

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No. 1411 of 2015 (O&M)

Date of decision: 14.08.2015

Naseeb Singh (deceased) through LR and another

... Appellants

versus

Faqir Singh

.... Respondent

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Amardeep Singh Gill, Advocate for the appellants.

Mr. Sukhdev S. Kanwal, Advocate
for the caveator/respondent.

K.Kannan, J.

The appeal is by the defendants who are father and son who resisted the plaintiff's claim for declaration that the plaintiff and defendants are entitled to 1/6th share in all the properties as co-parceners and for an injunction that the plaintiff shall be entitled to 1/18th share against the defendants. The status of the property as co-parcenary was denied in the written statement and parties went to trial for an adjudication on the basis of plaintiff's assertion. At the time of trial, the defendants confronted the plaintiff with an earlier suit which the plaintiff had filed in relation to the very same subject matter where he had sought for the relief of possession of his share in the property on the basis that he is a co-parcener and for the relief of injunction in relation to the specific

two items which he claimed to be in exclusive possession. The defendants were also the defendants in that suit. They had been set ex-parte but the Court did not grant decree in favour of the plaintiff. It did not grant the decree as prayed for. The Court found that the plaintiff had not established the co-parcenary character of the property and that he was entitled to a share thereon. While dismissing the claim for possession it allowed for the relief of injunction to all items of property specified therein on the basis of the plaintiff's documentary proof adduced that the he is in possession thereof leaving it to the defendants to take independent action for recovery of possession.

An assertion that the previous suit had been only for recovery of possession and that a fresh suit for declaring that he is a co-parcener was not barred, was taken up by the plaintiff as a ground to establish his competency to sue. The defendants took a plea that they had not known about the earlier decree and wanted to contend that it had been obtained by the plaintiff behind their back. All the same, when the suit was decreed in favour of the plaintiff, the defendants took a legal plea which was permissible on the facts declared by the plaintiff himself that he had earlier filed a suit for possession on the basis that he was a co-parcener with reference to suit properties along with defendants and the ultimate finding was that such a status of holding had not been established. When the suit was decreed and the when the defendants preferred an appeal, they made reference to the plaintiff's earlier suit and the dismissal of the plea for recovery of possession as constituting *res judicata* for obtaining declaratory relief and for injunction. The Court dismissed the appeal of

the defendants to hold that the defendants had not taken a defence of *res judicata* and not even an issue had been framed. It proceeded to therefore, dismiss the appeal. The following substantial questions of law arise for consideration:-

1. Whether the plaintiff was not barred by *res judicata* by the decision between the parties in relation to the very same subject matter where the plaintiff's claim for possession on the basis that he was a co-parcener was dismissed.
2. Whether the contention regarding *res judicata* could be taken up even without a specific plea in that regard, when the plaintiff himself had conceded to the nature of decree that had been passed earlier between the parties in his own plaint.

The respondent in caveat was interested in having the disposal of the appeal itself, inspite of my informing that the case could be admitted and stay granted. He pressed for an adjudication and since the counsel wanted to argue on merits, I have, after framing the substantial questions, proceeded to dispose of the appeal as under:-

Res-judicata is a question of law which would require to be proved on the facts, before it is accepted in any case. Where a plea of bar of suit is taken, it shall be expressly brought to the attention of the parties and the issue shall be considered. If there was no plea of *res judicata* made in the written statement and hence the issue was not framed, the effect of earlier decree would become essential for consideration when the matter was specifically brought before it. It was not even so much required for defendant to plead in this case because the plaintiff had

himself referred to the earlier suit and had attempted to explain the maintainability of his own suit. The suit proceeded on an assumption that since the earlier suit did not contain the relief of declaration, the subsequent suit with a relief of declaration was materially and substantially different. The plaintiff, therefore, had himself volunteered an explanation about institution of earlier suit that it was “for recovery of possession on the basis that he was a co-parcener”, and the subsequent suit was “for a declaration that he was a co-parcener”. When the appeal was filed by the defendants, the plaintiff's specific knowledge to the fact through a ground of appeal that the challenge to the suit was only on the basis that the earlier adjudication, although rendered when the defendants had been set ex-parte, would constitute res judicata. The plaintiff was bound to explain the same and the Court was required to consider it.

The Appellate Court made short of the matter by stating that since there was no issue, the objection of res judicata could not be brought in appeal. As I have explained already that under normal circumstances, the Court was required to take its adjudication on the objections taken at the trial and on an issue raised between the parties and set down as such in its judgment. If ever there was no issue, it is not as if the Appellate Court can simply shirk the same and proceed for an adjudication. The provisions of Order 41 Rule 24 and 25 themselves give a clear mandate to an Appellate Court to decide on matters brought before it when the pleadings are clear, even though a particular issue had not been framed. Rule 24 states that where evidence and record were sufficient, the Appellate Court may determine the case finally after

resettling the issue if necessary. Rule 25 states that the Appellate Court may frame issues and refer them to trial Court if such a situation was warranted. In this case, when a point of *res judicata* was taken in the grounds of appeal founded on pleadings by the plaintiff, the Appellate Court was bound to take that issue and consider. In this case, the Appellate Court has considered the issue but wrongly done so. In consideration, it believed that one of the issues raised as a ground of appeal need not be considered. Such a view was clearly untenable in the light of the provisions contained under Order 41 Rule 24 and 25 CPC.

At the time when the second appeal came for admission and when I put to the counsel for the respondent, to state as to how the suit was competent, the counsel would respond to it by a statement that since the previous suit was for possession on the basis of co-parcenary without a prayer for declaration and such a declaratory prayer came only in a subsequent suit, Section 11 CPC will not apply. I must observe the contention as too wide off the mark and lead to absurd results. It is not difficult to sugarcoat a pleading or camouflage the actual relief by clever pleading by dropping certain expressions. When the earlier suit had been filed for possession on the basis that he was a co-parcener, it was another way of saying that he would be able to obtain the possession only if he proved the character of the properties as co-parcenary. The Court was bound to give adjudication before it accepted or declined the relief of recovery of possession about the character of properties. That was precisely what the Court did when it found that the co-parcenary character was not established and denied to him, a substantial relief of

recovery of possession. The decree was only for injunction with reference to two items of properties which was found to be in his possession and therefore protected his possession till the defendants took action for recovery in accordance with law.

In the subsequently instituted suit when he has sought for declaration that he is a co-parcener he was literally asking for an adjudication on the matter which had come to a close through a previous decision. Section 11 CPC which enacts a rule of public policy states that the matter which was directly and substantially a issue in the former suit between the same parties and which has become final would operate as *res judicata*. It cannot be that to consider a plea of recovery of possession, the issue of property as co-parcenary or not was not directly and substantially an issue. The subsequent suit for the same relief coined in a different fashion of a declaration that he was a co-parcener with the defendant nos. 1 and 2 was an attempt at reopening an issue of what had concluded against the plaintiff.

The suit was hopelessly barred by *res judicata*. There have been some judicial approaches to consider the ex-parte decree as not strictly coming within the purview of the Section 11 CPC but apply the bar differently on the principle of estoppel. The plaintiff's suit was earlier decreed only for 2 items for injunction and dismissal of recovery of possession of all the rest of suit properties will itself estop the plaintiff from claiming declaratory relief on the same subject matter.

Both the questions of law whaan aaj thich I have placed above regarding the *res judicata* and the fact of lack of pleadings have

been answered above and the judgments of the Courts below are set aside
and the regular second appeal is allowed.

(K.KANNAN)
JUDGE

14.08.2015

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