

(2016) 11 BOM CK 0043

In the Bombay High Court

Case No : Notice of Motion No.634 of 2013 in Suit No.574 of 2004

Rasiklal Manikchand Dhariwal

APPELLANT

Vs

Kishore Wadhwani

RESPONDENT

Date of Decision : 18-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Citation : (2017) 2 AIRBomR 462 : (2017) 69 PTC 175

Hon'ble Judges : S.C. Gupte, J.

Bench : Single Bench

Advocate : Mr. Hemant Engineer i/b Gordhandas & Fozdar Advocates, for the Defendant No. 1; Dr. Veerendra Tulzapurkar, Senior Counsel a/w Mr. P.K. Saxena, Mr. Vinod Bhagat, Mr. Anil Naidu and Mr. Dhiren Karania i/b G.S. Hegde & V.A. Bhagat Advocates, for the Defendan

Final Decision : Dismissed

Judgement

S.C. Gupte, J. - This Notice of Motion is taken out by the Defendants for dismissal of the present suit under Section 11 of the Code of Civil Procedure ("Code"), as barred by res judicata, or alternatively, for rejection of the plaint under Order 7, Rule 11 of the Code.

2. The Plaintiffs claim to be registered proprietors and users for a long time of the trade mark "MANIKCHAND" and have filed the present suit alleging infringement of their trade mark and passing off of goods by the Defendants by the use of the mark "MALIKCHAND", which is deceptively similar to the trade mark "MANIKCHAND". It is the Plaintiffs' case that they are engaged in manufacture and marketing of diverse range of goods such as tea, packaged drinking water, chewing tobacco, pan masala, gutkha and mouth freshners, etc. and have adopted and used the trade mark "MANIKCHAND" for marketing their goods including chewing tobacco since the year 1961, the name "MANIKCHAND" being the middle name of Plaintiff No.1. (As of the date of the suit, as originally filed, the Plaintiffs' application for registration was pending before the Trade

Mark Registry. During the pendency of the suit, the trade mark is registered in the name of the Plaintiffs.) The Plaintiffs submit that the trade mark "MANIKCHAND" has, by reason of its long and extensive user by the Plaintiffs, has come to be exclusively associated with their goods. The Plaintiffs' case originally was that the Defendants have been unauthorisedly using the mark "MALIKCHAND" for marketing similar goods and thereby passing off their goods as the goods of the Plaintiffs. After obtaining registration of their trade mark "MANIKCHAND", the Plaintiffs have amended the suit and included the relief against infringement of their registered trade mark.

3. On the other hand, it is the case of the Defendants that Defendant No.2 is the proprietor of the trade mark "MALIKCHAND" and has been marketing his goods, namely, gutkha, pan masala, supari mix, etc. under the brand name "MALIKCHAND". These goods, according to the Defendants, manufactured in Indore are supplied to all parts of India through various dealers. On or about 15 March 2004, Defendant No.2 filed a suit before the District Court at Mandaleswar, Madhya Pradesh against the Plaintiffs herein claiming passing off goods by the latter by using the mark "MANIKCHAND". An interim injunction was granted by the District Court restraining the Plaintiffs from passing off their goods under the trade mark "MANIKCHAND", which has since been confirmed by the Indore Bench of High Court of Madhya Pradesh and the Supreme Court by dismissing the Plaintiffs' SLP. (The suit filed by Defendant No.2 is referred to hereinafter as "Indore suit".)

4. On the application of Defendant No.2, this Court had originally stayed the hearing of the present suit under Section 10 of the Code on the ground of pendency of the Indore suit referred to above. By a judgment and decree dated 7 March 2007, the Indore suit was decreed in favour of Defendant No.2. The learned District Judge issued a permanent injunction restraining the Plaintiffs from using the trade mark "MANIKCHAND" in relation to Gutkha, pan masala, and supari mix preparations, holding Defendant No.2 to be the prior user of the mark "MALIKCHAND". First Appeal filed by the Plaintiffs herein before the Indore Bench of Madhya Pradesh High Court challenging that decree was dismissed. The Plaintiffs' SLP challenging that dismissal was also dismissed by the Supreme Court. A review petition from the judgment by the Supreme Court was also dismissed. It is the Defendants' case that the decree passed in the Indore suit has thus become final and operates as *res judicata*, barring the trial of the present suit. The Defendants, accordingly, apply for dismissal of the suit under Section 11 of the Code. Alternatively, the Defendants pray for rejection of the plaint under Order 7, Rule 11 on the ground that the present suit is barred under Section 11 of the Code.

