

(2016) 02 AHC CK 0005
In the Allahabad High Court
Case No : Civil Revision No. 427 of 2011

Smt. Shiv Patti Devi (Since Deceased) And Others	APPELLANT
Vs	
Yudhishtir Dhar Dubey and others	RESPONDENT

Date of Decision : 29-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 11, 115(3)

Citation : (2016) 4 ADJ 462 : (2016) 116 ALR 253 : (2016) 2 ARC 580 : (2016) 132 RD 59 : (2016) 1 RJ 686

Hon'ble Judges : Pramod Kumar Srivastava, J.

Bench : Single Bench

Advocate : Yogesh Agarwal, Advocate, for the Appellant; Manish Goyal, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Pramod Kumar Srivastava, J. - Heard learned counsel for the parties.

2. This revision has been filed against the order dated 08.12.2008 passed by Civil Judge (Senior Division), Gorakhpur, in Original Suit No. 538/2003 (Yudhishtir Dhar Dubey v. Smt. Shiv Patti Devi and others) by which application 126-Ga of defendants under Order-VII, Rule-11 CPC was rejected.

3. The fact relating to this revision are that defendant's side had filed a Writ Petition no. 17599/1999 for cancellation of registered free hold sale-deed dated 11.01.1999. This writ petition was allowed and the sale-deed in question was cancelled by judgment dated 08.05.2003 of this High Court. Thereafter original suit no. 538/2003 (Yudhishtir Dhar Dubey v. Smt. Shiv Patti Devi and others) was filed in the Court of Civil Judge (Senior Division), Gorakhpur for certain property and it was pleaded that the disputed property is different from that property which was subject matter of writ petition no. 17599/1999. The plaintiff had sought relief in this suit for declaring that judgment of the High Court in Writ Petition No. 17599/1999 relating to said free hold registered sale-deed was for

different property, other than one mention in the plaint, and defendants 1st set (Smt. Shiv Patti Devi and Paras Nath Gupta) be restrained from interfering in possession of plaintiff or damaging the construction of plaintiff present over this property in suit.

4. The defendants of original suit no. 538/2003 had moved application "126-Ga" dated 02.08.2008 under order-VII, Rule-11 CPC in which it was stated that relief sought in plaint relates to the matter that has already been decided finally by High Court in Writ Petition No. 17599/1999, and special leave petition against said order has already been dismissed by Hon"ble Apex Court; therefore, the present suit is abuse of process of Court. In other original suit no. 530/1994, judgment dated 08.10.1998 passed, by which it was ordered the plaintiff be not evicted from disputed land. After the death of Smt. Shiv Patti Devi, the Will executed by her in favour of her husband has become effective, so plaintiff is estopped from filing the suit against the defendants. Therefore for this reason, this suit should be dismissed.

5. The trial court had accepted the objection against the said application of plaintiff, afforded opportunity of hearing and thereafter passed order dated 08.12.2008 by which application 126-Ga under Order-VII, Rule-11 CPC was rejected. In this order, the trial court had given finding that Writ Petition No. 17599/1999 was filed for cancellation of registered free hold sale-deed dated 11.01.1994, which was cancelled by judgment of said writ petition. The application for recalling the said order was dismissed and the S.L.P. preferred against the said order was also dismissed on 04.08.2003; but this fact can be decided only after receiving the evidences of the parties as to whether the property in dispute in the present suit and in writ petition no. 17599/1999 are the same or different. Since it is a mixed question of fact and law, so it is not possible to decide this matter at this stage. So application 126-Ga cannot be allowed. Aggrieved by this impugned order dated 08.12.2008 of the trial court, the defendants of original suit had preferred present revision.

6. Learned counsel for the revisionist contended that disputed property involved in writ petition no. 17599/1999 and original suit no. 538/2003 are the same. He pleaded that since the rights of the parties have been finally determined in the judgment dated 08.05.2003 of this Court passed in writ petition no. 17599/1999, therefore the proceedings for the same property between the same parties in original suit no. 538/2003 is barred by principles of res-judicata under Section 11 CPC. He contended that being barred by Section 11 CPC, the original suit should be dismissed under Order-VII, Rule-11 CPC.

