December, 1896 by which the Chief Seumanutafa has transferred to the defendant (Mrs Gurr) a piece of land of an area approximately 42 acres situated near Vailima between the Vaisigano river and the road from Apia to Siumu, is null and void. The decision as to the transfer of this land and as to payment of the costs of the case is reserved for final judgment."

It is conceded by plaintiff that at the present stage of his present action he is bound by the finding in the judgment proper in the previous action: that the agreement of 28 December 1896 is null and void. Plaintiff, however, raises two contentions in regard to this judgment. The first is that, though bound by the judgment, he is not bound by or estopped from disputing any of the findings of fact contained in the "reasons for the decision" upon which the judgment is based. The reasons for the decision were shortly (a) that the General Act of the Berlin Conference, Article IV, section 1(b), debarred Europeans from purchasing the land of Samoans and (b) that the land in question was such land and that Mrs Gurr belonged to the debarred class. Plaintiff contends that he is free to dispute the character of the land and the status of Mrs Gurr. This is contested by the defence and is the first of two main points at issue between the parties. Plaintiff's second contention as regards the judgment is that it is of an interim or partial nature in that it does not decide the claim for possession of the land but deals solely with the agreement, which is only one of the grounds on which the claim for possession was based. He argues that therefore it belongs to the class of judgments described in paragraph 303 of the German Civil Process Ordnung which I shall call "interim judgments". The important characteristic of such judgments from the plaintiff's point of view is that they are given in anticipation of a final and more comprehensive judgment and that they are assailable along with that final judgment when it is given and not till then. If this contention is sound the plaintiff will, he claims, be in a position to assail the judgment of 11 March 1913 at a later stage when the claim to possession of the land has been decided by a final judgment. He claims that as no right of appeal against an interim judgment can come into existence till the final judgment is given, no delay on his part in the meantime can have resulted in his losing that right.

It is common ground that the judgment of 11 March 1913 did not purport to put an end finally to the proceedings commenced by So'oalo Tolo against the late Mrs Gurr for possession, and it appears from the evidence of Mr Klinkmuller that according to German procedure there would be a further hearing at which So'oalo Tolo would, if the case took the ordinary course, relying on the judgment of 11 March 1913 and on the finding of the Land and Titles Commission as to ownership, ask for a final judgment in his favour on the claim for possession. The second point at issue therefore, is whether the right of appeal against what I shall call the incomplete judgment of 11 March 1913 came into existence when that judgment was delivered to Mrs Gurr in March 1913, and in accordance with the German rules of procedure, lapsed one month afterwards or whether it has not yet come into existence at all but will do so on delivery of final judgment.

I deal first with the first main point at issue about the findings of fact contained in the decision. The following is a question put to Mr Klinkmuller who was called by the Court as an expert on the subject of

German law, and his answer.

QUESTION: "If the parties and privies are debarred from re-litigating the actual subject matter of the decision of the Imperial District Court, are they also barred from re-litigating the facts on which the judgment was based, for instance, the status of Mrs Gurr?

ANSWER: "The parties are also barred from re-litigating the facts of the first case (Gaupp-Stein pp. 737 and 740)."

The quotations referred to are from Gaupp-Stein's Commentary and read as follows:-

P. 737: "The effect of the validity - by which I gather is meant the conclusive character of the judgment - consists of the prohibition to ascertain the facts of the case anew in order to pass now the decision formerly refused - and again equally prohibited is the subsequent different legal deliberation of the identical facts of the case in order to pass a decision contrary to the effect of the previous one. The judge of the subsequent action has to accept the previous judgment even if he clearly notices that the decision is wrong for legal reasons."

P. 740: "The validity of the judgment has the effect that all further legal arguments of the parties are disallowed. It prohibits especially that the decided facts be put before the Judge again in order to obtain a different decision by virtue of supplemented material for the case."

It seems clear from these quotations that the "facts of the case" or "the decided facts" as they are called in these quotations cannot be "ascertained" again, and that the legal result cannot be argued again.

