

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

F.A. No. 220 of 2012

Sardar Satpal Singh, S/o. Sardar Late Vidyal Singh, Aged About 62 years,
R/o. Church Road, Kedarpur Town Ambikapur, Distt. Surguja (C.G.)

---- Appellant

Versus

1. Smt. Saroj Shukla, W/o. Late Jainath Shukla, Aged About 75 Years, R/o. Mohalla Anandnagar, Raipur, Post- Raipur, Distt. Raipur (C.G.)
2. Sachin Dev Shukla, S/o. Late Jainath Shukla, Aged About 51 Years, R/o. Mohalla Anandnagar, Raipur, Post- Raipur, Distt. Raipur (C.G.)
3. Jaidev Shukla, S/o. Late Jainath Shukla, Aged About 48 Years, R/o. Mohalla Anandnagar, Raipur, Post- Raipur, Distt. Raipur (C.G.)

---- Respondents

For Appellant : Mr. A.K.Prasad, Advocate

For Respondents : Mr. B.P.Sharma with Mr. Rahul Mishra, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

03/08/2015

1. This appeal is against the judgment and decree dated 06.10.2012 passed in Civil Suit No.02-A/2012 by the Second Additional District Judge, Ambikapur, whereby, the suit filed by the appellant/plaintiff was dismissed with a finding that the suit filed is barred under the provisions of Section 11 and Order 2 Rule 2 of CPC.
2. The brief facts of the case are that a civil suit for specific performance of contract for sale dated 04.07.1987 in respect of the land bearing Khasra No.1245 & 1246 alongwith the superstructure was filed against the respondents. It was contended that pursuant to sell the entire sale consideration of Rs.55,000/- has been paid to the respondents. The

prayer made in such suit was for execution of the sale deed in terms of the agreement entered in between the parties. After issuance of notice, the written statement was filed wherein all the averments of the plaint were denied. In the plaint, the periodical payments of sale consideration were shown to be made at para 5 from 04.07.1987 to 11.10.2004 and was stated that entire sale consideration was paid. The said averments however were denied to the extent that the amount was not paid in lieu of the sale consideration but was adjusted towards the rent proceed. On the basis of pleadings of parties, the learned Court below framed the issues, which reads as under :

- वाद विषय -

(आज दिनांक-27.08.2012 को पारित)

1. क्या वादी के पक्ष में स्व. जयनाथ शुक्ला ने वादग्रस्त भूमि का विक्रय करने हेतु विक्रय अनुबंधपत्र दिनांक-04.07.1987 को निष्पादित किया है ?
 2. क्या उक्त अनुबंध के संबंध में वादी ने स्व० जयनाथ शुक्ला को 55,000/- रु० अदा किया है ?
 3. क्या वादी और स्व० जयनाथ शुक्ला के बीच वादग्रस्त भूमि का प्रथम विक्रय अनुबंधपत्र दिनांक-09.01.1985 को हुआ था ?
 4. क्या वादी द्वारा प्रस्तुत वाद अवधि बाधित है ?
 5. क्या वादी ने वाद का उचित मूल्यांकन कर उचित न्यायशुल्क अदा नहीं किया है ?
 6. सहायता एवं वाद व्यय
3. During the course of trial, after framing of the issues, an application was preferred by the defendants/respondents under Section 11 read with Order 2 Rule 2 of CPC. In such application, it was contended that earlier to the present suit i.e. Civil Suit No.02-A/2012, earlier a suit was filed before the Fifth Civil Judge Class-II, Ambikapur, which was numbered as

Civil Suit No.20-A/2003 in respect of same agreement of sale. It was stated that the said civil suit was decided against the plaintiff, which was subject of First Appeal before the First Additional District Judge, Ambikapur. The said first appeal was decided on 10.02.2005 and subsequently the same was subject of challenge in the Second Appeal before the High Court and the Second Appeal was decided on 20.09.2011. Consequently, it was pleaded that earlier issues were decided in Civil Suit No.20-A/2003 wherein the legality of agreement of sale was held in affirmative but relief for specific performance was not sought. Therefore, the subsequent Civil Suit No.02-A/2012, the present suit, is barred as the judgment and decree passed in Civil Suit No.20-A/2003 has attained its finality.

