

**Court No. - 9**

**Case :-** FIRST APPEAL No. - 170 of 2022

**Appellant :-** Vijay Gupta And Another

**Respondent :-** Shashi Jain

**Counsel for Appellant :-** Sujeet Kumar, Chhaya Gupta

**Counsel for Respondent :-** Kundan Rai

**Hon'ble Rohit Ranjan Agarwal, J.**

1. Heard Sri Sujeet Kumar, learned counsel for the appellant and Sri Amit Shukla, learned counsel for the sole respondent.
2. This first appeal under Section 96 of CPC has been filed assailing the judgment and decree dated 24.11.2021 and 08.12.2021 passed by the Presiding Officer, Commercial Court, Gautam Budh Nagar in Original Suit No. 151 of 2021, whereby allowing the application No. 22-Ga filed under Order 7 Rule 11 CPC and dismissing the suit of the plaintiff appellants.
3. Facts leading to the dispute are that the appellants were the partners of unregistered firm M/S Triveni Adhesive Tapes, B-92, Sector 5, NOIDA, Gautam Budh Nagar, while the defendant respondent is the sole proprietor of M/S Parasnath Associates. The firm of the defendant respondent supplied BOPP films to M/S Triveni Adhesive Tapes and raised bills to the tune of Rs. 40,13,882/-. When the firm of the plaintiff appellants failed to make payment arbitration agreement was invoked and matter was referred to the Paper Merchant Association and the Arbitrator made an award on 14.12.2009 for making payment to the defendant respondent of Rs. 48,42,284/-.
4. The award made by the Arbitrator was challenged by Triveni Adhesive Tapes/appellants by filing an application under Section 34 of the Arbitration & Conciliation Act, 1996 [hereinafter referred as the 'Act of 1996'] before the Additional District Judge, Tees Hazari Court, New Delhi. In the said application criminal complaint as to the forgery in

respect of bills were also made by the appellants. The Court vide judgment and order dated 13.04.2015 dismissed the application filed under Section 34 of the Act of 1996 as well as found that the allegations of forgery and fabrication were false. Against the order passed under Section 34, the appellants filed an appeal under Section 37 of the Act of 1996 being F.A.O. No. 167 of 2015 before the Delhi High Court. The said appeal was dismissed by the Delhi High Court on 04.03.2016. Aggrieved by the said order, the appellants filed Special Leave Petition No. 9289 of 2016 before the Apex Court. On 18.04.2016 the said special leave petition was dismissed by the Apex Court. A review petition was moved by the appellants which was also dismissed vide order dated 20.07.2016. In between a complaint under Section 340 of Cr.P.C. was filed by the appellants which was dismissed by the Additional District Judge/II, Central Tees Hazari Court, New Delhi on 13.04.2015. Against the said order a criminal appeal was filed being Criminal Appeal No. 836 of 2015 before the Delhi High Court which was dismissed on 08.11.2020.

5. The defendant respondent had filed execution proceedings before the Delhi High Court on 25.05.2015 which was transferred to Tees Hazari District Court on 31.01.2017 on account of change in pecuniary jurisdiction of the Court. The bank accounts of the appellants were attached by order dated 22.02.2019. The execution petition filed at Delhi was disposed off on 27.04.2019 for want of jurisdiction to execute the award passed by the Arbitrator. The contesting defendant respondent, thereafter, filed execution case before the District & Sessions Judge, Gautam Budh Nagar on 27.05.2019 which is still pending.

6. In the meantime, the appellants had filed Original Suit No. 151 of 2021 before the Commercial Court, Gautam Budh Nagar claiming relief of declaration, declaring that there was no arbitration agreement in existence between the parties and the award made on 14.12.2009 was without jurisdiction. Further a declaration has been sought that the award made on 14.12.2009 was on the basis of forged and fabricated bills which

will not bind the plaintiff appellants, also relief of permanent injunction has been sought by the plaintiff appellants restraining the defendant respondent from getting the award dated 14.12.2009 executed.

7. The said suit was contested by the defendant respondent by filing an application under Order 7 Rule 11 and Section 151 of the CPC and Section 3 of the Limitation Act, 1963. The said application was replied by the plaintiff appellants on 03.09.2021. The court below vide judgment dated 24.11.2021 allowed the application filed by the defendant respondent and dismissed the suit of the plaintiff appellants. Hence, this appeal.

