

(2013) 04 CAL CK 0095
In the Calcutta High Court
Case No : C.O. No. 3249 of 2011

Pannalal Gupta

APPELLANT

Vs

Sri Kiran Sankar Jana and Others

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 151
Constitution of India, 1950 — Article 227
Transfer of Property Act, 1882 — Section 53A

Citation : (2013) 2 CALLT 564 : (2013) 3 CHN 457

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Haradhan Banerjee, Mr. Narul Haque, Mr. Sarathi Sarma and Mr. Manabendra Thakur, for the Appellant; Jiban Ratan Chatterjee, Sanjoy Mukherjee and Mr. Subir Banerjee for the Opposite Party Nos. 1, 2 and 3 and Party-in-Person Mr. Prasanta Jana for the Opposite Party No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Harish Tandon, J.—By raising a plea of res judicata, the petitioner assailed the judgment and order dated July 18, 2011 passed by Additional District Judge, 3rd Court, Alipore in Misc. Appeal No. 384 of 2007 in this revisional application. The facts which emerges from the respective stands of the parties are etymolized hereinbelow:

In the plaint of the Title Suit No. 7 of 2007 filed before the Civil Judge, Junior Division, 3rd Additional Court, Alipore, the plaintiffs/opposite parties assets that their predecessor-in-interest namely Naryan Chandra Jana since deceased was the original tenant under one Purnendu Sekhar Basu in respect of one brick walled tin shed room on the ground floor at Premises No. 26/1, Gobinda Bose Lane, P.S. Kalighat, Kolkata-700 025 at a monthly rental of Rs. 12/- according to English Calendar. The said deceased paid rent to the said landlord up to the month of November, 1984 and after his demise, the rent was paid by the plaintiffs/opposite parties to the said landlord up to the month of May, 1995, but

he did not grant any receipt.

2. Subsequently, it is brought to the notice of the plaintiffs/opposite parties that the defendant No. 1/petitioner acquired the right, title and interest of the suit premises from the said landlord by dint of purchase. The rent was sought to be tendered to him but he refused to accept the same. It has alleged that on May 16, 2006, the petitioner along with two unknown persons approached the plaintiffs/opposite parties and asked for vacating the suit premises and on refusal, they threatened to forcibly dispossess the plaintiffs/opposite parties therefrom. In the aforesaid backdrop, the plaintiffs/opposite parties prayed for declaration of the tenancy right and permanent injunction restraining the defendant/petitioner from demolishing and/or making any disturbances and/or interference with the peaceful possession and enjoyment in respect of the suit property. An application for injunction was also filed praying for an order of temporary injunction restraining the petitioner from demolishing and/or making any disturbances or interference with the peaceful enjoyment of the opposite parties in respect of the suit property and/or from making any attempts to oust them without due process of law.

3. Having moved the said application for interim order on May 19, 2006, the Trial Court refused to pass an ad interim order of injunction. Subsequently, an application under Order 39 Rule 7 of the CPC was taken out by the plaintiffs/opposite parties praying for an appointment of the Advocate Commissioner for holding the inspection of the property which was eventually allowed. The Commissioner filed the report which is on record. Alleging the further threat by the petitioner to vacate the premises on November 7, 2006, an application u/s 151 of the Code was filed making the identical prayer as that of the injunction application. In the written objection to the said application, the petitioner took the specific defence that neither the predecessor nor the plaintiffs/opposite parties were/are the tenant in respect of the suit premises. The said application was taken up before the injunction application and was dismissed with the following observations namely (i) the petition is not maintainable because of the pendency of the injunction application (ii) the ad interim order was refused in an application for injunction, no further order could be passed in the said application (iii) no document is filed in support of his claim as tenants in respect of the suit premises and neither prima facie, has been made out nor the balance of connivance and in connivance lies in favour of granting injunction.

4. Thereafter, an application for injunction was taken up and it appears from the order passed by the Trial Court that no written objection to the said application for injunction was filed by the petitioner.

5. The Trial Court held that the plaintiffs/opposite parties have not produced any document in support of their alleged tenancy although, the documents produced relates to their right to remain in possession which itself cannot be a ground to pass an order for temporary injunction.

6. The plaintiffs/opposite parties assailed the said order by filing the Misc. Appeal No. 384 of 2007 under the provisions of Order 43 Rule 1(r) of the CPC before the Additional District Judge, 3rd Court, Alipore. The said order is reversed with the categorical finding that the rent receipt, ration card and voter identity card depicting the address of the suit premises are prima facie proof of the tenancy and the possession of the plaintiffs/opposite parties. The Appellate Court farther held that the Commissioner's report reveals the factum of the possession of the plaintiffs/opposite parties in respect of the suit premises and reverses the order of the Trial Court, having held that the plaintiffs/opposite parties made out a prima facie case and balance of convenience and in convenience lies in his favour and if the temporary injunction is not passed, it would cause irreparable loss and injury.