4. In reply to the application, the appellant/plaintiff denied the averments and stated that the earlier civil suit was with respect to the declaration and injunction and in such civil suit because of the pecuniary jurisdiction, the suit was dismissed. Thereby, the finding of such earlier Civil Suit No.20-A/2003 would be an outcome of the result by a Court having no pecuniary jurisdiction. The trial Court thereafter on the basis of such application under Section 11 read with Order 2 Rule 2 of CPC, passed the impugned order dismissing the suit as barred and hence it is subject of challenge before this Court.
5. Mr. A.K.Prasad, learned counsel for the appellant, would submit that the order passed by the Additional District Judge whereby it was held that the present suit is barred under Section 11 readwith Order 2 Rule 2 of CPC is without any substance on record as these facts were neither pleaded in the written statement by the defendants nor any issues were framed in this regard. He submits that in order to attract the provisions of bar under Section 11 readwith Order 2 Rule 2 of CPC, it should have been

established on record on the basis of pleading and issues. Therefore without framing of issues the provisions of Order 2 Rule 2 of CPC cannot be invoked. He placed his reliance in **(2014) 6 SCC 424** and would submit that in order to attract the bar under Order 2 Rule 2 of CPC it should have been pleaded by the defendant in the suit and the specific issues should have been made in this regard. He further placed his reliance in **2014 (3) C.G.L.J. 99** and stated that since the *res judicata* is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed, the same cannot be decided as has been done in the instant matter. He further placed his reliance in **(2010) 10 SCC 141** and would submit that the plea of *res judicata* is a restraint on the right of a plaintiff to have an adjudication on his claim and therefore the suit cannot be short-circuited by deciding issues of fact without there proper pleading and issues. He therefore prays that the judgment and decree dated 06.10.2012 be set aside.

6. Per contra, Mr. B.P.Sharma alongwith Mr. Rahul Mishra, learned counsel appearing for the respondents vehemently opposed the argument. He would submit that the pleading is not necessary in view of the fact that the decision of an earlier suit was admitted by the plaintiff in the reply to the application under Section 11 read with Order 2 Rule 2 of CPC. He referred to Section 11 and explanation clause 8 of CPC and would submit that according to the provisions, even the adjudication is outcome of Court of limited jurisdiction, the finding would be within the ambit of Section 11. He placed his reliance in **2010 AIR SCW 6761** and stated that in a suit for declaration of title and injunction when there is an omission to claim relief of specific performance of agreement to sell, it would amount to relinquishment of that part of claim. It is contended that in the earlier suit for declaration and injunction, no claim was made for

specific performance of the agreement. He further placed his reliance in **(1994) 2 SCC 14**. It was further contended that in a suit or proceeding, notwithstanding the fact that the Court with limited or special jurisdiction was not a competent Court to try the suit, the finding in such earlier suit would be a res judicata by application of Explanation VIII to Section 11. It is submitted that Section 11 aims to prevent multiplicity of the proceedings and accords finality to an issue, so that parties are not vexed twice and vexatious litigation would be put to an end. He lastly placed his reliance in **(2013) 1 SCC 625** and would submit that in case the plaintiff omits to claim any relief or relinquishes a part of the claim in absence of any leave to obtain the same, the subsequently relief would be barred as in the instant case in the earlier round of litigation, the plaintiff has not reserved his right of leave to claim the relief as contemplated under Order 2 Rule 2 of CPC. Therefore, the subsequent suit for specific performance is barred and the order is well merited.

7. I have heard learned counsel appearing for the parties at length and perused the record.
8. Reading of the plaint would show that a suit for specific performance was filed before the Court of Additional District Judge, Ambikapur, which was numbered as Civil Suit No.02-A/2012. In such suit, the averments were made to the extent that an agreement for sale dated 04.07.1987 was executed between the parties in respect of certain properties i.e. land bearing Khasra No.1245 & 1246 along with the superstructure made therein at 1200 sq.ft. and further averments of the plaint would show that the entire sale consideration of Rs.55,000/- having been paid, the prayer was made that the sale deed be executed in favour of the plaintiff and the decree be passed accordingly. In reply to plaint averments the pleadings were denied except the fact that with respect to the sale consideration. It

was contended in written statement that the amount of sale consideration was not paid for the alleged agreement but the payments made were adjusted as against the oral rent agreement as with the lapse of time since the rent had increased.