The particular facts which the plaintiff wishes to dispute are the status of the late Mrs Gurr and whether the land, was land coming within the purview of the Berlin Act so as to be in-alienable. In his "reasons for the decision" Dr Schubert first discusses whether the land is native or alien and disposes of Mrs Gurr's contention that because it had or may have been alienated it remained alien land to which the restrictions of Article IV, section 1(b) (of the General Act of Berlin) could not be applied. He then goes on to the status of Mrs Gurr and uses these words:-

"The defendant then had and has also now the status of a European and could not as such, according to Article IV, section 1(b) of the Act acquire any land outside the Municipality."

It seems to me to be impossible to seriously argue that the two facts of the character of the land and the status of Mrs Gurr, so clearly referred to as reasons for the decision are not "facts of the case" or "decided facts". I must hold that they are "decided facts" and that the German law "prohibits to ascertain them anew" or to argue their legal effect a second time. In other words I decide that Mrs Gurr if alive would be estopped, so long as this judgment stands, from denying that she was what the judgment finds her to be, viz., "a European", or that the land came within the purview of the Berlin Act, and that she was consequently incapable of acquiring it by the agreement of 28 December 1896.

Reason as well as law seem to require this decision. The judgment, it is admitted, cannot be challenged at the present stage yet it is so directly based on the two facts in question that to challenge either of them necessarily means challenging the judgment. To admit that the judgment must

stand and at the same time to challenge the facts is so unreasonable a proposition that it would require very clear legal authority to make it acceptable.

Plaintiff's contention on the point just decided is based upon quotations given his witness Mr Nauer from Struckmann and Hock's Commentary. According to one of these quotations when the German Civil Process law was in course of codification it was proposed to enact that "the extent of the legal force of a judgment is to be defined in the meaning of the reasons for the judgment", but this proposal found no support and did not become law. Another quotation relied on reads "The effect of the judgment is restricted to what the parties wished to have decided. The facts and reasons in law contained in the reasons for the judgment do not become valid."

Reading these quotations along with those cited above the conclusion to which I came is that what we should call "obiter dicta" - findings of fact or law which the parties do not require a decision upon - are not binding on the parties. But I think the parties must be taken to have required a decision on the status of Mrs Gurr and of the land because Mrs Gurr raised those very questions - see her allegations as set out thirdly and fifthly in the judgment. The decisions upon these facts are therefore not "obiter dicta".

I come now to the second main issue. The question whether, upon the delivery at a later date of final judgment, there will come into existence a right to appeal against what I have called the incomplete judgment of 11th March 1913, depends upon the paragraph of the German Civil Process Ordnung under which the incomplete judgment was given. The argument and evidence of the plaintiff is directed to showing that it was given under paragraph 303. This paragraph deals with "interim" judgments which are assailable by appeal only upon the delivery of the "end" judgment of which they form an "anticipatory component part". If this argument is sound there will be a right of appeal against the incomplete judgment when plaintiff's claim for possession of the land is finally dealt with in the next stage of the proceedings, the incomplete judgment being then assailable along with the "end" judgment.

The argument for the defence is directed to showing that the incomplete judgment was given under paragraph 301 or alternatively under paragraph 304 of the Civil Process Ordnung. These paragraphs deal with "partial" judgments and "fore running" judgments respectively both of which are assailable by appeal only within one month of their delivery, being in that respect themselves "end" judgments though they may not finally settle all matters in issue. If this argument is sound the right of appeal has long since lapsed.

The Civil Process Ordnung contains, under the title "Proceedings up to judgment", a description of a number of different kinds of lawsuit (paragraphs 253 to 299). If then proceeds to set out under the next title "Judgment" a number of different kinds of judgments by which the different kinds of lawsuits may be concluded (paragraphs 300 et. seq.). Among the paragraphs of this title are those referred to above, viz., 301, 303 and 304. They read as follows:-

301: "If out of several claims made in one statement of claim only one or if only part of a claim........ is mature for final decision, the Court has to pass such a decision by means of end-judgment (partial judgment)".

303: "If a singular means for attack or for defence or an interim dispute is mature for decision, the decision may be passed by interim judgment."

