

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No. 106/2009 & CM No. 11014/2009**

Date of Decision: February 10, 2010

SH. SOHAN LAL & ANR. Appellants
Through: Mr.Om Prakash, Advocate.
versus

MOHD. USMAN (NOW DECEASED) & ORS. Respondents
Through: Mr.Amjet Andlay, Advocate for
Respondent No.4.
Mr.Sanjeev Sabharwal, Advocate
for Respondent MCD.
Mr.Manish Srivastava, Advocate
for Respondent No.6.
Mr.Akshay Chandra, Advocate for
Respondent No.5.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

J U D G M E N T

ARUNA SURESH, J. (Oral)

RSA No. 106/2009

1. Notice could not be issued to the LR's of respondent No. 1 and respondent No.2 as PF was not filed. Since appellant has not been able to serve the notice as ordered and has failed to take steps, no further orders

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are required to be passed for service of notice of the appeal on LR's of respondent No. 1 and respondent No.2 respectively.

2. Mr. Om Prakash, learned counsel appearing for the appellant has submitted that on 26th February 2004, the Trial Court had framed a preliminary issue regarding maintainability of the suit if it was barred by principles of *res judicata* as laid down in Section 11 CPC. He has submitted that the First Appellate Court went wrong in remanding back the case vide impugned order dated 28th March, 2009 without properly appreciating the facts of the case. He also submitted that the Appellate Court set aside the judgment and decree of the Trial Court and remanded back the case for trial holding that the question of *res judicata* was not a pure question of law but was a mixed question of law and fact. Therefore, according to him, a substantial question of law whether question of *res judicata* is a pure question of law or is a mixed question of law and fact is required to be formulated and adjudicated upon in this appeal.

3. I find no merits in the submissions of the learned counsel for the appellant.

4. Respondent herein filed a suit for injunction bearing No.766/75 against the appellant claiming himself to be the owner of pucca

shed bearing Municipal No.5409/A, New Market, Sadar Bazar, Delhi-6.

The said suit was filed against Abdul Malik and Chanda Ram and his two sons, namely, Sohan Lal i.e. the Appellant herein and Jagga on the allegations that the appellants were blocking the doors on Eastern and Northern sides of the shed of the respondent. The said suit was partly decreed on 18th July, 1979 restraining the appellants from blocking the doors marked as AB and CD on Northern side of the shed. However, the relief for the Eastern side of the shed was declined. Appeal against the said judgment and decree filed by the respondent was also dismissed on 3rd September, 1998. Respondent also filed a Regular Civil Appeal bearing No.8/99 against the judgment and decree of the Appellate Court. The said appeal was also dismissed.

5. Respondent thereafter filed a suit bearing No.986/99 (in which the impugned orders have been passed and is being referred to as second suit). In the second suit, respondent has impleaded various authorities like MCD, DDA, DESU and Commissioner of Police as other defendants beside the appellants. The relief claimed in this suit was in the form of a permanent injunction for restraining the appellants from carrying on any trade on the passage/street adjoining Eastern side of the shed bearing No.5409-A and further by way of a mandatory injunction to remove the

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boxes tarpaulins and all other goods stocked on the side of Eastern wall and certain reliefs were claimed against the statutory authorities.

6. The Trial Court framed following preliminary issue:-

“1. Whether present suit is not barred by resjudicata i.e. Section 11 CPC as the issue in manner has been heard and finally decided by competent court? OPP.”

7. Trial Court treated this issue as a question of law and proceeded to decide the same. It came to the conclusion that the second suit was barred by principles of *res judicata* and dismissed the same accordingly. Appellate Court did not agree with the findings of the Trial Court and observed that the question of *res judicata* was a mixed question of law and fact. The relevant observations of the Appellate Court made in the impugned order are contained in paragraphs 18 to 21, which read as follows:-

“18. On consideration of the pleadings of the two suits, it cannot be said that matter in issue in the two suits was apparently identical. On such a situation at the best what the trial court ought to have done was to frame a issue of resjudicata if necessary for decision and decide the same at the time of final disposal alongwith the other issues after giving liberty to the parties to adduce their respective evidence. The question of resjudicata on the given facts of the

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case was not a pure a question of law but was a mixed question of facts and law.

19. On consideration of the facts in the two suits, it may be noted that the facts stated in the second suit were prima facie making a new cause of action. The trial court while passing the impugned order seems to have totally ignored the facts under which the relief against the Eastern side of the wall as claimed in the former suit came to be decided against the appellant in that suit. The alleged incident of putting boxes and tarpaulins on a subsequent date after the alleged removal of earth are prima facie sufficient for giving a fresh cause of action to the appellant to file a fresh suit for injunction.

20. The trial court in the present case should have taken the note of WS filed on behalf of MCD wherein it was stated that defendant no.1 and 2 had encroached upon the Municipal land being a passage and the MCD would take action against them. Then at the same time the relief in the present suit was not only against the private parties but was also sought against the Statutory Authorities too for not taking action against the respondent no.1 and 2 for the alleged illegal encroachment made by them in the passage. So this way the relief as sought was also quite different in the two suits. In such facts and situation to deal with the question of resjudicata as preliminary issue was least desirable.

21. On a apparent consideration of the two suits, it may be noted that the matter in issue in the second suit was relating to the alleged acts of the respondent no.1 and 2 of the year 1991 only and alleged inaction on the part of the Statutory Authorities which had given a new cause of action to the appellant to file the second suit. The alleged cause of action arose to appellant in

the second suit when the respondent no.1 and 2 allegedly raised construction on the Eastern side of the shed of the appellant which as per the record of the first suit was having malba. In view of this alleged development, it cannot be said that it does not give any cause of action if the appellant feels aggrieved from such alleged action of respondents.”

8. To my mind, the Appellate Court was right in its observations when it concluded that the question of *res judicata*, on the given facts of the case, based on subsequent events was a mixed question of law and fact. The cause of action, as alleged in the second suit, is based on subsequent events and the second suit has also been filed against various authorities of the Government, beside the appellants. Whether a question of *res judicata* is a mixed question of law and fact or a pure question of law is based on the facts and circumstances of each case.

9. In this case, since there have been numerous litigations *inter se* the parties and the second suit has been filed on subsequent events, whether principles of *res judicata* are applicable to the facts and circumstances of this case is a mixed question of law and fact. Without looking into the facts and evidence and deciding the case on merits, the Trial Court could not have decided the issue of *res judicata* treating it as a preliminary issue based only on law.

10. Under these circumstances, no substantial question of law is

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required to be formulated in this case. No prejudice has been caused to the appellants by the impugned order of the Appellate court. The Appellate Court has rightly remanded back the case to the Trial Court after setting aside its order of dismissal for deciding the issue of *res judicata* along with others on merits of the case.

11. Hence, finding no merits in the appeal, I hereby dismiss the same.

CM No.11014/2009 (for stay)

12. Since the appeal is dismissed, this application has become infructuous and the same is accordingly dismissed.


(ARUNA SURESH)
JUDGE

FEBRUARY 10, 2010
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