

(2013) 07 KAR CK 0346

In the Karnataka High Court

Case No : Regular First Appeal No. 1116 of 2013

T. Narayana

APPELLANT

Vs

Rangaswamy Since deceased by his legal representatives

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 3, Order 2 Rule 2, Order 7 Rule 11(d)

Citation : (2013) 4 AKR 368 : (2013) 4 KCCR 3112

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : R.L. Patil, for the Appellant; T. Seshagiri Rao, Advocate for Respondent Nos. 10 and 11 to 17, for the Respondent

Judgement

Anand Byrareddy, J.—Heard the learned counsel for the appellant and the learned counsel representing Respondent No. 10. The appeal coming on for admission, is considered for final disposal having regard to the facts and circumstances. Therefore, the appeal is admitted to file. Since a pure question of law arises, notice to other respondents is dispensed with. The appellant was the plaintiff. The suit was for permanent injunction. The suit having been contested by some of the defendants, including the present Respondent No. 10, who was Defendant No. 2 therein, the court had framed issues and thereafter has, by the impugned judgment and decree, rejected the plaint as not maintainable and that it was vexatious in nature and hit by Order II Rule 2 of the Code of Civil Procedure, 1908 (Hereinafter referred to as "the CPC", for brevity). It is that which is sought to be challenged in the present appeal.

2. At the outset, the learned counsel for the appellant would contend that the court below could not have rejected the plaint at a stage when issues were framed and recording of evidence had commenced. The learned Counsel would draw attention to the application filed by defendant no. 2 under Order VII Rule 11(d) CPC. It is pointed out that the claim in the application was that the plaintiff

had filed an earlier suit in O.S. 7028/1996 before the very court, for permanent injunction against five persons including one Rajamahala, whom the defendant no. 2 is said to have represented as a power of attorney holder. It was stated that the plaintiff was claiming as the absolute owner of the property having purchased the property in execution proceedings arising out of a suit in O.S. 7493/1995, on the file of the City Civil Court, Bangalore.

It was contended that the suit in O.S. 7028/1996 was contested and the same was dismissed by a judgment dated 26.9.2009. It was observed therein that the plaintiff was not in possession of the suit property.

It was further stated that the suit property in the above referred suit and the present one, were the same. Therefore, the Issue no. 1 in both suits also being one and the same - the finding would operate as res judicata and hence sought rejection of the plaint. It is contended that even if the court was inclined to dispose of the suit on the plea of res judicata raised in an application, it ought to have framed an issue in that regard and treated the same as a preliminary issue and the parties could have been heard and allowed to tender evidence in support of their respective contentions, if warranted before deciding the issue and even dismissing the suit. This was especially necessary since no material was placed before the court for the court to dispose of the suit on the mere claim that it was barred. The learned counsel would take this court through the relevant provisions to support this contention.

3. The learned counsel for the respondent seeks to contend otherwise and supports the view of the trial court.

4. On the face of it, the court below appears to have made short shrift of the suit. It is noticed that the court below has briefly narrated the pleadings of the parties in the impugned judgment. There was no plea, of the suit being barred by res judicata, raised by any of the defendants.

The trial court had framed the following issues:

ISSUES

1. Whether the plaintiff proves that he is in lawful possession of suit property?
2. Whether the plaintiff proves that defendants are unlawfully interfering with his possession and enjoyment of suit property?
3. Is the plaintiff entitled to the reliefs sought for in the suit?
4. What order or decree?

Additional Issues dated 04.01.2010

1. Does the plaintiff prove his ownership over the suit schedule property as alleged?
2. Does the plaintiff prove his forcible dispossession from the suit schedule

property by the defendants as alleged?

3. Whether the suit is properly valued and court fee paid sufficient?

It is evident that there was no issue framed as regards the bar of res judicata.

The plaintiff had then tendered evidence through PW-1 and the matter was set down for cross-examination of the said witness. It is at that stage that an application was filed by the present contesting respondent (Defendant no. 2) in IA no. 17, under Order VII Rule 11(d) CPC with a prayer for rejection of the plaint on the ground that the suit was barred on the principle of res judicata.

5. The trial court had framed the following points for consideration on the application and objections filed thereto:-

1. Whether defendants have made out a case and placed sufficient materials on record to show that this suit is not maintainable and whether I.A. 17 is fit to be allowed?