304: "If a claim is in dispute as to its cause and as to its amount, then the Court may decide as to the cause

first. The judgment must as to legal remedies be regarded as an end judgment."

The incomplete judgment of 11 March 1913, after declaring the agreement of 28 December 1896 to be void, states that the claim for transfer of the land is not yet mature for judgment because of the doubt as to the person of the Samoan owner, and explains that for that reason a "partial" judgment has been given. It ends by quoting paragraphs 256 and 301 of the Civil Process Ordnung. The quotation of paragraph 256 shows the kind of lawsuit and the quotation of paragraph 301, the kind of judgment which the Judge believed himself to be dealing with. Paragraph 256 describes lawsuits instituted "for the determination of the existence or non-existence of a legal relation and for the acknowledgment of a document or the ascertainment of its spuriousness". Paragraph 301 describes "partial" judgments which are yet "end" judgments in that they are independently assailable by appeal within and only within one month of their delivery.

The plaintiff's argument is that, admitting for the moment that the action was an action under paragraph 256, that very fact shows that the judgment could not be a judgment under paragraph 301 or paragraph 304 because an action under paragraph 256 can never, so he claims, result in a judgment under paragraph 301 or paragraph 304. He undertakes the task of proving, principally from Mr Klinkmuller's answers, that Dr Schubert in quoting paragraph 301 mistook the nature of his own judgment.

The German law assists the plaintiff insofar that it shows that the quotation of a paragraph of the Civil Process Ordnung at the end of a judgment is not conclusive that the judgment is a judgment under that paragraph. See quotations from Struckmann & Koch and from Sydow and Busch at page 17 of Mr Klinkmuller's answers.

To prove that Judge Schubert was wrong the plaintiff relies on a distinction made by the German law between judgments which have the quality of conclusiveness - the word used by Mr Klinkmuller in translating from the German is "validity" - and those which have not that quality. The quality of conclusiveness or "validity" means that the judgment is no longer assailable, either because the right to appeal against it has lapsed or because the unsuccessful party has appealed from Court to Court until he has exhausted his right of appeal. See quotation from Struckmann and Koch on page 1 of answers. Judgments under paragraph 301 or paragraph 304, being "end" judgments, have this quality of conclusiveness as soon as the month allowed for appeal has lapsed. Two results may flow from this quality of conclusiveness in a judgment - (a) It may give a right of execution, e.g., a warrant of distress may be issued on it and (b) It acts by way of estoppel on the parties and their assigns. See quotation from Reincke on page 1 of answers. It appears that a judgment in an action taken under paragraph 256 gives no right of execution. See quotation from Struckmann and Koch pp. 292/3 at p. 9 of answers. The argument of the plaintiff is that a judgment in an action under paragraph 256, not being executionable, cannot have the quality of conclusiveness (validity) and therefore cannot be a judgment under paragraph 301 or paragraph 304.

The answer to this argument clearly is that though the right to execution may follow from a conclusive (valid) judgment, there are conclusive judgments which give no right of execution. The quotations from Struckmann and Koch and Reincke at p. 10 of answers show that a judgment in an action under paragraph 256 may have the quality of conclusiveness, and the quotation from Gaupp Stein p. 561 on the same page of the answers shows that such a judgment cannot be executionable because it deals only with the ascertainment of rights apart from any consequential relief; because it is only what we should call a declaratory judgment.

I must therefore decide that the fact of the action being an action under paragraph 256 does not prevent the judgment being a judgment under paragraph 301 or paragraph 304. The first of plaintiff's objections to paragraph 301 as the paragraph under which the judgment was given therefore

fails and for the same reason his objection to paragraph 304 also fails.

Plaintiff then argues alternatively that the action was not an action under paragraph 256, but this does not advance his case as he does not indicate any other paragraph under which it could be classified. In any case I must decide against him on that point for the following reason. Paragraph 256 reads -

> 256: "Civil proceedings may be instituted for the purpose of determination of the existence or non-existence of a legal relation, or acknowledgment of a document or of ascertainment of its spuriousness:
>
> Provided that the plaintiff has a legal interest that the legal relation or the authenticity or spuriousness of the document be determined forthwith."

