
(2005) 04 AHC CK 0052
In the Allahabad High Court
Case No : C.M.W.P. No. 34370 of 2000

Union of India (UOI)

APPELLANT

Vs

Smt. Harnandi Devi (D.) through L.Rs. and Another

RESPONDENT

Date of Decision : 13-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 115, 11A

Citation : AIR 2005 All 266 : (2005) 3 AWC 2560

Hon'ble Judges : Sanjay Misra, J

Bench : Single Bench

Advocate : V.K. Goel, for the Appellant; Pankaj Mithal and S.K. Tyagi, S.C., for the Respondent

Judgement

Sanjay Misra, J.—Heard Sri V. K. Goel, learned counsel for the petitioner and Sri Pankaj Mittal, learned counsel appearing on behalf of respondents.

2. By means of this writ petition, the petitioner seeks to challenge the order dated 1.2.2000, passed by the Civil Judge (Senior Division) Hapur in Suit No. 52 of 1998 whereby the application No. 101 Ga 2 made for one month's time to produce stay order from High Court has been rejected and evidence of the plaintiff petitioner has been closed. The said order has been filed as Annexure-1 to the writ petition. Learned counsel for the petitioner submitted that earlier he had made an application before the trial court for deciding the preliminary issue. The said application was rejected on 8.3.1999 by the trial court. Feeling aggrieved the petitioner had filed Revision No. 123 of 1999 before this Court wherein an interim order dated 24.9.1999 was obtained by him and further proceedings before the trial court in Suit No. 52 of 1998, Union of India v. Harnandi, was stayed for a limited period. It is submitted that the aforesaid revision was dismissed in default on 24.11.1999. An application for recall of the said order was made by the petitioner on 1.12.1999. Learned counsel for the petitioner submits that because of the dismissal of the revision, the trial court proceeded with the suit and therefore, the petitioner filed an application No.

100C before the trial court seeking time to produce the order of the High Court whereby earlier order of dismissal in default would stand recalled. The trial court granted him time. However, on 1.2.2000 the application of the petitioner was rejected by the trial court. This order dated 1.2.2000, has been filed as Annexure-4 to the writ petition. A perusal of the same indicates that the trial court having rejected the application No. 100C of the petitioner directed him to produce his evidence on the very same day.

3. The petitioner's application No. 101 (Ga-2) for deciding the preliminary issue first was rejected by the order impugned on the same date on the reasoning that such an application had already been decided. In this order, the trial court has rejected the prayer of the petitioner on the ground that the petitioner is delaying the proceedings intentionally and that earlier order dated 15.9.1999 has already been passed whereby it has been directed that all the issues will be decided together. Against this order of the trial court the petitioner has filed a Revision No. 414 of 1999 before this Court which is pending and there is no interim order operating. Learned counsel for the petitioner submits that his main grievance against the order impugned dated 1.2.2000 (Annexure-1 to the writ petition) is that trial court has closed his evidence on the very same day, i.e., 1.2.2000. He submits that on 1.2.2000 two orders were passed and the same have been enclosed as Annexure-1 and Annexure-4 with the writ petition.

4. Against the aforesaid two orders dated 1.2.2000, the petitioner filed two revisions before this Court being Revision No. 107 of 2000 and Revision No. 108 of 2000. The said revisions were finally decided by this Court on 11.5.2000 wherein it has been held that since the interim order passed in Revision No. 123 of 1999 stood vacated as on the date when the orders dated 1.2.2000 were passed, therefore, there was no error committed by the trial court in passing the said order. This Court has further held that the revisions were not maintainable u/s 115, CPC against both the impugned orders dated 1.2.2000. Learned counsel for the petitioner submits that he has filed present writ petition against the order dated 1.2.2000 whereby his adjournment application was rejected and his evidence has been closed.

5. In so far as the question as to whether the trial court could pass the order on 1.2.2000 in view of the fact that the interim order passed in Revision No. 123 of 1999 stood vacated on that date is concerned. Learned counsel for the petitioner does not press the competency of the trial court to pass the order after vacation of the interim order. However, he submits that subsequent to the passing of the impugned order, his revision was restored on 7.4.2000 and interim order staying further proceedings of the suit was also revived. It is contended by the learned counsel for the petitioner that upon reviving of the interim order on 7.4.2000, further proceedings in the suit stood stayed. Learned counsel for the petitioner has pressed upon the issue of closing of the evidence of the petitioner without recording any finding as to failure on the part of the petitioner to produce his evidence on earlier dates. He submits that since the proceeding had already been

stayed by the High Court on 24.9.1999, therefore, there was no occasion for the petitioner to produce or fail to produce evidence prior to the passing of the impugned order.

