
(2011) 03 AHC CK 0437

In the Allahabad High Court

Case No : First Appeal From Order No. 763 of 2011

Zulfikar Ahmad and Others

APPELLANT

Vs

Smt. Khurshida Begum and Others

RESPONDENT

Date of Decision : 11-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 9 Rule 6, Order 9 Rule 8, Order 9 Rule 9, 11

Citation : (2011) 5 ADJ 6 : (2011) 4 AWC 3866 : (2011) 8 RCR(Civil) 2198 : (2011) 113 RD 453

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shishir Kumar, J.—Heard learned Counsel for Appellants.

2. This First Appeal From Order has been filed against the order in Appeal No. 121 of 2008 dated 25.1.2011.

3. According to Defendants-Appellants, in Suit No. 686 of 1994 and Suit No. 283 of 2004 for the same property between the same parties and rights of the parties have already been decided, therefore, present suit filed by Plaintiffs-Respondents itself was not maintainable. In such circumstances, an application u/s 11 of Code of CPC was filed by Defendants with an allegation that issue regarding res-judicata be decided as a preliminary issue and if ultimately Court comes to conclusion that rights of parties have already been decided in the earlier suit, there is no necessity to proceed further.

4. An objection to that effect has also been filed by Plaintiff-Respondents that was dismissed by order dated 25.9.2008 and the application opposing to decide the issue of res-judicata, application of Plaintiff was rejected and the Court has directed that the matter be listed on 3.10.2008 to decide Issue No. 3. According to Appellants this order was never challenged by Plaintiffs and when the case

was listed, an application was filed to decide Issue No. 3 as directed on the earlier date. On 18.10.2008, Court below has found that rights of the parties have already been adjudicated in the earlier proceeding, therefore, present proceeding is barred by principle of res-judicata and has directed that suit be treated to be dismissed. Plaintiffs-Respondents aggrieved by aforesaid order, filed an appeal. The Appellate Court vide its judgment and order dated 25.1.2011 was pleased to allow the appeal on the ground being mixed question of facts and law, this question cannot be decided as a preliminary issue because the fact of the case in the earlier proceeding as well as the property in dispute and the rights of the same parties has to be taken into consideration while passing the order u/s 11 of Code of Civil Procedure.

5. Learned Counsel for Appellants submits that once application for opposing to decide Issue No. 3 as a preliminary issue filed by Plaintiff has already been rejected and the Court has already directed to decide the issue as Issue No. 3, in such circumstances, the Appellate Authority cannot pass an order to that effect that it will be seen subsequently when the matter is considered and decided after exchange of pleadings of the parties and Issue No. 3 cannot be decided as a preliminary issue. He has placed reliance upon a judgment of the Apex Court in Abdul Rahman Vs. Prasony Bai and Another, and has placed reliance upon para 21 of the said judgment The same is being quoted below:

21. For the purpose of disposal of the suit on the admitted facts, particularly when the suit can be disposed of on preliminary issues, no particular procedure was required to be followed by the High Court. In terms of Order XIV, Rule 1 of the Code of Civil Procedure, a Civil Court can dispose of a suit on preliminary issues. It is neither in doubt nor in dispute that the issues of res-judicata and/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.

6. In such circumstances, counsel for Appellants submits that in view of the Apex Court judgment, it is necessary for the Court below to dispose of a suit on a preliminary issue. It is neither in doubt nor in dispute that the issues of res-judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Therefore, the Appellate Court has committed an illegality apparent on the face of record to allow the appeal and set aside the judgment and decree dated 18.10.2008. The Court below has failed to take into consideration the fact that Suit No. 686 of 1994 dated 29.7.1999 passed by the Civil Judge was challenged by Respondent No. 1 and co-Plaintiff by way of Civil Appeal No. 263 of 1999. One Smt. Shamima Akhtar, sister of Respondent has also filed a Suit No. 283 of 2004 for permanent injunction against Appellants regarding the same property on the same ground as taken in Suit No. 686 of 1994 and again only to harass Appellants, present suit has been filed though rights of the parties have already been adjudicated in the earlier two suits as it was between the same party and property in dispute was the same. Therefore, in

view of the Apex Court judgment, Issue No. 3 should have been decided as a preliminary issue as directed by the trial Court.

