

(2012) 03 BOM CK 0198
In the Bombay High Court
Case No : Second Appeal No. 2 of 2004

Shri Vinayak D. S. Karmalkar

APPELLANT

Vs

Shri Anand Bisi Gaonkar, Mrs. Yesu alias Anandi Anant
Gaonkar and Others

RESPONDENT

Date of Decision : 03-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 11

Citation : (2012) 03 BOM CK 0198

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : J. E. Coelho Pereira, with Mr. D. Pangam, for the Appellant; M. B. Da Costa with Ms. K. Devgikar, for the Respondent

Judgement

F.M. Reis, J.—The above appeal was admitted by this Court on 12.02.2004 on the following substantial questions of law :

1. Whether the Courts below could have dismissed Regular Civil Suit No. 77/1987 on the ground of res-judicata in as much as Decree in Regular Civil Suit No. 23/1987, is not yet become final, as the same is pending in Appeal before the Additional District Court, South Goa, at Margao ?

2 Whether the Courts below failed to appreciate the distinction between Section 10 and Section 11 of C.P.C., in as much as the legislature has not laid down that a suit u/s 10, is liable to be dismissed and it has to be only stayed and had it been the intention of the legislature to dismiss the suit upon decision in the first suit, but legislature would have at the threshold barred the subsequent suit ?

During the course of the hearing of the above appeal, Shri J. E. Coelho Pereira, learned Senior Counsel appearing for the appellant has proposed an additional substantial question of law. After hearing the learned Senior Counsels, I find it appropriate to frame an additional substantial question of law namely :

Whether the Courts below erred in dismissing the suit on the ground of Res-

judicata without framing issue and without leading evidence in contravention of the judgment of the Supreme Court, reported in Smt. V. Rajeshwari Vs. T.C. Saravanabava, ?

2. Shri Coelho Pereira, learned Senior Counsel appearing for the appellant during the course of the hearing of the above appeal points out that the above appeal may be disposed of only on the additional substantial question of law framed today. The learned Senior Counsel does not press for the substantial questions of law framed by this Court by order dated 12.02.2004 as according to him, the same have become infructuous. Considering the said aspect, I have heard the learned Senior Counsels on the additional substantial question of law referred to herein above.

3. Shri Coelho Pereira, learned Senior Counsel appearing for the appellant has assailed the impugned judgment as according to him, the earlier suit filed by the plaintiff therein against the respondent herein was for a permanent injunction simpliciter to restrain the respondent from interfering in any manner in the suit property. The learned Senior Counsel further pointed out that the present suit filed by the appellant is also for a permanent injunction in respect of the portion of the property surveyed under no. 140/18 of Village Cotarli, where according to the appellant, he is occupying the said portion pursuant to the lease executed by the original owners who were the plaintiffs in the earlier suit bearing No. 23/1987. The learned Senior Counsel has further pointed out that during the pendency of the suit which was the subject matter of the present appeal, the earlier suit filed by the said owners came to be decreed but however the respondent herein preferred an appeal before the learned District Judge which was allowed by judgment and decree dated 25.08.2004. It is further pointed out that the said judgment came to be confirmed by this Court by judgment dated 19.01.2006. The learned Senior Counsel further pointed out that the identity of the suit property and the reliefs sought are not identical and that the parties are also different. According to the learned Senior Counsel, the question of holding that the suit filed by the appellant has become infructuous does not arise at all. The learned Senior Counsel further pointed out that the earlier suit was for an injunction simpliciter and the present suit though it is also for an injunction nevertheless, the claim of the appellant was on the basis of the documents executed by the owners pursuant to which the appellant is in settled possession of the disputed portion. The learned Senior Counsel further pointed out that the respondent herein has also filed a counter claim in the said suit to demolish the shed which counter claim came to be dismissed. The learned Senior Counsel as such submitted that the disposal of the counter claim has also become final. The learned Senior Counsel further submitted that the appellant had filed an application immediately after the suit came to be decreed in favour of the original owners that in view of the disposal of the earlier suit, the present suit is to be decreed. The learned Senior Counsel further submitted that whilst disposing the said application, the learned Judge has gone to the extent of dismissing the suit as being barred by res-judicata. The learned Senior Counsel

further submitted that it is well settled law that the principle of res-judicata is a mixed question of law and fact and the question of dismissing the suit without recording of evidence would not arise. In support of his submissions, the learned Senior Counsel has relied upon the judgment of the Apex Court reported in Smt. V. Rajeshwari Vs. T.C. Saravanabava, . The learned Senior Counsel as such submitted that in view of the said judgment of the Apex Court, the impugned judgment passed by the Court below deserves to be quashed and set aside.

