

(2023) 07 OHC CK 0019

In the Orissa High Court

Case No : Regular Second Appeal No.300 Of 2012

Biswanath Mukharjee

APPELLANT

Vs

Netaji Sangha And Others

RESPONDENT

Date of Decision : 05-07-2023

Acts Referred:

Code of Civil Procedure, 1908 — Section 11

Citation : (2023) 07 OHC CK 0019

Hon'ble Judges : Sashikanta Mishra, J

Bench : Single Bench

Advocate : Gouri Mohan Rath, Bibekananda Bhuyan, D.N. Mohapatra

Final Decision : Allowed

Judgement

Sashikanta Mishra, J

1. The present appeal is directed against the reversing judgment passed by the Second Addl. District Judge, Cuttack in RFA No.107/2010 on 13th August, 2012. The present appellant was the Defendant No.1 in C.S. No.485/2007 of the Court of learned Civil Judge (Sr. Division), 1st Court, Cuttack. The said suit filed by the present Respondents-Plaintiffs was for declaration that as per the resolution passed on 9th November, 2007 by the General Body of the Plaintiff Sangha, Defendant No.1 is no longer the Secretary of the said Sangha and has no authority to represent it in the body of Orissa Cricket Association (OCA)-Defendant No.2, as its representative with further declaration that the Sangha had not passed any resolution on 15th December, 2006 electing its office bearers and for appointment of receiver/observer for conducting the election of the office bearers of the Sangha on or before 23rd January, 2008. Further declaration was prayed for that the Plaintiffs are the lawfully elected care-taker office bearers of the Sangha as per extraordinary General Body Meeting dated 9th November, 2007 and are therefore authorized to represent the Sangha for all purposes and for a direction to the Defendant No.2 to recognize the elected representatives of the Sangha in its body as members. As per judgment passed

on 6th October, 2010 followed by a decree, learned Civil Judge (Sr. Division), 1st Court Cuttack dismissed the suit on contest. The said judgment and decree as already stated was reversed by the First Appellate Court by decreeing the suit in part.

2. The present appeal has been admitted on the following substantial questions of law;

“(i) Whether the learned 1st Appellate Court has committed gross error of law in arriving at a conclusion that the order dt.8.11.2007 vide Ext.Q passed in C.S. No.67/2004 will stand as resjudicata under Section 11 C.P.C. and thus debarred the learned trial Court from exercising its jurisdiction to adjudicate the issue relating to the resolution dt.15.1.2004, specifically when the said order dt.8.11.2007 was not passed on merit nor the same is based on any assessment of any evidence on record on the issue of validity of the resolution dt.15.1.2004 in the earlier suit.

(ii) Whether the learned Court below committed gross error of law by holding that there is no valid resolution on 15.12.2006 re-electing the appellant as the Secretary of the Sangha, specifically when there is no challenge to the said resolution from any side in the earlier suit although it was very much filed by the appellant in the previous C.S. No.67/2004 and hence the instant claim is barred under Section 11 Exp.IV of C.P.C.”

For convenience, the parties are referred to as per their respective status in the trial Court.

3. Briefly stated, the facts of the case are that Netaji Sangha (Plaintiff No.1) is a Society registered under the Societies Registration Act, 1860 in the year 1971-72 having been established, inter alia, to develop sportsmanship among its members through participation in different sports events. The OCA granted affiliation to the Plaintiff Sangha with its Secretary being an ex-officio member of the association. Defendant No.1 was elected as the Secretary of the Plaintiff Sangha on 20th December, 2001. There being allegations of mismanagement of the affairs of the Sangha and mis-appropriation of its funds etc. an extraordinary General Body of the Sangha was held on 15th January, 2004, whereby he was removed from the post of Secretary as also from primary membership of the Sangha. One Siba Prasad Mukherjee was elected as President and one Tarun Kumar Mukherjee as Secretary of the Sangha. Challenging the Resolution dated 15th January, 2004 as illegal and unconstitutional, Defendant No.1 filed Civil Suit No.67/2004 in the Court of learned Civil Judge (Sr. Division), 1st Court, Cuttack seeking a declaration that he was still continuing as the Secretary of the Sangha and for permanent injunction against the so-called newly elected members. During pendency of the suit, an interim order was passed by the Trial Court whereby the Defendant No.1 (Plaintiff in the suit) was permitted to continue as the Secretary. On 8th November, 2007, the suit was dismissed for disappearance of cause of action. On 9th November, 2007 an Extraordinary General Body