8. Sri Sujeet Kumar, learned counsel for the appellants. Submitted that the court below was not justified in rejecting the suit of the appellants on the ground of res judicata as issue between the parties in the earlier round of litigation and subsequent suit is not the same. According to him it was after discovery of fraud being played by the respondent upon the appellants that the present suit has been filed.

9. He further submits that arbitral proceedings are persona in nature and would not affect the subsequent suit. According to him the issue in both the proceedings are different. Reliance has been placed upon the decision of Apex Court in case of **Srihari Hanumandas Totala Vs. Hemant Vithal Kamat & Others (2021) 9 SCC 99**. Relevant paragraph no. 25.4 is as under;

*"25.4 Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused."*

10. Opposing the appeal Sri Shukla, learned counsel for the respondent, submitted that issue in both the proceedings are one and the same. He invited the attention of the Court to the objections filed under Section 34 of the Act of 1996 by the appellants in the earlier round of proceedings wherein in paragraph no. VIII the appellant had taken ground that he had

not issued the Form No. 3-F and Form C issued by the department and the appellant had not claimed any modvate rebate on such purchase of excisable goods.

11. He next invited the attention of the Court to paragraph no. V and VII of the plaint filed in subsequent suit wherein a similar plea has been taken as regards issuance of Form 38/31. According to him the subsequent suit filed by the appellants is barred by the provisions of Section 11 (a) and (d) read with Order 2 Rule 2 CPC. He next contended that once the award has been upheld by the Apex Court re-agitating the matter by filing a subsequent suit is barred by the principle of res judicata.

12. I have heard learned counsel for the parties and perused the material on record.

13. The short issue raised by the appellants for consideration of this Court is, as to whether the subsequent suit filed by the appellants is barred by the provisions of res judicata and application under Order 7 Rule 11 CPC is maintainable or not and the plaint can be rejected by the court below holding the suit to be barred by the provisions of res judicata.

14. Before advertng to decide the matter in hand a cursory glance of the provisions of Section 11 is necessary for better appreciation of the case which are extracted here as under;

*“11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”*

15. From the reading of Section 11 it is clear that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties under whom they are or any of them litigating under the same title,

in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

16. While Order 7 Rule 11 enumerates the circumstances in which a plaint shall be rejected. Clause (a) of Order 7 Rule 11 provides that where plaint does not disclose a cause of action, while clause (d) provides that where the suit appears from the statement in the plaint to be barred by any law.

17. Applicability of Section 11 and plea of res judicata has been explained by the Apex Court in case of **V. Rajeshwari Vs. T.C. Saravanabava (2004) 1 SCC 551**. Relevant paragraph nos. 11 and 13 are extracted here as under;

*“11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.*

*13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in [Syed Mohd. Salie Labbai v. Mohd. Hanifa \[\(1976\) 4 SCC 780\]](#) the basic 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 suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in [Gurbux Singh v. Bhooralal \[AIR 1964 SC 1810 : \(1964\) 7 SCR 831\]](#) placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar*

*to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy. Of State for India in Council [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.”*

18. Apex Court in **Kamala Vs. K.T. Eshwarasa (2008) 12 SCC 661** held as under;

*“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.*

*22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.”*

*The Court further held:*

*“23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a (2008) 12 SCC 661. preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.*

*24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another*

*thing to say that although the same discloses a cause of action, the same is barred by a law.*

*25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”*

19. In **Shrihari Hanumandas Totala (Supra)** Hon’ble the Chief Justice of India Dr. D.Y. Chandrachud, J. laid down the guiding principles for deciding the application under Order 7 Rule 11 (d). Relevant paragraph no. 25 is extracted as under;

*“25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:*

*25.1 To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;*

*25.2 The defense made by the defendant in the suit must not be considered while deciding the merits of the application;*

*25.3 To determine whether a suit is barred by res judicata, it is necessary that (i) the ‘previous suit’ is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and*

*25.4 Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the ‘previous suit’, such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.”*

20. The Apex Court laid down that a plaint can be rejected on the ground that suit is barred by any law or only on the consideration of the application made in the plaint. The defense of the defendant in the suit must not be considered while deciding the application on merit. His

Lordship further held that to determine whether a suit is barred by res judicata, it is necessary that firstly the previous suit is decided, secondly the issues in the subsequent suit were directly and substantially in issue in the former suit, thirdly the former suit was between the same parties or parties through whom they claim, litigating under the same title; and lastly that these issues were adjudicated and finally decided by a court competent to try the subsequent suit.

