
(2019) 04 UK CK 0042

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 964 Of 2015

M/s Cooper Pharma & Ors

APPELLANT

Vs

Shamshad Ahmad

RESPONDENT

Date of Decision : 05-04-2019

Acts Referred:

Code Of Civil Procedure 1908 — Section 10, 11, Order 7 Rule 11, Order 9 Rule 13, Order 14 Rule 1, Order 14, Rule 2(2)

Citation : (2019) 04 UK CK 0042

Hon'ble Judges : Lok Pal Singh, J

Bench : Single Bench

Advocate : Dharmendra Barthwal, Vikas Bahuguna

Final Decision : Disposed Off

Judgement

Lok Pal Singh, J

1. By means of present writ petition, petitioners have sought a writ of certiorari quashing the impugned judgment and order dated 26.11.2014 (Annexure No.11) passed in Civil Revision No.1 of 2011 Shamshad Ahmad vs. M/s Cooper Pharma and others.

2. Facts leading to filing of present writ petition are that the petitioners filed a suit being O.S. No.49 of 2008 against the respondent for a relief of mandatory injunction. Respondent/defendant contested the suit and filed his written statement. In the written statement, the respondent/defendant denied the plaint averments and contended that a suit being O.S. No.487 of 2002 was filed by him for a decree of permanent injunction against The Pradeshiya Industrial and Investment Corporation, State of Uttarakhand and U.P. Industrial Corporation, wherein the defendants did not appear and the suit was decreed in his favour by judgment and decree dated 07.04.2003. It was also contended that the plaintiffs are claiming rights from Pradeshiya Industrial and Investment Corporation Ltd. on the basis of lease deed in their favour. It was further contended that the

Pradeshia Industrial and Investment Corporation Ltd. has filed an application for setting aside the ex-parte judgment and decree dated 07.04.2003, under Order 9 Rule 13 of C.P.C. which is registered as Misc. case no.67 of 2003, and which is still pending. In the written statement, it was also stated that the suit of the plaintiff is not maintainable and is barred by Section 10 and 11 of C.P.C. Further, as the decree has been passed against the predecessors of the plaintiffs, therefore, the plaintiffs' suit is barred by the principles of res judicata in view of provisions contained in Section 11 of C.P.C. On the pleadings of parties, trial court framed necessary issues in the matter. The trial court, vide order dated 26.11.2010 decided issue nos.3 and 4 as preliminary issues. Issue no.3 was framed to the effect "whether the suit of the plaintiff is barred by the provisions of Section 10 and 11 of C.P.C. Issue no.4 was framed to the effect "whether the suit is barred by provisions of Order 7 Rule 11 CPC". The trial court on issue no.3 recorded a finding that for stay of subsequent suit, it is necessary that two suits are pending simultaneously in courts with similar jurisdiction and both have same cause of action and have same parties. The trial court further held that the earlier suit had been decreed ex-parte and an application under Order 9 Rule 13 CPC is pending adjudication which would not tantamount to a pending suit and as such plaintiff's subsequent suit is not barred by Section 10 C.P.C. On issue no.4, the trial court recorded finding that the plaintiffs' suit is not barred by Section 11 C.P.C. since the defendant's suit was not decided on merit rather it was an ex-parte decree. The trial court further recorded a finding that the suit is not barred by Order 7 Rule 11 CPC.

3. Feeling aggrieved by order dated 26.11.2010, the defendant preferred civil revision being Civil Revision No.1 of 2011. The revisional court, vide judgment and order dated 26.11.2014, allowed the revision in part with the observation that the maintainability of the original suit no.49 of 2018 in view of the provisions of Section 10 and Section 11 of C.P.C. would depend upon the judgment of Misc. case no.67 of 2003 and stayed the proceedings of the suit till the disposal of misc. case no.67 of 2003. Feeling aggrieved, the plaintiffs/petitioners have approached this Court.