Meeting was convened, whereby one Ashis Kumar Majumdar was chosen as the working President and Tarun Kumar Mukherjee as the working Secretary of the Sangha. Though such resolution was communicated to OCA, it did not recognize the same. On the other hand, Defendant No.1 claimed to have been elected as the Secretary pursuant to Resolution dated 15th December, 2006. As such, the Plaintiffs filed the suit claiming the reliefs as aforementioned.

The Defendant No.1 (present appellant) contested the suit mainly on the ground that he was elected for a period of 5 years as per resolution dated 20th December, 2001 and he continued as the Secretary till 20th December, 2006 whereupon he was re-elected for another term of 5 years. It was further claimed that there was no extraordinary General Body Meeting of the Sangha on 15th January, 2004. He denied the allegation of mis-management, misappropriation and acting in connivance with the OCA. He further questioned the locus standi of Tarun Kumar Mukherjee and Ashis Kumar Majumdar to file the present suit.

4. Basing on the rival pleadings, the Trial Court framed as many as thirteen issues. Issue Nos.III, IV, VI, VII, VIII and IX were considered together at the outset. After examining the oral and documentary evidence on record, the trial Court held that Defendant No.1 had continued as Secretary of the Sangha on the strength of interim order passed by the Court in the earlier suit (C.S. No.67/2004) and therefore, his tenure was for a period of five years. As such the subsequent election of the Plaintiffs for a period of one year after dismissal of the suit is illegal. The Trial Court therefore, held that the Plaintiffs are not the office bearers of the Sangha, rather Defendant No.1 is elected Secretary as per Resolution dated 15th December, 2006. Consequently the Resolution dated 9th November, 2007 was held to be prima facie illegal. The Trial Court, thereafter took up the remaining issues and held that the Plaintiffs have no locus standi to institute the suit. The suit was thus dismissed.

5. Being aggrieved, the Plaintiffs carried the matter in appeal. The First Appellate Court took into consideration whether the judgment passed in the previous suit i.e. C.S. No.67/2004 would act as bar for the Trial Court to exercise its jurisdiction to adjudicate the same issue relating to the Resolution dated 15th January, 2004. After taking into account the settled position of law as laid down in several decisions of the Apex Court, the First Appellate Court held that the question relating to Resolution dated 15th January, 2004 was directly and substantially in issue, both in the former suit (C.S. No.67/2004) and the present suit. The First Appellate Court further observed that the interim order passed during pendency of the earlier suit as lodged with the final order of dismissal of the suit on the ground of disappearance of cause of action. It was further held that such dismissal was not on any technical ground, but must be treated as a judgment passed on contest. Moreover, the said judgment was never challenged by Defendant No.1 and therefore, the plea taken by him in the present suit denying the validity or legality of the Resolution dated 15th January, 2004 is hit by the principle of estoppel by accord. The First Appellate Court thus found that

the Trial Court had overlooked the vital aspect of the suit being hit by resjudicata. The First Appellate Court further held that in view of the Resolution dated 15th January, 2004, the Defendant No.1 was no longer a Member of the Sangha and therefore, he could not have been elected as a office bearer by Resolution dated 15th December, 2006. The Resolution dated 9th November, 2007 passed immediately after dismissal of the earlier suit was also taken note of by the First Appellate Court whereby the plaintiffs were elected as working President and working Secretary of the Sangha which was not wrong. According to the First Appellate Court, the Trial Court was swayed away by the interim order passed during pendency of the former suit and therefore, wrongly dismissed the suit by holding the defendant no.1 to be entitled to continue as Secretary for five years.