7. It is pertinent to record in this aspect that for the first time, a plea was taken by the petitioner relating to the principle of res judicata because of the dismissal of an application u/s 151 of the Code filed by the plaintiffs/opposite parties in the said suit. The Appellate Court rejected the aforesaid contention as the plea of res judicata was not taken before the Trial Court.

8. Mr. Banerjee, the learned Advocate appearing for the petitioner attacked the said order in contending that the res judicata not only applies between the two proceedings but also in the different stages of the same proceedings. He submits that the Trial Court at the time of disposal of an application u/s 151 of the Code made a categorical finding that the petitioner has not made out a prima facie case relating to his right of tenancy in respect of the suit premises, such finding has not been upset because of non-challenge of the said order and, therefore, shall operate as res judicata against the plaintiffs/opposite parties in an application for temporary injunction. To buttress the said submission, he placed reliance upon a judgment of the Supreme Court in case, of Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , Ajay Mohan and Others Vs. H.N. Rai and Others, Lastly, he submits that the plea of res judicata being the pure question of law can be raised even before the Court of last resort and placed reliance upon a judgment in case of Gurucharan Singh Vs. Kamla Singh and Others,

9. Mr. Jiban Ratan Chatterjee, the learned Senior Advocate appearing for the opposite party Nos. 1, 2 & 3 strenuously submits that the plea of res judicata having not taken before the Trial Court cannot be allowed to be taken either before the first Appellate Court or before the Revisional Court for the first time. He further submits that the petitioner did not file any written objection to an application for injunction and, therefore, in absence of any specific case of res judicata, the petitioner is prevented from raising the said plea before the higher forum. By contending that the application u/s 151 of the Code was filed in aid of the injunction application, more particularly, for an ad interim order on the subsequent event, the order rejecting the said application cannot operate as res judicata, in as much as, the consideration for granting the ad interim or interim

order is different than the temporary injunction. The Revisional Court exercising the superintendence power under Article 227 of the Constitution of India can set aside the order not impugned in the revisional application if otherwise, found to be illegal and placed reliance upon a judgment of this Court in case of Maloy Kumar Bera Vs. Rabindra Nath Bera, Lastly, he submits that the Appellate Court has rightly refused to entertain the plea of res judicata raised for the first time.

10. Mr. Prasanta Kumar Jana, the opposite No. 4, appeared in person and submits that the supervisory jurisdiction under Article 227 of the Constitution is exercised to keep the subordinate Courts within the precincts of their jurisdiction and is not available to correct the mere error of facts or law unless, the error is manifest and apparent on the face of the proceeding, having based on clear ignorance or utter disregard of the provision of law or a grave injustice has occasioned thereby. He further submits that the principle of res judicata cannot apply in absence of any specific issue being framed, more particularly, when the scope of both the suits were different and placed reliance upon a judgment of the Apex Court in case of Williams Vs. Lourdasamy and Another,

11. It is deciphered from the respective submissions that the gamut of dispute hinges on the plea of res judicata. The prayer made in an application u/s 151 and an application under Order 39 Rule 1 & 2 of the Code are more or less similar and identical. The application u/s 151 of the Code was taken out, alleging that subsequent to the refusal of an ad interim order of injunction, further attempt was made to oust the plaintiffs/opposite parties from the suit premises whereas injunction application was based upon the allegation of a previous threat of dispossession.

12. As indicated above, the application u/s 151 of the Code was rejected not only on the ground that it is not maintainable because of the pendency of the injunction application but no document in support of the tenancy was produced. From the length and breadth of the said application, it could not be gathered that the said application was made in aid of an injunction application, but one can safely proceed on the admitted fact that the said application was taken out when the injunction application was pending.

13. The nomenclature to the application is not determining factor but the Court must look into the substance in order to find out the nature of the application in relation to the facts pleaded therein and the relief claimed. There is no impediment in taking out of further injunction application, even if, an earlier application for injunction is disposed of either allowing or rejecting if necessitated by a changed and subsequent circumstances. The changed circumstances or subsequent event must be of such magnitude that requires to be adjudicated de hors the findings made in an earlier application and not on the same set of facts.

