
(2014) 03 CHH CK 0042
In the Chhattisgarh High Court
Case No : Second Appeal No. 715 of 1999

Shiv Kumar

APPELLANT

Vs

Raj Kumar

RESPONDENT

Date of Decision : 07-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 11, 96

Citation : (2014) 3 CGLJ 214 : (2014) 3 MPJR 12

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Ravish Verma, Advocate for the Appellant; Akhil Agrawal, Panel Lawyer, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Sanjay K. Agrawal, J.

1. This appeal has been admitted for final hearing on 7-4-2000 on the following substantial questions of law:

"(1) Whether the finding recorded by the revenue court in Revenue Case No. 4-A/6/81-82 would operate as res judicata in the civil suit?

(2) Whether the revenue court was competent to decide the issue regarding the fact that respondent No. 2 was not the widow of Amarnath and the respondent No. 1 his son?"

[For the sake of convenience, the parties will be referred in the instant judgment as were referred in the suit.]

The imperative facts required to be noticed for adjudication of this appeal are as under:

1.1 Original plaintiffs Rajkumar alias Raju and Dhulenihibai alias Ganeshiyabai, who are son and widow of Amarnath Dubey, respectively, filed a suit for

declaration and possession stating inter alia that Amarnath Dubey and original defendant Babulal Dubey were brothers and sons of Sevaram. Original defendant Babulal Dubey died during pendency of the suit and his legal representatives Shivkumar (son) and Udkunwar (widow) were brought on record. It was further pleaded that the suit land measuring area 3 acres 20 dismil, mentioned in Schedule B annexed to the plaint, was originally held by Sevaram, the father of Amarnath Dubey and Babulal Dubey, in his own title and upon his death, Amarnath Dubey and Babulal Dubey jointly inherited the suit property and they started cultivating the suit land separately after partition and due mutation of their names in the revenue records. It was further pleaded that Amarnath Dubey died in the year 1962-70 leaving behind him original plaintiffs Rajkumar alias Raju (son) and Dhulenihibai alias Ganeshiyabai (widow) and upon death of Amarnath Dubey, original plaintiffs Rajkumar alias Raju (son) and Dhulenihibai alias Ganeshiyabai (widow) have inherited the suit property. Taking benefit of absence of Rajkumar alias Raju and Dhulenihibai alias Ganeshiyabai, defendant No. 1 Shivkumar got his name mutated in the revenue records and the original plaintiffs were dispossessed from the suit property leading to filing of the suit for declaration and possession that they are entitled for entire land mentioned in schedule A annexed to the plaint and ? share of the land mentioned in schedule B annexed to the plaint.

1.2 Defendants No. 1 Shivkumar and No. 2 Udkunwar filed a joint written statement before the trial Court and stated that the plaintiffs are not the successors of deceased Amarnath Dubey as plaintiff No. 2 Dhulenihibai alias Ganeshiyabai was married with Santu Lohar and it was also pleaded that plaintiff No. 1 Rajkumar alias Raju is not the son of deceased Amarnath Dubey and mere was no partition between Amarnath Dubey and Babulal Dubey. The mutation done in favour of the plaintiffs was set aside by Naib-Tahsildar, Bilaspur on 23-10-1982.

2. The trial Court, after full fledged trial, by judgment and decree dated 2-8-1994 held that the property mentioned in schedule A belonged to late Amarnath Dubey and the plaintiff No. 1 is the son of Amarnath Dubey and plaintiff No. 2 is the widow of Amarnath Dubey, and the plaintiffs are entitled for 1/2 share in the property mentioned in schedule B. Defendants Shivkumar and Udkunwar challenged the judgment and decree passed by the trial Court in an appeal u/s 96 of the Code of Civil Procedure, 1908 (henceforth "the CPC").

3. The first appellate Court, by the impugned judgment and decree dated 6-2-1999, dismissed the appeal affirming the findings of the trial Court and holding that plaintiffs No. 1 and 2 are son and widow of Amarnath Dubey, respectively and they are entitled for the ? share in the property mentioned in schedule B.

4. This is an appeal by defendant No. 1 u/s 100 of the C.P.C. challenging the judgment and decree dated 6-2-1999 passed by 1st Additional District Judge, Bilaspur in Civil Appeal No. 22-A/96 arising out of the judgment and decree

dated 2-8-1994 passed by 8th Civil Judge Class-II, Bilaspur in Civil suit No. 84-A/94 whereby the trial Court has decreed the suit of the plaintiffs.