9. At para 15 of the written statement, faintly it was stated that after death of the original defendant, different litigations were pending in between the parties before the High Court and Supreme Court and false & vexatious litigation were proceeded. On reading of the plaint and the written statement, admittedly, there is no pleading to the fact that in respect of the same suit property, earlier civil suit was filed by the plaintiff for declaration and injunction wherein the plea for specific performance of the agreement was not claimed. Consequently, on the basis of the pleading of the parties when the issues were framed as has been shown at para 2 the issue with respect to the fact that the suit is barred under Section 11 read with Order 2 Rule 2 of CPC was not framed by the Court.
10. The documents would show that for the first time, an application was moved under Section 11 read with Order 2 Rule 2 of CPC by the defendants wherein it was contended that on the earlier point of time in between the same parties a civil suit was filed bearing No.20-A/2003 before the Fifth Civil Judge Class-II, which was decided on 14.10.2004. The copy of the said order was also enclosed alongwith such application wherein perusal of such order of civil suit it reflects that an issue was also framed that whether an agreement to sell dated 04.07.1987 was executed in favour of the plaintiff or not. Further, the finding was also arrived at by the Court in affirmative. In such application, it was further contended that in view of the decision of the earlier Civil Suit No.20-A/2003, the subsequent Civil Suit No.02-A/2012 would be barred since no relief or prayer for specific performance was made in earlier suit.

11. Therefore, perusal of written statement and application under Section 11 read with Order 2 Rule 2 of CPC would show that plea of res judicata and bar of suit was raised by way of application and not in the written statement. Therefore, no issues were framed on this aspect.
12. The object of Order 2 Rule 2 of CPC is to ensure that no defendant is sued or vexed twice in regard to the same cause of action and second to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of CPC is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.
13. It is a settled proposition that the plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea has to be clearly established. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. Reading of the written statement in this case would show that there is no pleading made with respect to the res judicata. It was only for the first time in the application under Section 11 read with Order 2 Rule 2 of CPC such plea was raised by the defendants. As has been held by the Supreme Court in case of ***Alka Gupta v. Narendra Kumar Gupta*** reported in **(2010) 10 SCC 141**, the Court will not make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. The Court has specifically stated that the suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced without a trial.

14. In order to attract the bar under Order 2 Rule 2, it has to be specifically pleaded by the defendant in the suit and the trial Court should have specifically framed a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. Perusal of the case file of the Court below would show that alongwith the application under Section 11 read with Order 2 Rule 2 of CPC, the order of the earlier Civil Suit No.20-A/2003 was placed on record. The Supreme Court in case of **Coffee Board v. Ramesh Exports Private Limited** reported in **(2014) 6 SCC 424**, has reiterated the principles laid down in case of **Alka Gupta v. Narender Kumar Gupta {(2010) 10 SCC 141}** and **Gurbux Singh v. Bhooralal {AIR 1964 SC 1810}** and had reaffirm the proposition which reads as under :

“11. The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the trial court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in *Alka Gupta v. Narender Kumar Gupta*, which referred to the decision of this Court in *Gurbux Singh v. Bhooralal*, wherein it was held that :

“13.....'6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (1) that the second suit was in respect of

the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar'."

15. Therefore, necessarily in order to come to a finding and examining the cause of action pleaded by the plaintiff in the suit in between the suit filed earlier whether was one and same, there should have been proper opportunity of hearing by framing the issue in this regard. If certain facts are not pleaded in the written statement, the same cannot be substituted by way of an application and take the place of pleading. Furthermore, as has been followed by this Court in case of **Ballu Ram Sahu & Another v. Smt. Lata Sahu & Another** reported in **2014 (3) C.G.L.J. 99** and held by the Supreme Court in case of **Madhukar D. Shende v. Tarabai Aba Shedage** reported in **(2002) 2 SCC 85** that the question of res judicata is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed, it cannot be held that the defendant has established the plea of res judicata by raising appropriate pleading. The plea therefore in the instant case cannot be considered on the basis of the application under Section 11 read with Order 2 Rule 2 of CPC in absence of any issues.

16. The argument which has been advanced by the learned counsel for the defendants holds the sway on the merit of the case and the same cannot be applied in the facts when the pleading of res judicata was not made in the written statement. There is no dispute of legal proposition, which has been advanced by the respondents but the same can only be considered after framing of the issues by the learned Court below.
17. In the result, the appeal is allowed. The case is remitted back to the Court below and if the parties choose to amend their pleadings, if so advised, the Court may frame issue to adjudicate the matter afresh on merits to decide the plea of res judicata.
18. In facts of the case, no order asto cost.

Sd/-
(Goutam Bhaduri)
Judge