On such findings, the First Appeal was allowed by setting aside the judgment and decree of the Trial Court. The suit was thus decreed in part by declaring that Defendant No.1 has no authority to represent the Plaintiff Sangha in OCA, that Resolution dated 15th December, 2006 was not passed by the Sangha and that the election of the Plaintiffs as working Secretary and President vide Resolution dated 9th November, 2007 was valid and legal.

6. Heard Mr. G.M.Rath, learned counsel for the Appellant (Defendant No.1), Mr. B.N.Bhuyan, learned counsel for the Respondent Nos.1 and 2 (Plaintiffs) and Mr. D.N. Mohapatra, learned counsel for the Respondent No.3-OCA (Defendant No.2).

7. Assailing the judgment of the First Appellate Court, Mr. Rath, would contend that the former suit was dismissed not on merits but on the technical ground of disappearance of cause of action and therefore, the said judgment cannot operate as res judicata in the subsequent suit. Even otherwise the Plaintiffs having relied upon the Resolution dated 15th January, 2004, the burden of proving the same was on them which they failed to do. The First Appellate Court therefore, committed gross error of law in harping upon the so called weakness of the Defendant's case rather than insisting upon the Plaintiffs to prove their case independently. Mr. Rath, further argued that the Resolution dated 15th January, 2004 was never enforced. It was also argued that the bye-laws of the Society do not provide for a care-taker Governing Body, which the First Appellate Court did not take into consideration at all.

8. Mr. B.N. Bhuyan, on the other hand, has supported the impugned judgment by submitting that dismissal of the former suit was not on any technical ground but on the finding that the cause of action had disappeared by efflux of time. The said suit was hotly contested. In any event, the judgment passed in the former suit had not been challenged and therefore, attained finality.

9. Mr. D.N.Mohapatra submits that OCA being the parent body cannot have any say as regards the management of the Plaintiff Society or on the dispute among its office bearers which is an internal matter of the Society. He further contends

that the OCA grants affiliation and membership basing on valid decisions taken by the Governing Body of the Plaintiff Sangha.

10. In view of the foregoing narration, the primary question that falls for consideration in the present appeal is, whether dismissal of the former suit (C.S. No.67/2004) on the ground of disappearance of cause action can operate as res judicata in a subsequent suit. Before proceeding further, it would be apposite to refer to Section 11 of C.P.C. which embodies the rule of res judicata and reads as under;

"11.Res-judicata-No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

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11. It has been long settled by several pronouncement of the Apex Court as well this Court that the following contingencies must be satisfied to constitute res judicata;

- (i) There must be two suits one former suit and the other subsequent suit;
- (ii) The Court which decided the former suit must be competent to try to subsequent suit;
- (iii) The matter directly and substantially in issue must be the same either actually or constructively in both the suits.
- (iv) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit.
- (v) The parties to the suits or parties under whom they or any of them claim must be the same in both the suits;
- (vi) The parties in both the suits must have litigated under the same title.

12. The above principles are so basic that it is not necessary to refer to any case law in this regard. Now, it is to be considered whether the former suit, dismissed for disappearance of cause of action would come within the mischief of Section 11 of C.P.C. and thereby act as a bar for a subsequent suit between the parties. As has already been seen, the requirement of law is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit.

13. A similar question came up for consideration before the Apex Court in the case of Sheodan Singh vs. Smt. Daryao Kunwar; reported in AIR 1966 SC 1332, wherein the Apex Court observed in Paragraph-14 as under;

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Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be *res judicata* in a subsequent suit.

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(Emphasis added)

14. The same principle was considered by the Apex Court recently in the case of Prem Kishore and others v. Brahm Prakash and others; reported in 2023 SCC OnLine SC 356, wherein under Paragraph- 34 of the judgment, the Apex Court has reiterated the same proposition. Thus what follows is, a suit not decided on merits but on technical grounds cannot operate as *res judicata*.