2. Whether defendants prove that the plaint of the plaintiff is liable to be rejected as prayed as per law?

The summary of the findings of the court below, are as under:-

i. That the plaintiff had admittedly filed an earlier suit in OS 7028/1996.

ii. The defendants in that suit were Vijayamma, Ramakrishna, R. Parasmal, Rajmahal & B.K. Sharada. The present respondent no. 10 had participated in that suit as a power of attorney holder of Rajamahar.

iii. The suit properties involved in the two suits were the same.

iv. The issues framed in the two suits were identical.

v. The "parties are also almost same or the parties are in one or other way claiming under them or agents of the earlier defendants" (This finding is reproduced verbatim, in the language of the court below)

vi. The suit in OS 7028 was dismissed on merits on 26.9.2009 with a finding that the plaintiff was not in possession of the suit property.

vii. Recording of evidence was not necessary to decide on the plea of res judicata in the present case in view of the principles laid down in the judgment of the apex court in the case of Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another,

viii. The plaintiff could not bring successive suits in respect of the same suit property.

ix. Reliance is placed on the decision of the apex court in the case of Saleem Bhai and Others Vs. State of Maharashtra and Others, to conclude that the trial court can exercise power under Order VII Rule II of CPC at any stage of the suit before

registering the plaint or after issuing summons to the defendant at any time before conclusion of the trial.

The trial court having arrived at the above findings and drawing inspiration from certain other rulings, as to the need to prevent vexatious litigation and to avoid multiplicity of proceedings, has proceeded to pass the following order/judgment:-

ORDER

In the result, therefore this I.A. 17 filed by the defendant Nos. 2 and 6 U/O. 7 Rule 11(d) r/w 151 of C.P.C. is hereby allowed.

Consequently, the plaint filed by plaintiff - T. Narayana U/O. 7 Rule 1 is hereby rejected; as it is not maintainable and 2nd suit vexatious in nature and hit by order-II Rule- 2 of CPC.

Accordingly, if any I.As. pending/filed are also disposed off in terms of the above order.

Under the facts and circumstances of this case, the parties to bear their own costs.

Draw decree accordingly.

6. We may first take stock of the relevant provisions of law that would come into play, in the trial court considering the application filed under Order VII Rule 11(d) CPC. The provision Order VII Rule 11 reads thus:

11. Rejection of plaint.- The plaint shall be rejected in the following cases:--

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provision of Rule 9:

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the

requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.

7. In proceeding to reject the plaint, the court below has acted on the application filed by defendant no. 2 and the allegations made therein and has placed reliance on the decision of the apex court in the case of Saleem Bhai and Others Vs. State of Maharashtra and Others, in passing the impugned judgment. In the said decision of the apex court, the defendant had filed an application before the trial court under Order VII Rule 11(a) and (d) CPC, the plaintiff, on the other hand, had filed an application Under Order VIII Rule 10 CPC calling upon the trial court to pronounce judgment as the defendant had not filed written statement. The trial court dismissed the application under Order Rule 10 and on the application under Order VII Rule 11, the trial court directed the defendant to file his written statement. That order was unsuccessfully challenged before the High Court and the defendant was before the apex court.

8. The apex court, while interpreting the scope of Order VII Rule 11 CPC, in the above circumstance has expounded thus:-

9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.

9. After observing as above, the apex court had remitted the matter to the trial court for consideration of the application filed by the defendant and to decide whether the plaint could be rejected on the averments contained therein.

10. In the case on hand, the trial court has drawn inspiration from the observation of the apex court that the trial court could exercise the power under the provision at any stage of the suit, but was oblivious to the circumstance that the trial court was not acting on the averments in the plaint, not even on the averments in the written statements filed by the several defendants, but on the basis of the application as aforesaid. The trial court has clearly acted contrary to the law as laid down by the apex court.

11. Incidentally, in Samar Singh Vs. Kedar Nath alias K.N. Singh and Others, the apex court has, while dealing with an election petition, held that the power to summarily reject a plaint, conferred by Order VII Rule 11 CPC, can be exercised

at the threshold of the proceedings and is also available, in the absence of any restriction statutorily placed, to be exercised at any stage of subsequent proceedings. However, the court has also emphasized the need of raising a preliminary objection as to the maintainability as early as possible though the power of the court to consider the same at a subsequent stage is not taken away.

12. The following observation of the apex court in the case of *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, are also instructive:

Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting afresh plaint in terms of Rule 13.