7. After hearing learned Counsel for Appellants and after perusal of record, it appears that earlier an application was filed as Application No. Ga 50 with a prayer that Issue No. 3 be decided after the evidence is completed between the parties with all other issues. An objection was taken on behalf of Defendants - Appellants that Issue No. 3 was framed only for the purposes that whether suit is barred by principle of res-judicata or not. Therefore, it should be decided as a preliminary issue but that application was rejected and 3.10.2008 was fixed. It appears that when the case was listed on 18.10.2008, Plaintiff was absent and Defendant was present. The trial Court has decided Issue No. 3 treated to be a preliminary issue and has dismissed the suit recording a finding that in view of decision of Suit No. 263 of 1999 and Suit No. 686 of 1994 present suit is barred by principle of res-judicata as provided u/s 11 of the Code of Civil Procedure. Plaintiff-Respondent aggrieved by the aforesaid order, filed an appeal which was numbered as Appeal No. 121 of 2008. The Appellate Authority has taken a view that question of res-judicata is a mixed question of law and fact and if on 18.10.2008, Plaintiff was absent then an order should have been passed under Order 9, Rule 8 instead of deciding the Issue No. 3 as a preliminary issue and dismissing the suit accordingly.

8. Under Order 9, Rule 6 of Code of CPC there is a procedure that in case on the date fixed, if Plaintiff is present and Defendant does not present after service then the order to that effect can be passed. Rule 8 provides that in case only Defendant is present but Plaintiff does not appear when it is called for hearing then Court shall pass an order that the suit is dismissed. Therefore, if on that particular date, Plaintiff was not present, the trial Court instead of deciding Issue No. 3 should have passed an order under Order 9 Rule 8 of Code of CPC because Order 9, Rule 9 of Code of CPC provides that where a suit is wholly or partly dismissed under Rule 8, the Plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. Meaning thereby instead of dismissing the suit being barred by principle of res-judicata, the trial Court should have passed an order in case the Plaintiff was absent on a particular date and an order should have been passed under Order 9, Rule 8 of Code of Civil Procedure, as that has not been done so, therefore, the Court below has taken into consideration the said fact and has further held that Issue No. 3 which was relating to take a decision regarding principle of res-judicata is concerned should have been decided in the interest of justice not as a preliminary issue and should have been decided with other issues.

9. The Apex Court judgment relied upon by counsel for Appellants will not be applicable in the present facts of the case as the Apex Court has held in that particular case that on the admitted fact when suit can be disposed of on a preliminary issue then in that case, it is not necessary to adopt the procedure as required. The Apex Court has further said that "such issues, in fact, when facts

are admitted, ordinarily should be decided as preliminary issues". Meaning thereby the Apex Court was of opinion that once the facts are admitted to the parties then it can be decided as a preliminary issue otherwise it is the discretion of the Court to decide the issue of res-judicata with other issues.

10. Further it has also to be seen that the order was passed in absence of Plaintiff. As regards the principle of Section 11 is that no Court shall try any suit or issue in which the matter directly and substantially an issue has been directed or substantially was the issue in a former suit between the same parties litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has substantially raised and has been heard and finally decided by such Court. Meaning thereby the Court has to see whether between the same parties regarding the same property the dispute in the earlier suit was the same and it has been adjudicated between the parties. In that circumstances, the Court below can take a decision and held that the suit is barred under the principle of res-judicata.

11. In Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, the Apex Court while considering the issue for the purposes of determination of res-judicata, has held that it was not necessary to examine the judgment, but also the plaint, the written statement and to determine if the matter was directly and substantially in issue in the previous suit. The Appellate Court has rightly found that the issue of res-judiciata, rightly cannot be disposed of as a preliminary issue. It has to be examined thoroughly on the basis of evidence on record being fact that question of res-judicata is a question of law and fact and is not a pure question of law. Only issue of law does not require any evidence to prove. It can be treated as a preliminary issue and that too when suit can be disposed of on its decision. Therefore, the Appellate Court has rightly held in exercise of jurisdiction that this cannot be decided as a preliminary issue and, therefore, rightly set a side the order impugned.

12. As regards, the contention of Appellants, cannot be accepted that the Appellate Authority should have directed the trial Court to decide such issues first before deciding other issues in view of fact that unless and until Court is satisfied upon the pleadings of the parties that on the basis of relevant record, the rights of the parties have already been decided in the earlier suit or any other proceeding and the property in question substantially are the same. Unless and until the Court is satisfied, such issue of res-judicata cannot be decided as a preliminary issue.

13. In view of facts and circumstances of the case I am of opinion that there is no illegality in the order passed by Court below. The appeal lacks merit and is hereby dismissed but in the facts and circumstances of the case it will be appropriate that the Court below may decide the suit finally after affording full opportunity to the parties, if possible, within a period of six months from the date of production of certified copy of the order.

14. No order as to costs.