15. Coming to the facts of the case, it is seen that Defendant No.1 had filed C.S. No.67/2004, inter alia, seeking a declaration that the meeting held on 15th January, 2004 under the Presidentship of Siba Prasad Mukherjee (Defendant No.2 therein) and the Resolution made therein removing the Plaintiff from the Secretariship and electing Tarun Kumar Mukheree (Defendant No.1 therein) as the Secretary of Netaji Sangha is illegal and unconstitutional. No doubt, the suit was contested and an interim order was passed by the Court allowing the Plaintiff (present Defendant No.1) to continue as the Secretary. However, a petition was filed by the defendants in the said suit being CMA No.39 of 2007 for dismissal of the suit as the same had become infructuous. The Trial Court found that as per its bye-law the Secretary of the Sangha is to be elected each year before 23rd January and that in the year 2001 all the Members of the Sangha passed a Resolution deciding that the Secretary shall continue for five years. Thus, the tenure of the Plaintiff as Secretary was still 23rd January, 2006. Under such circumstances, the cause of action for filing the suit no longer remained to be adjudicated upon in view of the fact that after expiry of the previous tenure on 23rd January, 2006, the Plaintiff had been re-elected as Secretary vide Resolution passed on 15th December, 2006. The suit was thus dismissed as having become infructuous. It goes without saying that the matter directly and substantially in issue in the said suit i.e. validity and constitutionality of the

Resolution dated 15th January, 2004 was never adjudicated. In view of what has been discussed herein before, the said issue was available for adjudication even after dismissal of the suit for disappearance of cause of action.

16. A reading of the judgment passed by the Trial Court in the present case reveals that it was held that the Resolution passed on 15th January, 2004 removing Defendant No.1 from the Secretaryship as well Membership of the Sangha is illegal on the ground that the procedure prescribed under the bye-laws had not been followed. The trial Court further took note of the Resolution dated 20th December, 2001 whereby Defendant No.1 was elected as Secretary for five years and treated it as genuine. Therefore, all the Resolutions passed electing the care-taker body and electing working Secretary and working President in between 15th January, 2004 to 8th November, 2007, i.e. the date of dismissal of the suit are illegal as the same were done in violation of the Court's order. The Resolution dated 20th December, 2001 electing the Defendant No.1 as Secretary for a period of five years was never challenged by any one. The Trial Court therefore held that the Plaintiffs are not office bearers of Netaji Sangha and rather Defendant No.1 was the elected Secretary as per Resolution dated 15th December, 2006. The Trial Court further took note of the fact that the suit was filed not by the original President and Secretary but by the working President and working Secretary. Since the bye-laws of the Sangha do not provide for any working President or working Secretary, the suit is not maintainable. Since Defendant No.1 had duly intimated the Court of his re-election for a further period of five years as per Resolution dated 15th December, 2006, the Plaintiffs have no cause of action to file the suit. The suit was thus dismissed. After going through the reasoning adopted by the Trial Court as mentioned above, this Court finds nothing wrong therein so as to be persuaded to interfere therewith.

17. Coming to the judgment of the First Appellate Court, it is observed that the said Court proceeded on an entirely erroneous perception of law as regards the principle of res judicata to hold that the judgment passed in the former suit was on merit despite the fact that the same was dismissed for disappearance of cause of action. The Appellate Court further misdirected itself in holding that the Defendant No.1 was hit by estoppel by accord. In view of the analysis of facts and law made hereinbefore, it is evident that the finding of the First Appellate Court is erroneous and cannot be sustained in law. In view of the findings of this Court as above, it becomes no longer necessary to examine the other findings as the same are based on incorrect application of law. The further finding that the Trial Court mostly relied on the temporary order of injunction granted in favour of Defendant No.1 in the former suit being oblivious of the bar contemplated under Section 11 of C.P.C. is also erroneous for the reason that the Trial Court has merely referred to the interim order of injunction to support its findings that the claim of the Defendant No.1 of being elected as Secretary for five years as per Resolution dated 20th December, 2001 was genuine.

18. Thus, from a conspectus of the discussion of law and facts made

hereinbefore, this Court has no hesitation in holding that the impugned judgment being erroneous, warrants interference. Resultantly, the appeal is allowed. The impugned judgment passed by First Appellate Court is hereby set aside. The judgment and decree passed by the Trial Court is hereby confirmed.

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