

In the High Court of Punjab and Haryana at Chandigarh

Civil Revision No. 8140 of 2017(O&M)
Date of Decision:22.11.2017

Jiwan Singh Virk and another

---Petitioners

vs.

Amarjit Singh Virk and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Sapan Dhir, Advocate
for the petitioners

Rekha Mittal, J.

The present petition directs challenge against order dated 3.11.2017 passed by the Additional Civil Judge (Senior Division), SAS Nagar Mohali whereby application dated 7.10.2017 (Annexure P-18) under Section 11 read with Section 151 of the Code of Civil Procedure (in short “CPC”) filed by the petitioners/defendants No. 1 and 2 for dismissal of the suit titled “Amarjit Singh Virk vs. Harpreet Singh Virk” (Annexure P-2) being barred by *res judicata*, has been dismissed.

Counsel for the petitioners has submitted that Charan Singh Saini, defendant No.4 executed a general power of attorney qua plot bearing No. C-140, Phase-7, Industrial Area, Mohali, allotted to him (Charan Singh Saini) by Punjab Small Industries and Export Corporation (in short “PSIEC”). He sold the plot in favour of Jiwan Singh Virk. Jiwan Singh Virk

entered into an agreement to sell dated 28.12.2004 with one Sandeep Maggo. Earnest money of Rs. 11 lakhs in the said agreement to sell was retained by plaintiff Amarjit Singh Virk, real brother of Jiwan Singh Virk. When Jiwan Singh Virk claimed his money alongwith other money given to Amarjit Singh Virk, the plaintiff fabricated agreement to sell dated 10.8.2004 by forging signatures of Jiwan Singh Virk.

It is further argued that Amarjit Singh Virk filed frivolous suit bearing No. 466 of 2005 for possession by way of specific performance on the basis of forged and fabricated agreement to sell dated 10.8.2004. Amarjit Singh Virk fabricated two more agreements to sell dated 13.10.2005 as well as one alleged compromise dated 13.10.2005 by forging signatures of Jiwan Singh Virk and Harpreet Singh Virk. Amarjit Singh Virk withdrew his earlier suit and on 20.1.2006, he filed the present suit bearing No. 1615 dated 21.1.2006 against Jiwan Singh Virk and his son Harpreet Singh Virk for specific performance on the basis of agreement(s) dated 13.10.2005. Sandeep Maggo filed civil suit bearing No. 224 of 2006 for specific performance and in the alternative for recovery of Rs.22 lakhs. Amarjit Singh Virk filed application under Order 1 Rule 10 of the CPC for impleading him as a party in the suit filed by Sandeep Maggo which was allowed. He filed written statement in the said suit. After full-fledged trial, suit filed by Sandeep Maggo was dismissed by the Additional Civil Judge (Senior Division), Mohali whereby the court rejected claim of Sandeep Maggo but accepted plea of Amarjit Singh with regard to the agreement(s) propounded by him. Against the decree passed by the trial court, Sandeep Maggo filed appeal and the petitioners filed their cross objections before

the Additional District Judge, Mohali. On 26.2.2015, the First Appellate Court reversed the judgment and decree passed by the trial court and allowed specific performance of agreement in favour of Sandeep Maggo. The Appellate court recorded adverse observations with regard to agreement (s) set up by Amarjit Singh Virk. Against the judgment and decree passed by the Court in Appeal, the petitioners have filed appeal before the High Court. Amarjit Singh Virk has filed separate appeal, RSA No. 3153 of 2015, pending in this Court for 27.2.2018. It is argued with vehemence that as the agreement of sale propounded by Amarjit Singh Virk was directly and substantially in issue in the suit titled "Sandeep Maggo vs. Charan Singh Saini and others", which has been heard and decided by the Courts, plaintiff Amarjit Singh Virk cannot be allowed to proceed with the instant suit in view of bar created under Section 11 of the CPC. It is argued with vehemence that the trial court committed a serious error rather illegality by holding that the suit is not hit by the principle of *res judicata* as the subject matter as well as the parties and the relief claimed in both the litigations is different. In support of his contention, he has referred to judgments of Hon'ble the Supreme Court of India **The City Municipal Counsel Bhalki, By Its Chief Officer vs. Gurappa (Dead) by Lrs and another, 2015(4) RCR (Civil) 637, M/s Makhija Construction and Enggr. Private Limited vs. Indore Development Authority and others 2005(2) Civil Court Cases 790, Ramchandra Dagdu Sonavane (Dead) by L.Rs. vs. Vithu Hira Mahat (Dead) by L.Rs. and others, 2010(6) RCR(Civil) 367, Gangai Vinayagar Temple and others vs. Meenakshi Ammal and others 2009(4) RCR(Civil) 696, Commissioner of Endowments and others vs.**

Vittal Rao and others, 2005 AIR (SC) 454. Further reference has been made to judgment of the Rajasthan High Court **Kanhaiya Lal Sharma vs. Narendra Kanwar and another, 2007(2) W.L.C. 629.**

I have heard counsel for the petitioners, perused the paper book particularly various annexures, a part of the records.