5. Shri Ravish Verma, learned counsel appearing for the appellant/defendant No. 1 would submit that on an application of original defendant Babulal Dubey, the Naib-Tahsildar, Bilaspur has passed an order on 23-10-1982 in Revenue Case No. 4A-6781-82 in which the Naib-Tahsildar has revoked the order of Revenue Inspector dated 7-12-1980 recording the names of plaintiffs along with Babulal Dubey and has directed that name of Babulal Dubey only be recorded and names of the plaintiffs be struck off. Learned counsel would further submit that the order dated 23-10-1982 was challenged in an appeal before the Sub-Divisional Officer and the jurisdictional Sub-Divisional Officer, by order dated 27-2-1984, dismissed the appeal and, therefore, the finding recorded by the Naib-Tahsildar in the order dated 23-10-1982 would operate as res judicata in the civil suit filed by the plaintiffs subsequently and the Naib-Tahsildar has rightly decided the relationship between the parties and, therefore, the impugned judgment and decree passed by the first appellate Court be set aside.

6. No one has entered into appearance on behalf of the plaintiffs/respondents No. 1 and 2, though served.

Answer to Substantial Questions of Law:

7. Since both the questions are inter-related, they are being considered and answered collectively.

8. The question that falls for consideration in order to answer the first substantial question of law is whether the revenue Court has recorded a finding with regard to relationship of the parties in the order dated 23-10-1982, and if it has been recorded whether it will have the effect of res judicata in the civil suit filed subsequently.

9. In order to answer the above referred to question, a survey of the written statement filed jointly by defendants Shivkumar and Udkunwar would extremely be necessary. Defendants Shivkumar and Udkunwar have simply pleaded in their written statement that the plaintiffs had succeeded in getting their names recorded in the revenue records which was set aside by the Naib-Tahsildar, Bilaspur by order dated 23-10-1982 and the appeal filed by the plaintiffs was also dismissed by the jurisdictional Sub-Divisional Officer on 27-2-1984 and the name of Babulal was exclusively recorded in the revenue records and after the death of Babulal, his son and widow, namely, defendant No. 1 Shivkumar and defendant No. 2 Udkunwar succeeded the suit property. A careful perusal of the written statement would show that no plea of res judicata was raised before the trial Court and, therefore, the trial Court did not frame any such issue for determination. Even before the first appellate Court, no plea of res judicata was raised.

10. The plea of res judicata only bars investigation and decision on merits finally

decided between parties earlier if the defendant omits to plead the plea of res judicata and prove the same and the Court investigates and decides matters on merits. Such a decision would not be bad for want of jurisdiction. Plea of res judicata is one which might and ought to have been raised as a defence and established in order to operate as a bar in exercise of jurisdiction to try and dispose of the matter subsequently otherwise the latter decision will prevail and plea of res judicata itself will be barred by constructive res judicata and latter decision overlooking the bar of res judicata alone will prevail.

11. In *Madhukar D. Shende Vs. Tarabai Aba Shedage*, , the Supreme Court held that res judicata is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed and plea has not been raised, such a plea cannot be permitted to be raised for the first time. The Supreme Court held as under:

"14..... Res judicata is a mixed question of fact and law. We do not find the plea of res judicata having been raised in the plaint. Copies of pleadings and issues framed in the earlier suit have not been tendered in evidence and we do not find any issue on res judicata having been framed and tried between the parties in the present suit. No submission raising the plea of res judicata was made before any of the courts below or the High Court. We do not think such a plea can be permitted to be raised before this Court for the first time and at the hearing....."

12. Though the order dated 23-10-1982 has been filed in the civil suit yet the defendants have neither tendered it in evidence nor it has been proved in accordance with law.

13. Section 11 of the C.P.C. runs thus:

"77. 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.

Explanation I.--The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.--For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.--Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter

directly and substantially in issue in such suit.

Explanation V.--Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.--Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.--The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.--An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

14. Reverting back to the facts of the instant case, I find that the order dated 23-10-1982 was passed by the revenue Court in a summary proceeding for mutation accepting the name of original defendant Babulal and rejecting the names of the plaintiffs and that the present suit for declaration of title and possession was filed in the civil Court and as such the revenue Court is not competent to try the present suit in which the issue relating to order dated 23-10-1982 has been raised, therefore, in terms of Section 11 of the CPC, the decision on the said issue in the revenue Court would not operate as a res-judicata for the necessary condition as revenue Court is not competent to try the present suit for declaration and injunction.