14. Both the applications are based upon the claim of tenancy right though, the threat of dispossession alleged therein are different. While disposing of the

application u/s 151 of the Code, the Court expressly observed that the plaintiffs/petitioners has failed to make out a prima facie case of their tenancy right. The subsequent application on the basis of the tenancy right though the alleged of dispossession is different, is hit by the principle of res judicata, as the tenancy right is one of the factors in deciding subsequent application. The plea of tenancy right is negated though prima facie in an earlier application, the Court should not take a different view in relation thereto in a subsequent application. Right of tenancy and Right to possess are two different connotations and should not be mingled as has been held by the Apex Court in case of Williams (supra) in these words:

13. It is one thing to say that a person is in possession of the land in suit and it is another thing to say that he has a right to possess pursuant to or in furtherance of an agreement for sale which would not only bind the vendor but also bind the subsequent predecessor. Had such an issue been framed, the appellant or the respondent No. 2 could have contended that section 53A of the Transfer of Property Act had no application. For application of section 53A of the Act, an agreement has to be entered into in writing. The said section provides for application of an equitable doctrine of part performance. Requisite ingredients therefor must be pleaded and proved.

15. There cannot be second thought to the proposition that the principle of res judicata does not apply between the two different proceedings only but applies in the different stages of the same proceeding. Reliance could be made on a judgment of the Apex Court in case of Satyadhyan Ghosal & Ors. (supra) in this respect where the Supreme Court held:

7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or a question of law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the Trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a Court

has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a Higher Court cannot at a later stage of the same litigation consider the matter again?

16. The judgments on the aforesaid point are umpteen and does not require relook. In case of Ajay Mohan & Ors. (supra), the Apex Court reiterated the same principles.

17. The further point which springs out is whether the plea of res judicata is a pure question of law or not. Mr. Banerjee's contention that the question of law can be agitated even before the Court of last resort as held in case of Gurucharan Singh (supra) does not require revisit. The question of law, which strikes at the root of the case if no further facts or the evidence or the documents are required to be put in, can be agitated even before the Supreme Court for the first time. To attract the applicability of the aforesaid settled proposition of law, it should be held that the plea of res judicata is a pure question of law and not the question of fact as well. The plea of res judicata emerges from a procedural law but in substance, is substantive law since the right of the litigant is denied by the Court by applying the aforesaid principle. There is a distinction between a res judicata and issue estoppel or the cause of action estoppel. The res judicata put fetters on the Court from exercising jurisdiction to determine the lis if it has attained finality between the parties and, therefore, is a different kind of estoppel i.e. estoppel by accord whereas the issue estoppel is invoked against the parties. [(See Bhanu Kumar Jain Vs. Archana Kumar and Another,

18. Lord Diplock, J; in Thoday v. Thoday reported in (1964)1 All ER 341 defines in these words:

The cause of action estoppel, is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a Court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment...if it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per res judicata.

19. The plea of res judicata should not only be specifically pleaded but by conduct of the parties seems to have been taken in a proceeding, if the party does not raise a plea of res judicata, it would be deemed that he has waived such plea and, therefore, shall be precluded from raising the same before the higher forum. The aforesaid principle could be fortified that the principle of res judicata is a mix question of fact and law and not a pure question of law as tried to be contended by Mr. Banerjee. The point of res judicata is a mix question of fact and law can be gathered from a judgment of the Apex Court in case of Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs., which is

further reiterated in case of Ram Harakh (Dead) by Lrs. Vs. Hamid Ahmed Khan (Dead) by Lrs. and Others,

20. The waiver is an intentional and/or conscious relinquishment of a known, right or advantage, benefit, claim or privileges which except for such waiver, the party would have enjoyed. The waiver acquiescence or res judicata springs from a procedural law and cannot have any application in a case where the order have been passed by the Court which has no authority in that behalf. The principle of waiver or res judicata does not give the Court jurisdiction under the Act which it had none. The question of waiver could not arise when the points had through out been under consideration and discussion. Therefore, if the party does not plea res judicata nor raises a question before the Trial Court, he waived his plea and cannot be allowed to raise before the higher forum.

21. In the present case, there is no written objection filed to an application for injunction. Therefore, the entire facts remain uncontroverted. Even before the Trial Court the plea of res judicata was not taken and the application for injunction was dismissed solely on the ground that the plaintiffs/opposite parties has failed to make a prima facie case. The rent receipt which was annexed to an application for injunction is a prima facie proof of tenancy right which is protected under the Rent Restrictions Act which provides that the tenancy shall not terminate and/or determine unless, a decree is passed by a competent Court in a validly constituted proceeding under the said Act or by surrender of the tenancy in favour of the inducting landlord. Neither a plea of surrender nor a plea that a decree for eviction is passed against the tenant by a Competent Court, is taken by the petitioner. It is, therefore, held that the Court of appeal below rightly rejected the petitioner to raise the plea of res judicata as the same was not taken before the Trial Court from being taken for the first time.

22. The revisional application is devoid of any merit.

23. The same hereby dismissed. However, there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.