Before advertng to the submissions made by counsel for the petitioners, it is appropriate to extract a relevant part of Section 11 of the CPC, reads thus:-

“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 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.”

Hon'ble the Supreme Court of India in a catena of judgments has laid down the law relating to essential elements that need to be satisfied before a plea of res judicata can be raised by a party. In **Sheodan Singh vs. Daryao Kunwar, AIR 1966 SC 1332**, it was held as under:-

“A plain reading of section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely -(i) the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit; (ii) The former suit must have been a

suit between the same parties or between parties under whom they or any of them claim; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and (v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.”

A plain reading of the aforesaid extract leaves no manner of doubt that to constitute *res judicata*, the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit. Another pre-requisite is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. In the case at hand, the first suit was filed by Amarjit Singh Virk in January 2006 that culminated in ex parte judgment and decree against the defendants but later the said ex parte judgment and decree was set aside on the application filed by the petitioners. In the suit filed by Amarjit Singh Virk, petitioners Jiwan Singh Virk and Harpreet Singh Virk were impleaded as defendant Nos. 1 and 2 and defendant No. 3 is the PSIEC as the plot in question is stated to be allotted by PSIEC in favour of Charan Singh Saini through whom Jiwan Singh Virk is claiming right in the suit property. Indisputably, Sandeep Maggo who filed the subsequent suit in November 2006 is not a party to the suit filed by Amarjit Singh Virk.

In view of the above, the former suit filed by Amarjit Singh Virk is still pending. Parties to both the suits are not the same nor they litigated under the same title. As such, it can be safely held that if the present case is examined on the touchstone of principles laid down in **Sheodan Singh's case (supra)**, it can be safely held that plea of the petitioners by invoking Section 11 of the CPC is patently misconceived and has rightly been rejected. I would hasten to add that counsel for the petitioners has failed to advance any arguments much less meaningful and convincing as to how claim of respondent/plaintiff for specific performance of agreement(s) propounded by him or in the alternative for recovery of approximately Rs. 68 Lakhs can be decided in the suit filed by Sandeep Maggo even if agreement set up by the plaintiff is accepted to be correct in the pending Regular Second Appeal, filed by Sh. Amarjit Singh Virk.

Much stress has been laid by counsel for the petitioners that the principle of *res judicata* also binds the co-defendants if the relief given or refused by earlier decision involved a determination of lis between co-defendants. For this purpose, he has referred to judgment in **M/s Makhija Construction and Enggr. Private Limited's case (Supra)**. In para 16 of the judgment, Hon'ble the Apex Court has referred to the judgment passed way back in 1939 in **Munni Bibi vs. Trilokinath 58 IA 158, 165** wherein it has been held that to apply the rule of *res judicata* as between co-defendants, three conditions are requisite namely, (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally

decided. In view of the discussion made hereinbefore, the petitioners cannot derive any advantage from the ratio laid down in **M/s Makhija Construction and Enggr. Private Limited's case (Supra)** that principle of res judicata bind the co-defendants.

Before parting with this order, it is pertinent to mention that issue of res judicata is a mixed question of law and fact, required to be decided by framing an issue and on the basis of evidence to be adduced by the parties. The petitioners, at the stage of case being pending for evidence, filed the instant application with a clear intent to delay trial of the suit pending since 2006. The trial court failed to appreciate if the petitioners had raised any such question of suit being barred by res judicata, requiring an issue to be framed in this regard and decided in accordance with law. However, as the trial court had decided the application on merits, there was no alternative with the court except to examine the correctness of the order. As a matter of fact, both the suits should have been decided simultaneously by the same court. Had it been so, a mischievous attempt of the petitioners to stall the proceedings at the cost of wastage of time, money and energy of the stakeholders particularly precious time of the courts would have been avoided.

For the foregoing reasons, the petition fails and is accordingly dismissed in limine.

(Rekha Mittal)
Judge

22.11.2017

paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No