

(1995) 11 OHC CK 0002
In the Orissa High Court
Case No : First Appeal No. 145 of 1984

Ganta Swain and Others

APPELLANT

Vs

Kandhuni Gouduni and Others

RESPONDENT

Date of Decision : 03-11-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 2(2), 11

Citation : (1996) 1 OLR 89

Hon'ble Judges : P. Ray, J

Bench : Single Bench

Advocate : B.B. Ratho, P.K. Bhuyan, M.M. Mishra, R.P. Mohapatra, R.K. Bose and A.K. Satpathy, for the Appellant; Deenabandhu Panda and A.K. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

P. Ray, J.—The plaintiff-appellants filed Title Suit No. 90 of 1981 of the Court of the Subordinate Judge, Aska for a declaration that the judgment and decree passed in Title Suit No. 27 of 1971 relating to the suit lands are not binding on them.

2. It appears that Siria Gouduni (since deceased) filed Title Suit No. 27 of 1971 against the co-sharers including the present defendants for partition. The said suit was decreed preliminarily on June 26, 1975 and final decree was passed on January 6, 1981. According to the plaintiffs, during the pendency of the partition suit being Title Suit No. 27 of 1971 they purchased the suit lands from the said Siria Gouduni on January 22, 1975 by registered sale deeds. It has been alleged in the plaint that the plaintiffs had no knowledge of the said pending suit at the time of their purchase nor they were informed of anything about the said pending suit.

3. The defendants contested the suit denying the allegations made in the plaint. The defendants contended that the present suit is hit by the principles of lis

pendense and res judicata the same is not maintainable in view of Section 4 (4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972.

4. On the basis of the rival pleadings a preliminary issue about the maintainability of the suit was framed. The trial Court found that the suit cannot be said to be hit by Section 4 (4) of the aforesaid Consolidation of Holdings Act, because the Consolidation authority has no power or authority to declare a decree of the Civil Court as nullity or void. The Court below, however, held that the plaintiffs' claim is barred by the principle of res judicata and dismissed the suit. The plaintiff-appellants have filed the present appeal against the said judgment and decree.

5. On behalf of the appellants it has been argued that the plea of res judicata raises mixed question of fact and law accordingly, such question cannot be determined as a preliminary issue. In support of the said submission reliance has been placed on a decision reported in 72 (1991) CLT 172 (Dhruba Charan Hota v. Kanhu Charan Hota).

6. In the aforesaid decision reported in 72 (1991) CLT 172 (supra) the learned Judge relied upon two earlier decisions of this Court reported in Bairagi Ch. Das Vs. Kartik Chandra Das and Others, , Madhabananda Ray and Another Vs. Spencer and Company Ltd., in making an observation that an issue relating to res judicata is not an issue of law and cannot be decided as a preliminary issue. Upon a careful reading of the reported decision in Dhruba Charan's case it appears that the learned Judge's observation was confined to. the facts of the said case and he did not intend to lay down any general proposition. Moreover an analysis of the two decisions forming the basis of Dhruba Charars's case also Indicates that in none of the said two decisions any abstract principle of law has been laid down that a plea of res judicata can never be, a question of law or that it can never be decided as a preliminary issue.

7. In Batragi Ch. Das's case the trial Court rejected the prayer for determining the question of res judicata as a preliminary issue under Order 14, Rule 2 of the CPC. Against the said decision a revisionsl application was moved before this Court. It was held that a Court has the discretion to refuse to determine a question as a preliminary issue if it is satisfied that the issue is an Issue of fact or a mixed issue of fact and law and that the facts necessary for determination of the said issue are disputed and evidence are required to be led to establish those facts.

8. In Madhabananda Ray's case a Division Bench of this Court held that :

"The conscientious opinion was that in appellable cases piecemeal trial by taking up some of the issues preliminarily should be avoided as it may lead to protracted litigation and reported appeals in the same suit, the exception being where the issues of law going to the root of the case arises which are capable of being decided without evidence in that event the Court shall foe bound to try

these issues first. Discretion vested on the Court under the rules was to be exercised depending upon the facts of each case."

Regarding the ratio of the decision in Bairagi Ch. Das's case the Division Bench in Madhabananda Hay's case observed :

"The next decision is of Justice R. C. Patnaik reported in Bairagi Chandra Das v. Kartik Chandra Das and Ors. Discussing several other cases decided by this Court as well as by different High Courts. His Lordship has expressed the view that the Court in its discretion may try an issue of law only if that issue relates to the jurisdiction of the Court or bar to the suit created by any law for the time being in force. An issue of fact or mixed issue of fact and law cannot be decided as a preliminary issue. His Lordship further observed that where an issue of jurisdiction is a question of fact or is a mixed question of law and fact, it cannot be decided as a preliminary issue but it should be decided on merits along with the other issues. In that case, "whether the suit was barred by law of res judicata was the issue. His Lordship came to the conclusion that the issue relating to res judicata was not a pure issue of law and decision of that issue would not bring an end to the suit as there were other questions also to be decided. So far as the interpretation of the rule is concerned, in our opinion, the approach of the learned Judge in that case is in conformity with the clear provisions of the rule."