4. On the other hand, Shri M. B. Da Costa, learned Senior Counsel appearing for the respondents has pointed out that the appellant himself has invited the impugned judgment and as such the question of now contending that the suit should have disposed of after recording of the evidence would not arise at all. There is a final adjudication with regard to the claim of the respondent, and it is not open to the appellant to now raise any contention contrary to such finding. The learned Senior Counsel further pointed out that as the appellant himself has invited the said order, this Court should not interfere in the impugned judgment and the appeal deserves to be rejected.

5. The learned Senior Counsel further pointed out that the findings arrived at in the earlier suit become final and as such the findings cannot be reopen in the present proceedings. The learned Senior Counsel further pointed out that in any event, considering the contention of the appellant, in trying to litigate in the above suit for the last nearly 10 years by raising such false and fictitious contentions, the question of interfering in the impugned judgment would not arise. The learned Senior Counsel further pointed out that the contention of the learned Senior Counsel appearing for the appellant to the effect that the present suit is not barred by principle of res-judicata is totally misplaced as according to him, the suit filed by the appellant is barred by principle of res-judicata within the provisions of Section 11 of the Civil Procedure Code. The learned Senior Counsel has taken me through the impugned judgment as well as the material on record and pointed out that as the earlier suit has been finally decided in favour of the respondent, the suit filed by the appellant is hit by Section 11 of the CPC and consequently the same deserves to be dismissed as barred by principle of res-judicata. The learned Senior Counsel as such submitted that there is no question of any interference by this Court in the impugned judgment passed by the Courts below.

6. Upon hearing the learned Senior Counsels and on perusal of the records, it is well settled that the issue of res-judicata is a mixed question of law and fact. Such issue as such cannot be decided summarily without framing of issues and without recording the evidence and based on the judgment passed in the earlier suit. It is not in dispute that the issue framed by the learned Trial Judge as to whether the suit filed by the appellant is hit by Section 11 of the Civil Procedure Code, cannot be decided without recording of evidence. Hence, on this ground alone the learned Judge has acted in material irregularity in exercise of its jurisdiction whilst passing the impugned judgment in dismissing the suit as hit by

principle of res-judicata.

7. The question as to whether the suit filed by the appellant is barred by principle of res-judicata or not is a matter which the learned Judge would have to decide after hearing the parties and recording of the evidence though there are rival contentions raised to that effect which I have not considered in the present appeal. The issue of res-judicata as framed by the learned Judge would have to be decided on its own merits after hearing the parties in accordance with law. The view is supported by the judgment of the Apex Court in the case V. Rajeshwari V/s T. C. Saravanabava (supra). The Apex Court in the said case has held at paras 11 and 12 thus :

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 Kaushal. 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.

8. Considering the said judgment of the Apex Court, I find that the learned Judge was not justified to decide the issue of res-judicata as preliminary issue without recording of the evidence.

9. Be that as it may, I find that the appellant is not at all justified to file an application at Exhibit 39 in the said suit which came to be dismissed by the learned Civil Judge Junior Division, Sanguem. In fact, the said application filed by the appellant was misconceived in law at that stage of the proceedings. It is not in dispute that at that stage, the evidence of the appellant was already in progress. Hence, in view of the fact that the appellant has forced the respondent to litigate for the last nearly 10 years by filing such fictitious applications, I find it appropriate that the respondent is to be compensated by the appellant on that

count. The costs are as such quantified to Rs. 20,000/-to be paid by the appellant to the respondent as condition precedent. In view of the above, I pass the following :

ORDER

(i) The appeal is partly allowed.

(ii) The impugned judgment passed by the learned District Judge, South Goa, Margao, dated 20.09.2003 and the order dated 14.02.2002 passed by the learned Trial Judge are quashed and set aside.

(iii) Regular Civil Suit No. 77/1987 is restored to the file of the learned Trial Judge. The learned Trial Judge shall proceed to dispose of the suit after hearing the parties and recording of evidence in the light of the observations made herein above in accordance with law subject to the appellant paying a sum of Rs. 20,000/-to the respondent as condition precedent.

(iv) The appeal stands disposed of accordingly with no order as to costs.

(v) The parties are directed to appear before the learned Civil Judge Junior Division, Sanguem, on 18.06.2012 at 10.00 a.m.