21. In the instant case the arbitral proceedings which were carried out before the Arbitrator culminated on 14.12.2009. The appellants had filed an application under Section 34 of the Act of 1996 for setting aside the arbitral award which was dismissed on 13.04.2015. Subsequently, an appeal under Section 37 of the Act of 1996 was preferred by the appellants before Delhi High Court which was also dismissed on 04.03.2016. Thereafter, special leave petition preferred by the appellants was dismissed by the Apex Court on 18.04.2016 and review petition filed by the appellants was also dismissed on 20.07.2016.

22. The subsequent suit filed by the appellants before the Commercial Court at Gautam Budh Nagar seeking relief of declaration for declaring the arbitration agreement not in existence between the parties as well as declaring the award dated 14.12.2009 without jurisdiction and also for declaring the award dated 14.12.2009 to have been obtained on the basis of forged bill and the said award be not executed against the appellants, is in fact starting of fresh proceedings, which has already been culminated between the parties by the order of Apex Court, whereby special leave petition filed by the appellants was rejected on 18.04.2016 as well as review petition on 20.07.2016, affirming the award dated 14.12.2009 made by the Arbitrator.

23. From the reading of the plaint it is clear that subsequent suit which was filed by the appellants is on the same issue in which the matter had already been adjudicated and decided between the parties by the competent court. From reading of paragraph no. V and VII of the plaint it

is clear that same plea has been raised in regard to the issuance of Form 38/31 which was raised by the appellants in proceedings under Section 34 of the Act of 1996 wherein ground no. VIII was taken that he had not issued Form 3-F and Form 3-C issued by the department.

24. The relief claimed in the subsequent suit is only for declaring the award dated 14.12.2009 as void and the same having been obtained on the basis of forged bill. The award was challenged by the appellants in proceedings under Section 34 of the Act of 1996 and, thereafter, by filing appeal under Section 37 and ultimately the matter was carried up to the Apex Court.

25. Re-agitating the matter again by filing civil suit on the same ground that the award was made relying upon the forged forms and bills which had been under consideration by the competent courts in proceedings launched by the appellants earlier in time and decision rendered by the competent court is binding upon the appellants.

26. Reliance placed by the appellants on the decision of Apex Court in case of **Shrihari Hanumandas Totala (Supra)** does not help the appellants, in fact the guiding principles laid down by the Apex Court for deciding the application under Order 7 Rule 11 (d) clearly helps the case of the defendant respondent and as the previous proceedings have been decided between the parties and issues in the subsequent suit is directly and substantially are the same as was in the former suit and the former suit was between the same parties and the issue having been adjudicated finally by the competent court. The principle of res judicata would apply and from reading of the plaint it is clear that subsequent suit is barred by the provisions of Rule 11 (d) of Order 7.

27. The facts of **Shrihari Hanumandas Totala (Supra)** are distinguishable in the present set of case as in that case when the subsequent suit was filed the earlier suit was not decreed. The Apex Court, therefore, found that the plaint on the face of it did not disclose any

fact that may lead to the conclusion that it deserves to be rejected on the ground that it is barred by the principle of res judicata.

28. In the instant case the parties before this Court had been litigating since the year 2009 and the matter was concluded by the judgment of Apex Court rendered in the year 2016. The appellants before this Court want re-adjudication of the matter in the year 2021, on the same issue which was directly and substantially an issue in the earlier round of litigation and had already been adjudicated. The present suit has been filed only to avoid the execution proceedings which are pending before the competent court.

29. Considering the facts and circumstances of the case, I find that no case for interference is made out in the judgment and order passed by the Commercial Court at Gautam Budh Nagar on 24.11.2021 dismissing the suit of the plaintiff appellants being barred by the provisions of Section 11 of res judicata and rejecting the plaint under Order 7 Rule 11 CPC.

30. Appeal fails and is hereby dismissed.

31. However, no order as to costs.

**Order Date :- 31.10.2023**

Shekhar