Plaintiff objects that the action could not have been brought under this paragraph because So'oalo Tolo had no legal interest that the authenticity or spuriousness of the agreement of 28 December 1896 should be determined. But So'oalo Tolo was basing a legal claim to land upon that determination and that surely gives him a legal interest in it.

Plaintiff's next objection to paragraph 301 and paragraph 304 as the paragraphs under which the incomplete judgment was given is that neither of those paragraphs is so applicable to the judgment as paragraph 303. I refer again to the wording of these three paragraphs. I might have found it difficult to decide on this objection but for the judgment of the Reichgericht quoted on p. 22 of the answers. The claim dealt with in that judgment was closely analogous to the claim in the Imperial District Court. A plaintiff who had purchased a property under an agreement, desiring to avoid the purchase on the ground of fraud and error, filed a claim praying for a judgment (a) cancelling the agreement and (b) requiring the defendant to take back the property and the mortgages on it and to repay a sum of money (presumably the deposit). The German Supreme Court gave judgment that the agreement was null and void and expressly described its judgment as an "interim" judgment under paragraph 303. The Reichgericht, the final Court of Appeal over-ruling the Supreme Court, decided that the judgment was not a judgment under paragraph 303 in spite of the expressed opinion of the Supreme Court. The reason given for this by the Reichgericht was that the judgment was "not an interim judgment as to a singular means of attack" in terms of paragraph 303. The Reichgericht held that the challenged judgment was from its inherent nature a judgment under paragraph 304. The point in that case as in this concerned the right of appeal. The decision of the Reichgericht read in full affords an explanation of the meaning of these paragraphs which their translation perhaps necessarily does not give, owing to the difficulty of translating German legal phraseology into English. It also shows that Dr Schubert's judgment was not a judgment under paragraph 303. Whether it was, as Dr Schubert thought, a judgment under paragraph 301 or whether it was under paragraph 304, as I should have been inclined to think but for his opinion, it is unnecessary for me to decide as the effect is the same. A judgment under either paragraph 301 or paragraph 304 is an "end" judgment and upon the expiry of one month after its delivery, if no appeal is lodged, it acquires the quality of conclusiveness and acts by way of estoppel between the parties to the case.

But, argues the plaintiff, the parties in the present case are not the same parties as in the case before the German Court in 1913, and it becomes necessary therefore to decide whether the present plaintiff, Mr Gurr and the present defendant So'oalo Po are affected in the same way by the judgment of 11 March 1913 as the late Mrs Gurr and So'oalo Tolo were. Paragraph 325 of the Civil Process Ordnung reads -

> "The valid judgment operates in favour and against the parties and against those persons who, after the case became pending have become assigns of the parties."

Reincke's Commentary on this paragraph p. 342 quoted on p. 1 of answers reads:-

> "Section 1 (of paragraph 325) provides according to the nature of validity, that on principle the valid judgment shall operate for and against the parties of the decided lawsuit, and for and against third persons who have become assigns of the parties after the matter became pending. It makes no difference whether the assignment is a general one or a special one."

Mr Gurr comes into Court as the executor and in that capacity the general assignee of Mrs Gurr's rights. It would be inequitable as well as contrary to the paragraph just quoted that he should rely on that character in making the claim to the land and at the same time escape from the incidents attaching to it.

So'oalo Po also cannot, I think, be regarded as a stranger in law to So'oalo Tolo. The judgment of 11 March 1913 recites that So'oalo Tolo has filed his action against Mrs Gurr "in his capacity of head of the So'oalo family". So'oalo is a family name. Any rights which So'oalo Po may have to this land have devolved upon him from So'oalo Tolo by the custom of Samoa in a manner analogous to an assignment by operation of law. Whether he has any such rights may have to be decided elsewhere but in the meantime I hold that So'oalo Po is entitled in the same way as So'oalo Tolo to rely on the judgment of 11 March 1913.

Plaintiff has raised a number of further contentions and points with which I shall now deal.