5. As for the application for rejection of the plaint under Order 7, Rule 11, the law is that the Court must simply take the allegations and averments in the plaint into account and see if they make out a cause of action to be tried by the Court. If they do not, the plaint is liable to be rejected on the ground that it does

not make out any cause of action. The plaint, in the present case, avers (a) that the Plaintiffs are proprietors (now registered proprietors) of the mark "MANIKCHAND" (b) that the mark "MANIKCHAND" has acquired an extensive reputation and goodwill distinguishing the Plaintiffs' goods; and (c) that the Defendants have been unauthorisedly using the mark "MALIKCHAND" in respect of their goods, thereby passing off their goods (and now also infringing the Plaintiffs' registered trade mark "MANIKCHAND"). On these averments, taking them to be true, a clear cause of action in infringement and passing off is made out in the plaint. It cannot be said that the plaint is liable to be rejected under Order 7, Rule 11 of the Code.

6. As far as the prayer for dismissal of the suit under Section 11 of the Code is concerned, the same can only be on the footing that a preliminary issue concerning *res judicata* ought to be framed under Order 14, Rule 2 of the Code and decided against the Plaintiffs. A preliminary issue can be framed under Order 14, Rule 2 only if such issue is an issue of law and disposes of the case or any part thereof, without deciding other issues. Besides, the issue must relate to (a) jurisdiction of the Court, or (b) bar to the suit created by any law for the time being in force. And then, it is still a matter of discretion for the Court. The Court is not bound to take up any issue as a preliminary issue even if the legal requirements noted above are met. As the Allahabad High Court has held in a Full Bench decision in *Sunni Central Waqfs Board v. Gopal Singh Visharad*, AIR 1991 ALL 89 (FB), even if some issues fall within the ambit of clauses (a) and (b) of Rule 2 (2) of Order 14, the Court can, on a reasonable exercise of its discretion, refuse to determine those issues as preliminary issues.

7. The bar to the maintainability of a suit on the ground of *res judicata* is clearly a bar created by a statute, namely, Section 11 of the Code. There is no doubt also that the suit can be disposed of on this issue. The question that needs to be really decided, therefore, in the present case is whether the issue of the bar of *res judicata* is a pure issue of law. If the answer is in the affirmative, the Court will have to further consider whether it should, in exercise of its discretion, decide the issue as a preliminary issue.

8. To determine whether or not the plea of *res judicata* in the present case is a pure question of law, we may first note what are the components of that plea in the present case and whether any of those components requires determination of any factual aspect or calls for any factual inquiry requiring leading of evidence. The components of any plea of *res judicata* are the following :

- (a) identity between the matter/s directly and substantially in issue (or deemed to be in issue) in the subsequent suit and the former suit;
- (b) identity between the parties (or between parties under whom they or any of them claim) litigating under the same title;
- (c) competence of the Court trying the former suit to try the subsequent suit (or issue, in case of a court of limited jurisdiction); and

(d) final decision in the prior suit in respect of the matter/s in issue.

If there is any dispute between the parties on the existence of any of these components in their case and such dispute involves a fact finding exercise, the plea of res judicata to be considered by the Court cannot be termed as a pure question of law.

9. With the law on the point being thus put in place, let us consider the dispute/s between the parties herein concerning the components of the Defendants' plea of res judicata and whether such dispute/s involve a factual inquiry. There is hardly any dispute between the parties as to the competence of the Court which tried the Indore suit to try the present suit or as to the Indore Suit (a former suit) having been heard and finally decided by the Court. Though there is a ground urged by the Plaintiffs as to the identity of the parties in the two suits, the real controversy concerns the identity of the matter substantially and directly in issue in the two suits.