13. It is also to be noticed that the application was filed to claim that the suit was barred on the principle of *res judicata*. However, the court below has held that the suit was not maintainable and being a second suit was vexatious in nature and was hit by Order II Rule 2 CPC. The reasoning however, would indicate that the trial court had accepted the contention of the applicant that the suit was barred by *res judicata*.

14. There is no dispute that the plaintiff had filed an earlier suit in respect of the suit property in the year 1996 in OS 7028/1996, before the very court. However, it is not shown to be against the same parties. The only connection sought to be made out was that the second defendant in the present suit was the power of attorney holder for one of the defendants in the earlier suit. There is no discussion on how the present defendants and the defendants in the earlier suit were claiming under each other. The suit property however, was the same. Both the suits were for the relief of permanent injunction and apparently the issues were understandably identical.

15. There is no discussion on whether the plaintiff had or had not produced any other material to claim possession as against the present defendants, notwithstanding a finding against him in the earlier proceeding.

16. The declaration that the plaintiff was precluded from filing a second or a successive suit in respect of the suit property, was without reference to context and is hence not reasonable.

17. The trial court having relied on the decision in the case of *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, has concluded that:

.....to decide whether the principles of res judicata is applicable or not and case is maintainable or not, the recording of evidence is not necessary.

18. This conclusion is perplexing. The above decision of the apex court does not lay down any such law. The trial court's opinion is completely misleading on this aspect.

19. If it is to be understood that the trial court had accepted the contention of the applicant that the suit was barred u/s 11 of the CPC, the trial court was again not justified in summarily concluding that it was so. There is no indication, as already stated that any such circumstance could be gleaned from the averments in the plaint. The defendants had not raised any such plea in their written statements. The court had not framed an issue in that regard. There is no indication as to the material that was placed before the court along with the application filed by the defendant, seeking rejection of the plaint on the ground that the suit was barred.

20. In this regard the settled legal position as to the ingredients on the basis of which such a plea of res judicata could be addressed by the courts as stated in several cases may be taken note of;

21. In AIR 1936 258 (Privy Council) , it was held that the High Court was justified in refusing to permit appellant in that case from urging the plea of res judicata, on the ground that it had not been properly raised by the pleadings or in the issues, particularly in the issues. It was emphasized that it was necessary for the appellant, if he were to make use of the judgment in the earlier suit as res judicata, to identify the subjects in dispute in the present case with the subjects in the earlier case. This view has been reiterated in the case of AIR 1948 3 (Privy Council) and in State of Punjab Vs. Bua Das Kaushal,

22. A Full Bench of the Andhra Pradesh High Court in the case of Katragadda China Anjaneyulu and Another Vs. Katragadda China Ramayya and Others, has held that to invoke the doctrine of res judicata, the ingredients contemplated by Section 11 CPC should be satisfied. The court has to see whether the elements that constitute res judicata are present in a given case, which means an investigation in to the facts bearing upon the several aspects, contemplated by that Section. It is not a pure question of law which could be debated at any stage.

23. The apex court in the case of Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, has expressed thus:

..... Before we analyse these judgments, it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved:

- (1) that the litigating parties must be the same;
- (2) that the subject matter of the suit also must be identical;
- (3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction.

8. In the instant case according to the plaintiffs - respondents the identity of the subject-matter in the present suit is quite different from the one which was adjudicated upon in the suits which formed the basis of the previous litigation. In our opinion, the best 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 suits, and then to find out as to what had been decided by the judgments which operate as res judicata. Unfortunately however in this case the pleadings of the suits instituted by the parties have not at all been filed and we have to reply upon the facts as mentioned in the judgments themselves. It is well settled that pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment....

(emphasis supplied)

24. In Abdul Rahman Vs. Prasony Bai and Another, it is expressed that it is neither in doubt nor in dispute that the issues of res judicata or constructive res judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Such issues, in fact, when facts are admitted, ordinarily should be decided as preliminary issues.

25. In the light of the above infirmities and given the position of law, the judgment of the court below is liable to be set aside. The matter is remitted to the court below. It would be open for the court below to frame an issue on the plea of res judicata, even if it is raised in an application, in terms of Order XIV Rule 3 CPC and treat the same as a preliminary issue and deal with it in accordance with law. The suit, shall be recommenced from the stage of rejection of the plaint. No order as to costs.