4. In order to decide the controversy as to whether the subsequent suit filed by the plaintiffs was liable to be stayed under Section 10 of CPC, Section 10 of CPC would be necessary, which is reproduced hereunder:

"10. Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court."

5. The object behind enacting Section 10 of CPC would be that in regard to same property and issues involved between the same party, conflicting findings may

not come by the courts. In the present case, the suit filed by the respondent herein has already been decided by ex-parte judgment and decree dated 7.4.2003 and only an application under Order 9 Rule 13 is pending adjudication. The question which arises for consideration by this Court is whether mere pendency of an application under Order 9 Rule 13 CPC would tantamount to pendency of suit in the court. In view of this Court, since Original suit no.487 of 2002 filed by the defendant has been decided by ex-parte judgment and decree dated 7.4.2003, therefore, an application filed by the plaintiffs for setting aside the ex-parte decree cannot be treated as pendency of suit. Thus, the learned revisional court has committed illegality in allowing the revision partly and in deciding issue no.3 in favour of defendant and staying the proceedings of original suit no.49 till the decision in misc. application no.67 of 2003 under Order 9 Rule 13 CPC.

6. Learned counsel for the petitioner would submit that the issue of res judicata is a mixed issue of law and fact and cannot be decided as preliminary issue. Learned counsel for the petitioner would place reliance on a decision of Hon'ble Apex Court rendered in the case of City Municipal Council Bhalki vs. Guruppa and another (2016) 2 SCC 200 and would refer to para-18, which is reproduced hereunder:

"18. The principle of res judicata is a need of any judicial system, that is, to give finality to the judicial decisions of the disputes between parties. It also aims to prevent multiplicity of proceedings between the same parties of the same subject-matter of the lis. An issue which are directly and substantially involved in a former suit between the same parties, and has been decided and has attained finality cannot be reagitated before the courts again by instituting suit or proceeding by the same parties on the same subject-matter of earlier lis."

7. As regards issue no.4, the trial court has recorded a finding that the ex-parte judgment and decree dated 7.4.2003 passed in favour of the defendant in O.S. No.487 of 2002 would not operate as res judicata against the petitioner and has decided this issue in favour of the plaintiffs. On this issue, the revisional court has not recorded any finding and has kept this issue alive till the decision in misc. case no.67 of 2003. Trial court has decided issue no.4 in favour of the plaintiffs.

8. Order 14 Rule 1 is in regard to the framing of issues. There are two kinds of issue. First, issue of fact; and second, issue of law. Under sub-rule (2) of Order 14, Rule 2, C.P.C., there is third kind of issue, which is mixed issue of law and of fact. In the present case, plea of res judicata has been taken by the defendant whereupon issue was framed by the trial court and it has been decided in favour of the plaintiffs. An issue of law can be decided as a preliminary issue whereas the mixed issue of fact and law cannot be decided as a preliminary issue. It is well settled that an issue of res judicata is a mixed issue of law and fact and it has to be decided on proper pleadings and evidence of parties. Thus, this Court is of the view that the trial court has committed illegality in deciding the issue of

res judicata as the preliminary issue. However, suit need not to be dismissed at this stage under the provisions contained in Order 7 Rule 11 C.P.C and is apparently not barred by any law.

9. In view of the foregoing reasons, this Court is of the view that the revisional court has committed illegality in allowing the revision in part and in staying the proceedings of the original suit no.49 till the decision in misc. application no.67 of 2003 under Order 9 Rule 13 CPC. Impugned judgment and order dated 26.11.2014 passed by revisional court is hereby set aside. Not only the revisional court but the trial court has also committed illegality in deciding the issue of res judicata as the preliminary issue. As observed aforesaid, issue of res judicata is a mixed issue of fact and law, which requires leading of evidence by the parties. Hence, findings recorded by the trial court to this effect are hereby set aside.

10. Writ petition is disposed of as above. No order as to costs.

11. Since the misc. application no.67 of 2003 and the original suit no.49 of 2008 are pending before the same court, court below is directed to decide both the cases expeditiously, in accordance with law.