7. Learned counsel for the respondent contended that plaint can be rejected under Order-VII, Rule-11 CPC only when from the statements of the suit it appears that plaint is barred by any law. He contended that from perusal of the plaint's averment only, the suit does not appear to be barred by any law, therefore the proceedings of Order-VII, Rule-11 CPC are not applicable. He further contended that the cause of action of the original suit is plaintiff's

entitlement over disputed land, and that the defendant has no right or title over it. In statement of plaint no incorrectness or irregularity is there, and the property in dispute of aforesaid writ petition is different from that of original suit. So the question of res-judicata in the present case can be decided after receiving the evidences only. In the circumstances, there is no error or incorrectness in the impugned order. He also pointed out that plea of res-judicata was not specifically taken in the written statement by the revisionist. He contended that there is no jurisdictional error in passing of the impugned order, therefore the revision should be dismissed.

8. In the case of Lal Chand v. Radha Krishna AIR 1977 SC 789, the Hon"ble Apex Court has held as under:-

"The fact that section 11 of Code of Civil Procedure cannot apply on its terms, the earlier proceeding before the competent authority not being a suit, is no answer to the extension of the principle underlying that section to the instant case. Section 11, it is long since settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law. The issues involved in the two proceedings are identical those issues arise as between the same parties and thirdly, the issue not sought to be raised was decided finally by a competent quasi-judicial tribunal. The principle of res-judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded on equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue."

9. In another case of State of Punjab v. Bua Das Kaushal A.I.R. 1971 S.C. 1676, Hon"ble Apex Court has held as under:-

"The question whether the decision in a writ petition operates as res-judicata in a subsequent suit filed on the same cause of action has been settled by this Court in Union of India v. Nanak Singh (AIR 1968 SC 1370). It has been observed that there is no good reason to preclude decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of finality of decision after full contest."

10. Having gone through the decisions relied by revisionist's side as mentioned above, this legal position is explicitly clear that doctrine of res-judicata will be applicable in those cases when the matter between same parties relating to same cause of action has once being decided on merit in the decision of writ petition under Article 226 of Constitution of India, and the same matter is reargued in civil suit before the civil court. But the matter to be considered here is as to whether the principles of res-judicata is applicable in present matter or

not. The plaintiff had filed original suit no. 538/2003 with specific averment that he should not be evicted from the disputed property in compliance of the judgment passed in the writ petition no. 17599/1999, because the property involved in writ petition and in the present original suit are different. This point was considered by the trial court properly and then learned Civil Judge had given finding to the effect that this question as to whether the property in dispute in civil suit and writ petition are same or different, can be decided only after receiving the evidences. The trial court had held that it is a mixed question of fact and law that cannot be decided at preliminary stages without evidences. This finding is apparently correct and just. When the plaintiff-respondent has specifically pleaded that property in both the proceedings are different then it appears appropriate to afford him opportunity to prove his averments. If the property in both the proceedings are different then rejection of plaint without affording opportunity to plaintiff in that regard will amount to gross injustice.

11. So far the arguments of learned counsel for the revisionist regarding plaint being liable to be rejected under the Order-VII, Rule- 11 (d) CPC is concerned, this provision reads that "the plaint shall be rejected where the suit appears from the statement in plaint to be barred by any law. From perusal of the statement of the plaint, it does not appear to be barred by any law; but if the plaint case is proved incorrect then law will permit the dismissal of suit. This can happen only when plaintiff is afforded opportunity to prove his case and fails. Whether the disputed property of writ petition no. 17599/1999 and original suit no. 538/2003 are same or different, is question of fact that can only be decided on the basis of evidences, therefore this findings of trial court is not erroneous that it is a mixed question of fact and law, which cannot be decided at this preliminary stages.

12. Section 115 (3) CPC, as amended by "The Code of Civil Procedure (Uttar Pradesh Amendment) Act, 2003" (U.P. Act No. 14 of 2003), reads as under:

"(3) the superior court shall not, under this section, vary or reverse any order made except where-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

13. In present case, if the impugned order is allowed to stand, it would neither dispose off finally any suit or proceeding relating to any rights of revisionist, nor it would occasion irreparable loss or any failure of justice to him, because in trial defendants-revisionist will have right to disprove the plaintiff's case and get the matter decided on its merits. The trial court had right to pass impugned order. By impugned order no case or right of any party was decided. Therefore revision against such order is not maintainable.

14. Court below was perfectly within its jurisdiction to reject the application "126-

Ga". No factual, legal or jurisdictional error appears to have been committed in passing of the impugned order that may attract the interference of revisional power of this Court. Therefore revision fails and is, hereby, dismissed.