6. Sri Pankaj Mittal learned counsel for the respondents submits that in view of the fact that the Revision Nos. 107 of 2000 and 108 of 2000, wherein both orders dated 1.2.2000, passed by the trial court had been challenged having been dismissed after recording the finding that the trial court was not in error in refusing to grant adjournment this writ petition is not maintainable against the order dated 1.2.2000. Two simultaneous remedies cannot be availed by the petitioner.

7. Learned counsel for the respondents submits that by maintaining this writ petition the petitioner is availing of two remedies before the same forum which is not permissible. He has relied upon the decision of the Supreme Court in the matter of Jai Singh Vs. Union of India and Others,

"In our opinion, the appellant cannot pursue two parallel remedies in respect of the same matter at the same time."

8. Learned counsel for the respondents submits that in view of the aforesaid decision, the appellant cannot pursue the parallel remedies in respect of the same matter at the same time.

9. He has also placed reliance on the decision of Supreme Court in the matter of Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, Paragraph 20 is quoted hereunder :

Para 20. "So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11, C.P.C. provides that 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. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that whether the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

10. Learned counsel for the respondent Sri Pankaj Mittal has also relied upon the

decision pronounced in the matter of Sharadchandra Ganesh Muley Vs. State of Maharashtra and others,

Wherein para 5 is quoted as under :

Para 5. "It has been seen that the bar u/s 11A was available to the appellant when the first writ petition was filed, since the Amendment Act 68 of 1984 had come into force on September 24, 1984, during pendency of the writ petition. He did not raise the point. Therefore, the doctrine of "might and ought" engrafted in Explanation IV to Section 11 of the C.P.C. would come into play and the, appellant is precluded to raise the controversy once over. Therefore, the doctrine of constructive res judicata puts an embargo on his right to raise the plea of bar of limitation u/s 11A."

11. In reply Sri V. K. Goel, learned counsel for the petitioner has placed reliance upon the decision of this Court in the matter of Bhure v. Peer Bux 1973 ALJ 312 and has submitted that decree of Court having no jurisdiction upon the subject matter would be inoperative and has submitted that in view of the fact that this Court having held that the revision u/s 115, C.P.C. being not maintainable against the impugned order, the petitioner can maintain this writ petition.

12. Having heard the learned counsel for the parties and considering their arguments, this Court finds that following facts of the case as they emerge are admitted between the parties.

(i) Revision No. 123 of 1999 filed by the petitioner against the earlier order dated 8.3.1999 of the trial court was dismissed for default on 24.11.1999. Interim order dated 24.9.1999, stood vacated as on that date.

(ii) Upon the dismissal of the revision and vacation of the interim order, the trial court proceeded with the suit.

(iii) On 1.2.2000, the application No. 100C of the petitioner for adjournment of the case to enable him to produce the

stay order of the High Court was dismissed and he was directed to produce his evidence on the same day.

(iv) By the order dated 1.2.2000, as contained in Annexure-1 to the writ petition the trial court has dismissed the application No. 101 (Ga 2) of the petitioner and directed that evidence of the petitioner stands closed.

(v) The Revision No. 123 of 1999 was restored to its original number and interim order was also restored by this Court vide order dated 7.4.2000, a copy of which is enclosed with the writ petition as Annexure-5.

(vi) On 11.5.2000, the Revision No. 107 of 2000 and Revision No. 108 of 2000 both against the aforesaid orders dated 1.2.2000 were dismissed by this Court by common order.

13. It is true that the petitioners has challenged the impugned order by filing

aforesaid two revisions before this Court. A perusal of the order dated 11.5.2000, passed by this Court in Revisions No. 107 of 2000 and 108 of 2000 indicates that this Court had considered facts on merits as to whether the trial court was justified in rejecting both applications of the petitioner and this Court has further gone to say that the Revision No. 107 of 2000 and 108 of 2000 were not maintainable against both the aforesaid orders dated 1.2.2000.

14. Learned counsel for the petitioner has submitted that this Court in exercise of its revisional jurisdiction has not considered the plea of the petitioner with respect to closing of evidence on the same date and not granting him sufficient time to produce his evidence. He submits that there is no reasoning in the impugned order to indicate that the petitioner was not producing his evidence inspite of repeated time being given and therefore, in the absence of such reasons, the impugned order ought to be set aside.