Both suits obviously concern the proprietorship and prior use of the Defendants herein of the trade mark "MALIKCHAND". That is the foundation of the Defendants' plea in the Indore suit for claiming a permanent injunction against the Plaintiffs herein from using a deceptively similar trade mark, namely, "MANIKCHAND". On the other hand, that is the very defence of the Defendants in the present suit. The Defendants' contention is that by reason of their proprietorship and prior use of the mark "MALIKCHAND", they cannot be enjoined from using it. The trial court trying the Indore suit framed various issues on this subject. Among them were the following :

1. Whether the Plaintiff (i.e. Defendant No.2 herein) has been running his business of Food, Pan Masala, Supari Mix by the name of Malikchand from the year 1959-60 ? and

7. Whether the Plaintiff has instituted the suit on false grounds? If yes, whether the Defendants (i.e. the Plaintiffs herein) are entitled to get special damages from the Plaintiff ?

The Defendants herein (i.e. the Plaintiffs in the Indore suit) led oral and documentary evidence in the Indore suit. The Plaintiffs herein (i.e. the Defendants in the Indore suit) did not avail of their right to cross-examine the Defendants' witnesses. The Plaintiffs also failed to lead any evidence in the Indore suit. The suit was thereafter heard ex parte and decreed on 7 March 2007. This decree, as we have noted above, has been confirmed by the Indore Bench of Madhya Pradesh High Court and an SLP therefrom has been dismissed by the Supreme Court. It is the case of the Plaintiffs herein in the present suit that the Defendants used forged and fabricated documents and played a fraud on the Court when they obtained the decree in the Indore Suit in this behalf. It is submitted that the Plaintiffs have specifically pleaded in the present suit that the assignment deed dated 1 May 1986, through which the trade mark "MALIKCHAND" along with the goodwill was claimed to have been assigned by

one Prabhudayal Choube to his son Ashok Sharma (the predecessor in interest of Defendant No.2), was a forged document; that the assignment deed dated 1 April 1992 through which the said Ashok Sharma purportedly assigned the trade mark "MALIKCHAND" to Defendant No.1, and the assignment deed of 1 April 1996, by which Defendant No.1 assigned the trade mark to Defendant No.2, were also forged and fabricated. The Plaintiffs have also moved a Chamber Summons seeking amendment of the plaint by incorporating various averments and documents in support of their case of forgery and fabrication of documents. It is submitted that these averments and the issues they raise substantially and directly were not before the Court which heard and finally decided the Indore suit. On the other hand, it is submitted by the Defendants that these matters were very much raised before the Madhya Pradesh High Court as part of the Plaintiffs' First Appeal and again before the Supreme Court in the SLP. The Madhya Pradesh High Court and the Supreme Court having turned them down and confirmed the decree in the appeal and special leave petition, respectively, (which were but a continuation of the suit), the matters in issue arising in connection therewith may be said to be heard and finally decided. In any event, it is submitted by the Defendants, these matters might and ought to have been made a ground of defence in the Indore suit by the Plaintiffs herein and are, accordingly, covered by the principle of constructive res judicata contained in Explanation IV to Section 11 of the Code.

10. At this moment, what we are considering is whether the issue of the bar of res judicata arising in this case is a pure question of law or a mixed issue of law and fact which calls for a factual inquiry. We are not examining the merits of the issue. If this court comes to the conclusion that on the pleadings of the parties, referred to above, the issue of res judicata can be decided as a matter of law, merely after hearing submissions of Counsel for both sides, this Court may proceed to frame and hear the issue and consider its merits as a preliminary issue. If not, this Court would defer the hearing of the issue to the hearing on other issues.

11. The Plaintiffs submit that on a complaint by the Plaintiffs, subsequent to the passing of the ex parte decree in the Indore suit, the Mumbai Police carried out a thorough investigation of the Plaintiffs' case of forgery and fabrication of the above referred to documents by the Defendants and a charge sheet has been filed against the Defendants. The Plaintiffs claim that various aspects of this forgery and fabrication have come to light after the ex parte decree was passed. It is submitted that these were not present before the Court when the ex parte decree was passed in the Indore Suit. It is submitted that all this evidence would be produced in the present suit and a finding would be invited from the Court on the question of forgery and fabrication and to that extent there is lack of identity between the matters directly and substantially in issue in the two suits. The Defendants' answer to these submissions is that what is relevant is whether the matter, namely, forgery or fabrication of the documents, was substantially and directly in issue in the Indore suit and not whether the particular evidence was

available on the matter before the Court when it decided the Indore suit. It is submitted that this specific matter was brought about in the First Appeal before the Madhya Pradesh High Court, which was a continuation of the Indore suit, and therefore, it did form part of the matter directly and substantially in issue in the Indore suit.