15. In Bhagwan Dayal Vs. Mst. Reoti Devi, , the Supreme Court clearly held that if the subsequent suit was not within the exclusive jurisdiction of the revenue Court and civil suit is maintainable in civil Court, the plea of res judicata would not be available. The Supreme Court held as under:

"13.....

"Therefore, it is clear that it is only in respect of such disputes or matters as are covered by the suits or applications specified in Section 189(1) that the Revenue Court can be said to have exclusive jurisdiction, that is, jurisdiction to the exclusion of a civil court.

If a particular matter is one which does not fall within the exclusive jurisdiction of the revenue court, then a decision of a Revenue Court on such a matter, which might be incidentally given by the revenue court, cannot be binding on the

parties in a civil court."

We agree with the said observations. On the same analogy, the present suit was not within the exclusive jurisdiction of the Revenue Court and, therefore, the suit in the civil court was maintainable. If so, Section 11 of the CPC is immediately attracted to the present suit. The relevant part of Section 11 of the Code reads:

"11. 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."

In this case the title to properties now put in issue was tried in the Revenue Court. But that court is not competent to try the present suit in which the same issue is raised. It follows that in terms of Section 11 of the Code, the decision on the said issue in the Revenue Court could not operate as *res judicata* for the necessary condition of competency of that court to try the present suit is lacking."

16. Thereafter, in *Richpal Singh and Others Vs. Dalip*, , the Supreme Court held that determining whether previous decision operates as *res judicata* or on principles analogous thereto is to find out whether the revenue Court has exclusive jurisdiction over the matter. The Supreme Court held as under:

"14. Applying the aforesaid principles, it appears to us that if the dispute was as to the nature of the relationship of landlord and tenant between the parties, the Revenue Court under the Punjab Tenancy Act had no jurisdiction; when there was admitted position, the relationship of landlord and tenant was accepted, the remedies and rights of the parties should be worked out under the scheme of the Act

15. A salutary and simple test to apply in determining whether the previous decision operates as *res judicata* or on principles analogous thereto is to find out whether the first court, here the Revenue Court could go into the question whether the respondent was a tenant in possession or mortgagee in possession. It is clear in view of language mentioned before that it could not. If that be so there was no *res judicata*. The subsequent civil suit was not barred by *res judicata*."

17. Apart from this, in the instant case, the proceeding of mutation before the revenue Court while passing the order dated 23-10-1982 was summary in nature. The revenue Court is neither a civil Court nor the application of original, defendant Babulal is a plaintiff. No issues were framed in the revenue Court and, therefore, the decision of the revenue Court will not operate as *res judicata*.

18. In *Inder Singh and Another Vs. Financial Commissioner, Punjab and Others*, , the Supreme Court observed as under:

"3..... It is well-settled law that the doctrine of res judicata envisaged in Section 11 of C.P.C. has no application to summary proceedings unless the statute expressly applies to such orders. The authorities are not the civil court nor the petition a plaint. No issues are framed nor tried as a civil suit. Under these circumstances, the Division Bench of the High Court was clearly in error to conclude that the earlier proceedings operated as res judicata."

19. Likewise, in *Ramji Gupta and Another Vs. Gopi Krishan Agrawal (D) and Others*, , the Supreme Court observed thus:

"In order to operate as res judicata, the finding must be such that it disposes of a matter that is directly and substantially in issue in the former suit, and that the said issue must have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly in issue in the case, cannot be made the basis for a plea of res judicata. A question regarding title in a Small cause suit may be regarded as incidental only to the substantial issue in the suit, and therefore, when a finding as regards title to immovable property is rendered by a Small Cause Court, res judicata cannot be pleaded as a bar in the subsequent regular suit for the determination or enforcement of any right or interest in the immovable property."

20. Thus, after examining the matter with utmost circumspection, I find that no specific plea was raised with regard to res judicata, no issue was framed, no plea was raised before the first appellate Court by the defendants and even otherwise the revenue Court had no jurisdiction to deal with the present suit. In view of Section 11 of the CPC, the proceeding drawn by the revenue Court in regard to the mutation being summary in nature would not operate as res judicata in the present civil suit.

21. Extremely recently, in *Erach Boman Khavar vs. Tukaram Shridhar Bhat and another s*, the Supreme Court observed in paragraph 34 of its decision that from the authorities it is clear as crystal that to attract the doctrine of res judicata, it must be manifest that there has been conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits.

22. In view of the legal position ascertained hereinabove and applying the ratio of law to the facts of the instant case, both the substantial questions of law are answered accordingly.

23. Consequently, the appeal deserves to be and is hereby dismissed. No order as to costs. A decree be drawn-up accordingly.