It will thus appear that the Division" Bench in Madhabananda Ray's case approved only that view expressed in Bairagi Chandra's case which concerned interpretation of Order 14, Rule 2. CPC.

9. In Bairagi Chandra Das's case the learned single Judge in the facts and circumstances of that case found that the issue relating to the res judicata in that case would not bring an end to the suit as there were other questions to be decided. It has not been laid down as a proposition of law that a question of res judicata is always a mixed question of fact and law or that it can never be decided as a preliminary issue. The learned Judge in Dhruba Charan Hota's case has not given any reason of his own, but made the said observation upon the view as if such a general proposition that the issue of res judicata cannot be determined as a preliminary, issue has been laid down in the cases of Bairagi Chandra Das and that of Madhabananda Ray. As pointed out hereinbefore such a general proposition of law has not been laid down in the aforementioned two cases.

10. Rule 2 of Order 14 of the CPC provides:

"Rule 2. Court to pronounce judgment on all issues--(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of

law only, it may try that issue first if that issue relates to :

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with that issue."

It is clear from the language of Order 14, Rule 2 (2) that if the Court is of the opinion that out of the issues both of law and fact the case or any part thereof may be disposed of on an issue of law only the Court may in its discretion try that issue first and deal with the suit in accordance with the decision on the said preliminary issue. Although it is generally desirable that the trial Court should dispose of all the issues, it does not necessarily follow that an issue which goes to the root of the trial cannot be considered as a preliminary issue. Such an interpretation will defeat the very object of Order 14, Rule 2 (2) of the CPC.

11. Section 11 of the CPC opens with the words-"No Court shall try any suit or issue." if the same is hit by the principle of res judicata. It is thus clear if it is found that a suit as a whole or any issue involved in it is hit by any of the principles laid down in Section 11 of the CPC, the Court need not try the same the all. The purpose behind Section 11 of the CPC is prevention of, successive trials of a suit or an issue which has already been determined between the parties or persons claiming under them. The very purpose of Section 11 will be defeated if it is insisted that a question of res judicata is to be always decided at the end of the trial along with all other issues of fact even if the Court is satisfied that the said question can be decided on the basis of the materials already on record. The bar of res judicata constitutes such a bar as contemplated in Order 14, Rule 2 (2) of the CPC Whether any issue on res judicata can be decided as a preliminary issue or not depends upon the facts and circumstances of the particular case and no abstract proposition of law universal application can be laid down.

12. The legal position appears to be that if the principles contained under Order 14, Rule 2 (2), CPC are satisfied and issue on res judicata is capable of being decided on the basis of the undisputable facts emerging from the pleadings, it is the duty of the Court to decide the said issue as a preliminary issue. If there is dispute about the basic facts and evidence is required to be taken, the issue cannot be decided as a preliminary issue.

13. As the decision in Dhruba Charan's case has been rendered relying upon the decisions of Bairagi Charan Das (supra) and Madhabananda Ray (supra) and the view expressed in this decision is in consonance with the said two decisions. I do not think it necessary to refer the question to any larger Bench.

14. Admittedly, the plaintiffs are transferees during the pendency of the Title No. 27 of 1971. It is well settled that transferees pendente lite are bound by the

decree or order ultimately passed in the litigation irrespective of the fact that whether they were parties to the same or had the knowledge thereof. Accordingly, the suit filed by the plaintiffs, who are admittedly the transferees pendente lite, for a declaration that the decree in T.S. No. 27 of 1971 is not binding on them is hit by the doctrine of lis pandanse.

15. The plaintiffs have claimed that they purchased the suit lands from Siria Gouduni on June 22, 1975 under registered sale deeds. It is also well settled that the effect of Section 52 of the Transfer of Property Act is not to wipe out the transfer altogether, but to subordinate the same to the rights based on the decree in the suit (vide. Nagubai Ammal and Others Vs. B. Shama Rao and Others, Thus, though the plaintiffs are not entitled to ask for any decree to avoid the binding effect of the partition decree passed in T.S. No. 27 of 1971, it is still open to them to accept the said decree and to institute any other suit on the basis of the transfer to claim other reliefs available under the law.

16. For the foregoing reasons, the appeal is dismissed. No order as to costs.