1. He questions whether this Court has the jurisdiction of the German Appeal Court. Whether it has or not does not appear to affect the decision I have given above because the essence of the decision is that no right of appeal now exists. The present case is not an appeal but a new action between privies of the parties in the first action.

2. Plaintiff claims that the confirmation to Dr Stockfloth by the former Supreme Court of Samoa on 22 May 1896 of lands in claim No. 250 of which "Avele" forms part, is a newly discovered fact such as would have entitled him to an "action for restitution", i.e., a re-opening of the proceedings before the German Court. The bearing of this confirmation, by the Supreme Court on the plaintiff's case, if any, is in the direction of showing that the land "Avele" had been already alienated and confirmed to a European and therefore did not come within the purview and prohibition of the Berlin Act when Seumanutafa purported to sell it to Mrs Gurr.

The paragraph of the Civil Process Ordnung dealing with re-opening of proceedings by "action of restitution" reads as follows:-

> 580: "The action for restitution takes place...if the party discovers or gets into position to use -
>
> (a) a judgment in the same matter which has previously become valid;
>
> (b) any other document which would have led to a more favourable decision."

Assuming in favour of the plaintiff that he may be said to have, since the judgment of 11 March 1913, "discovered or got into a position to use" the confirmation of 22 May 1896 which has been on file in the records for nearly 30 years, the question is whether it now gives him a right to re-open

the proceedings closed by that judgment. Clearly whether the confirmation is regarded as a "judgment in the same matter" or "another document which would have led to a more favourable decision" there must necessarily be a possibility of its influencing the decision before it can be used to re-open the proceedings. The judgment of the German Court shows that it could not possibly have influenced the decision. The judgment contains these words:-

> "It is not at all the point whether the alienated land has been native land all the time or whether it has been at a time in possession of an alien; for the Act does not know such distinction and the said distinction has obviously not the slightest bearing on the express purpose of the Act, viz., to keep for the Samoans their own land."

It is apparent from this that the production of the confirmation before the German Court would not have influenced its decision and therefore it cannot now be used as a ground for re-opening. Further than this, paragraph 586 of the Civil Process Ordnung provides that after the expiry of 5 years from the date on which a judgment becomes valid the action for restitution is inadmissible, so that it would in any case be inadmissible now.

3. Plaintiff sets up that the German Court was irregularly constituted. It appears from paragraph 579 of the Civil Process Ordnung (quoted in the statement of defence) that as this could have been pleaded on appeal it cannot now be made a ground for re-opening. Further paragraph 309 (quoted at page 6 of answers) together with Reincke's Commentary shows that there was no irregularity.

4. Plaintiff claims that there is some significance for him in the fact of the registration of the agreement of 28 December 1896, and in a charge said to have been made against Mrs Gurr by the German Government for survey of the land. It cannot be seriously argued that if a document is void, registration of it by one of the parties to it can have improved the position of that party. That would be to make registration an instrument of injustice instead of a contrivance for protection of rights. The opinion of the Registrar of Titles, that this agreement was registrable, if indeed he had any discretion to refuse registration, can have no weight against the subsequent judgment. Equally ineffective against the judgment is any opinion of the German Government as to Mrs Gurr's ownership which may be indicated by the charges made for survey.

5. Plaintiff complains of alleged irregularities of the German Court in the use of unsworn evidence. I must take the uncontradicted opinion of the expert in German law that this would under no circumstances be a cause for re-litigation.

Summarising the principal findings in the foregoing -

(a) The defendant in case 39/11 and her assigns is, in favour of So'oalo Tolo and his assigns, estopped not only from claiming that the agreement of 28 December 1896 was valid, but also from denying that the status of Mrs Gurr and the character of the land were as decided in the judgment.

(b) The plaintiff in the present case Mr Gurr is the assignee of the defendant in case 39/11 and the defendant in the present case So'oalo Po is, with the reservation I have already made on the point, the assignee of So'oalo Tolo, so that the estoppel

operates between the parties to the present action.

(c) The judgment being given under either paragraph 301 or paragraph 304 of the Civil Process Ordnung became at once subject to appeal and in the absence of appeal has now become conclusive with the result that the estoppel is final.