12. Dr. Tulzpurkar, learned Senior Counsel appearing for Defendant No.2, submits that a plea of *res judicata* cannot be defeated on the ground that the judgment in the previous suit was obtained by fraud. He relies on several judgments, particularly the cases of *L. Chinnayya v. K. Ramanna* Vol. XXXVIII Madras Series 203, (*Mada Pedda*) *Subbanna v. Kurnam Dhandra Bayamma* 1925 Madras 640, *Gokul Das Pitamber v. Odhavji Gigaghai* A.I.R. 1924 Bombay 100, *Muktamala Dasi v. Ram Chandra De* A.I.R. 927 Calcutta 84 and *Basdevanand Gir v. Shantanand alias Makhu Mahto* A.I.R. 1942 Allahabad 302, in this behalf. Though we are not considering here whether the previous judgment ought to be set aside, the principle of these cases is clearly relevant in the context of the rule of *res judicata*. If a fraud is capable of vitiating a judgment, there is no reason why it should not destroy the value of that judgment when a plea of *res judicata* is made on its strength and conversely, if it is incapable of vitiating the judgment, there is no reason why it should defeat the plea of *res judicata*. These judgments lay down that no previous judgment can be set aside by a new suit based on allegations generally that the decree-holder obtained it by practicing a fraud on the Court or by suppressing material evidence in the case; that a fraud to be a ground for vacating a judgment must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon and not one that has been or must be deemed to have been dealt with by the Court; and that a decree cannot be set aside merely because it was obtained by perjured evidence or suppression.

13. No doubt, the allegation of fraud for vacating a judgment must be extraneous to what has been adjudicated upon by the Court and not part of what has already been dealt with by the Court. For example, when evidence placed before a Court of competent jurisdiction by the successful party is accepted by that Court and a judgment is entered thereon, it is no longer open for the unsuccessful party to impeach that evidence in a subsequent suit by alleging that it was perjured evidence or an act of deceit or fabrication. After all the judgment of the Court decides the very questions, namely, whether or not the testimony of any witness is true or false and whether any document produced in evidence is genuine or not. These questions are not extraneous or collateral to the judgment, but very much a part of the judgment and intrinsic to it. It is another matter if the unsuccessful party were to allege (in a subsequent suit) that his opponent prevented him by an independent collateral wrongful act from bringing the truth before the Court, say by stealing his documents or deceiving or confining his witnesses. That would be something extraneous to the judgment obtained by the successful party and can certainly vitiate the judgment. These principles would equally apply to a case where the previous judgment was rendered *ex parte*. It was the duty of the opponent to have presented himself

before the Court and impeached the evidence at the trial. If, however, by a collateral act he was prevented from doing so, he could still assail the judgment and contend that it does not sustain the plea of *res judicata*. This is what the judgments cited by Dr. Tulzapurkar decide.

14. What is central to the above discussion is the principle of finality to be attached to a judgment rendered by a Court of competent jurisdiction as between the same parties or parties through whom they claim. As the Allahabad High Court in *Basevanand Gir's case* (Supra) held a "decree cannot be set aside merely because it is obtained by perjured evidence because, if the contrary were held, it would be necessary to hold new investigations again and again into the same question". If a set of facts is alleged by one party and denied by the other, it is for them to adduce their own evidence and impeach each other's evidence. Once the Court hears and assesses the evidence and rules on the set of facts, its decision is final. That is the principle. We must distinguish here between the set of facts and the evidence needed to prove or disprove them. No new evidence, which could have been produced before the Court when it rendered its decision, can be brought before the subsequent Court so as to avoid the plea of *res judicata*. But if a new fact or set of facts is found, which, independently or in conjunction with the original set of facts, affords a ground of relief or denies it, there is nothing in law to prevent the unsuccessful party from bringing a new suit in respect of the same relief. The principle of *res judicata* does not come in the way, for the matters in issue in the two suits, i.e. the prior and the subsequent suits, would in that case be clearly different.