15. With respect to this argument of learned counsel for the petitioner, this Court is of the view that proceedings have already been stayed by an order of this Court dated 7.4.2000, passed in Revision No. 123 of 1999, the said proceeding can proceed only if the revision is decided or the interim order is vacated. The said Revision No. 123 of 1999 is seized of the issue as to whether the preliminary issue should be decided first or all issues should be decided by the trial court together. Whatever be the decision of the said revision whether it be that the preliminary issue should be decided first or all the issues be decided together, the petitioner will be entitled to proceed with the suit only thereafter. The premises upon which the impugned order dated 1.2.2000, was passed was that there was no stay of proceedings of the suit as on that date. At present the proceedings are stayed by virtue of interim order passed by this Court in Revision No. 123 of 1999, the petitioner would be entitled to lead his evidence in case the Revision No. 123 of 1999 is decided and the order of the trial court dated 8.3.1999 in challenge therein is set aside or in case the Revision fails then the suit would proceed from the stage it was in at the time of passing of the order dated 8.3.1999 by the trial court. Upon a decision of this Court in the said revision, the suit would proceed in accordance thereof and the petitioner would be entitled to seek suitable directions for producing evidence in the suit which would proceed from the stage of the trial court's order dated 8.3.1999. Therefore, the impugned order dated 1.2.2000, passed only during the short period such stay stood vacated would not be any hindrance for the petitioner to seek such directions in the Revision pending before this Court.

16. This Court while dismissing the Revision No. 107 of 2000 and Revision No. 108 of 2000 has considered the merits of the orders dated 1.2.2000. Notice has also been taken of pendency of Revision No. 414 of 1999 before this Court against an order dated 15.9.1999. The order of the trial court dated 15.9.1999 was an order framing the issues and directing that all the issues shall be decided together. Such order is under challenge in Revision No. 414 of 1999. It is therefore, borne out from the record that the question regarding decision of

preliminary issue first or all the issues together is still pending. The stage at which the suit had reached as on 15.9.1999, is subject-matter of this revision. The trial court will be required to proceed to adjudicate upon the said issues or preliminary issue only after the decision of this Court in the said Revision No. 123 of 1999 and Revision No. 414 of 1999. Hence, no prejudice would be caused to the petitioner by virtue of the impugned order when the suit proceeds from the stage at which it had reached on 8.3.1999 and 15.9.1999 both such stages being much before 1.2.2000.

17. Section 11 of the CPC envisages rule of conclusiveness of the judgment to the effect that same cause should not be permitted to be raised twice over. This section does not affect the jurisdiction of the Court but it operates as a bar to the trial of suit or issue if the same was subject matter directly and substantially for "issue in a previous suit between the same parties litigating under the same title in a Court. The subsequent suit or proceedings in which such issue has been raised would be thus, *res judicata* if the same has already been decided on merits between the same parties in an earlier proceeding, then it cannot be permitted to be decided once again in a subsequent proceedings. The Explanation IV of Section 11, CPC is quoted hereunder :

"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."

18. This Explanation provides for constructive *res judicata*, even erroneous decision or a question of law attracts the provisions of Section 11, Code of Civil Procedure. The correctness or otherwise of judicial decision has no bearing upon the question whether or not, it operates as *res judicata* therefore, re-agitation of an issue already decided would be barred under the aforesaid Explanation.

19. In *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, the Supreme Court considered the applicability of the doctrine in the proceedings at different stages in the same suit and held as under :

"The principle of *res judicata* is based on the need of giving a finality to judicial decision, What it says is that once a *res judicata*, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation... This principle of *res judicata* is embodied in relation to suits in Section 11 of the CPC ; but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial court or Higher Court, having at an earlier stage, decided a matter in one way, will not allow the parties to re-agitate the matter again at the subsequent stage of the same proceedings."

20. This view has consistently been approved and followed by the Hon'ble Supreme Court in large number of cases in *Arjun Singh Vs. Mohindra Kumar and Others*, the Hon'ble Apex Court observed as under :

"...though Section 11 of the CPC clearly contemplates the existence of two suits and the findings in the first being res judicata in the larger suit, it is well established that the principle underlying it is equally applicable to the case of decision rendered at successive stages of the same suit or proceeding. But where the principle of res judicata is involved in the case of different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjective law provides for decision being reached as well as the specific provisions made on matters touching decision are some of the material and relevant factors to be considered before the principle is held applicable."

21. In Escorts Farms Ltd., Previously known as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumaon Division, Nainital, U.P. and Others, the Hon'ble Supreme Court examined the issue of res judicata observing the doctrine applied to give finality to "lis" in original or appellate proceedings. The issue once decided should not be allowed to be re-opened and re-agitated twice over. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged a thing judicially acted upon or decided, a thing or matter settled by judgments".

22. On the aforesaid position, this Court is of the view that petitioner having agitated the correctness of the impugned order dated 1.2.2000 in revision which has since been dismissed would be precluded from raising the same dispute and challenging the same order before the writ court.

23. In view of the reasons stated above, this writ petition has no force and is accordingly dismissed.

24. No order is passed as to costs.