15. This would be more pertinent in a case, such as ours, where a fraud has been alleged. A person may commit a fraud by a number of means. He may fabricate the stamp paper or ante-date it; he may himself or through someone else forge the signature/s of the executant/s; he may fabricate likewise supporting documents which help him assert the genuineness of the fabricated document/s. Each of these acts constitutes a fraud and an act of forgery or fabrication, as the case may be. These acts cannot be described as evidence of the fraud but the fraud itself. If new acts come to light which constitute such fraud, forgery or fabrication, it is not that new evidence of such fraud, etc. comes to light but a new material to base a plea of such fraud, etc. is found. Pleas of fraud based on these different acts are different pleas, even though they may relate to the same subject matter. For example, a person may have fabricated a document by ante- dating it, by forging the signatures on it and also by inserting some material therein subsequently. His opponent may have found about ante-dating and raised a plea of forgery against him in a prior suit. That plea may have been decided against the opponent in the prior suit. If, subsequently, the opponent finds the other facts, namely, the forgery of signature/s or the interpolation, and raises a new plea of fraud in a subsequent suit, the plea cannot be turned down on the principle of *res judicata* on the ground that fabrication of the document was a matter in issue in the prior suit. The plea of fabrication in the prior suit is different from the plea of fabrication in the

subsequent suit.

16. I have referred to the above aspect not because I am of the view that the plea of fraud and forgery in the prior suit, namely, the Indore suit, is different from the plea of fraud and forgery in this suit. For deciding that, one would have to take into account matters such as (a) what was the material available with the Plaintiffs herein and which formed part of their plea before the Madhya Pradesh High Court, (b) when did the present material (on which the plea of fraud is/is to be based in the suit herein) come to the knowledge of the Plaintiffs (so as to rule out the case of constructive res judicata), (c) how is the new material qualitatively different from the material available in the prior suit so as to warrant a new plea of fraud or forgery. These are all factual inquiries and would in all probability require evidence to be led. Only after such factual inquiries can the issue of res judicata be decided in the present case.

17. On these facts and as the law, which I have noted above, stands, I am of the considered view that the issue of res judicata in the present case is not a pure question of law, which can be framed and decided under Order 14, Rule 2 of the Code. In any event, considering the complex nature of the issue in the peculiar facts and circumstances of the present case, even if I were to treat this as an issue of law, I would rather exercise my discretion not to frame and decide it as a preliminary issue. I would instead make the parties undergo the whole trial rather than non-suit the Plaintiffs on such a highly debatable preliminary issue.

18. I am supported in this view by a couple of decided cases. A learned Single Judge of our Court (K.K. Desai, J.) in Nagnath Tatya Halge v. Kishan Tatya Halge AIR 1972 Bombay 228 (V 59 C 44) held that the question of res judicata that may be raised on behalf of any party in a suit should not ordinarily be disposed of as a preliminary issue; such question should normally be tried and disposed of at the final hearing of the suit, when all issues can be adjudicated upon by the Court at the same continuous hearing. In Vinayak D.S. Karmalkar v. Anand Bisi Gaonkar Second Appeal No.2 of 2004 decided on 13 March 2012, another learned Single Judge of our Court (F.M. Reis, J.) held that the issue of res judicata is a mixed question of law and fact and such issue cannot be decided summarily without framing issues and without recording the evidence and based on the judgment passed in the earlier suit. The Learned Judge based his view on the judgment of the Supreme Court in V. Rejeshwari v. T.C. Saravanabava (2004) 1 Supreme Court Cases 551. In that case, the Supreme Court had observed as follows :

"11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

12. The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the

foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal [see (Raja) Jagadish Chandra Deo Dhabal Deb V. Gour Hari Mahato, Medapati Surayya v. Tondapu Bala Gangadhara Ramakrishna Reddi and Katragadda China Anjaneyulu v. Kattaragadda China Ramayya]. The view taken by the Privy Council was cited with approval before this Court in State of Punjab V. Bua Das Kauushal. However, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the trial court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had throughout been in consideration and discussion and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged.

13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is field in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai V. Mohd. Hanifa the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh v. Bhorlal placing on a par the plea of res judicata and the plea of estoppel under Order 2, Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy, of State for India in Council pointed out that plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit."

19. In the premises, I am of the view that the Notice of Motion has no merit, and the same deserves to be dismissed. I may, however, make it clear that all observations made above are only with a view to see if there is any case for framing and considering a preliminary issue concerning the bar of res judicata and shall not in any way affect the actual determination of that issue in the trial.

20. Notice of Motion is dismissed. Costs to be costs in the cause.