

HONOURABLE SRI JUSTICE P. NAVEEN RAO

CIVIL REVISION PETITION No.6696 of 2017

Date :20.2.2018

Between :

Veerareddy Damodar Reddy s/o. late Bhasker Reddy,
50 years, Businessman, r/o. Gandhinagar, Hyderabad
and another.

.... Petitioners

And

Ch.Yashoda Devi w/o. late Narsimha Reddy, 87 years,
Household, r/o.H.no.1-2-251, Siddipet Road, Jangaon
and others.

.... Respondents

The Court made the following:



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ORAL ORDER:

Petitioners are plaintiffs. Suit filed to grant decree of declaration that the plaintiffs are absolute owners of the suit schedule property, direct the defendants or any one else claiming through them to deliver vacant possession and to award costs. Suit schedule property is plot to an extent of 250 sq yards in Survey No.461/4, Siddipet road, Jangaon town and mandal. Defendants 4 and 5 filed I.A No. 1140 of 2012 praying to dismiss the suit as barred by principle of res-judicata. The said I.A was considered and by order dated 17.7.2015 the Court below observed that the issue of res-judicata is a mixed question of fact and law, directed calling up the said I.A. along with the suit. Defendants 4 and 5 filed I.A.No.206 of 2017 to frame additional issue, 'whether the suit is barred by res-judicata' and said IA was ordered on 01.09.2017 and additional issue was framed. Thereafter, defendants 4 and 5 filed I.A No.223 of 2017 under 14 Rule 2 (2) (b) of CPC to decide the additional issue as preliminary issue. The Court below by the order against which this revision is filed allowed the petition.

2. Heard learned counsel for petitioners Sri C A R Seshagiri Rao and Sri S Chalapathi for respondents 1 and 2.

3. Learned counsel for petitioners submitted that on earlier occasion I.A. No. 1140 of 2012 was filed by defendants 4 and 5 praying to dismiss the suit as barred by res-judicata; the Court below having observed that it is a mixed question of fact and

law directed to call the said application along with the suit. The said order still holds the field as no revision was preferred against the said order. While so, it is not permissible for the defendants to file the present application to decide principle of res-judicata as preliminary issue. According to learned counsel for petitioners, merely because an additional issue was framed, cannot give rise to fresh cause of action to the defendants to file this application and the Court below failed to appreciate this contention. He would submit that in accordance with provision contained in Order 14 Rule 2, if an issue involves mixed questions of facts and law, the Court must decide such issues finally and cannot decide as preliminary issue. In the case on hand, issue of res-judicata requires consideration only after the evidence is recorded.

4. Per contra, Sri S Chalapathi, learned counsel appearing for respondents 1 and 2 herein submitted that consequent to framing of additional issue by the Court below on 1.9.2017, the present application was moved. In view of provision contained in Order 14 Rule 2 it is permissible for the Court to consider maintainability of the suit on principle of res-judicata as preliminary issue and therefore this application was validly moved. He therefore supports view taken by the trial Court in accepting plea of defendants 4 and 5 to consider res-judicata as preliminary issue.

5. In the light of the submissions made by the learned counsel, only issue that arise for consideration is whether the Court below erred in accepting plea of defendants 4 and 5 to consider issue of res-judicata as preliminary issue?

6. The issue of res-judicata is a mixed question of fact and law. Question whether subsequent suit is barred by earlier suit can be decided only after evidence is brought on record by respective parties. Without elaborating, suffice to note plaintiffs herein were not parties to earlier suit. According to defendants 4 and 5, plaintiffs claimed their title through defendants 1,5 and 15 in the earlier suit and decree having been passed in the said suit against those defendants, the plaintiffs being successors in interest the decree in the said suit is binding on them. This contention can be appreciated only after evidence is brought on record and not in isolation. Further, at the first instance when defendants 4 & 5 sought dismissal of the suit on the ground that it is hit by principle of res-judicata, the Court below observed that as res-judicata is a mixed question of fact and law, directed listing of I.A No. 1140 of 2012 along with the suit. Thus, merely because additional issue is now framed by the Court on res-judicata, it would not give rise to defendants 4 & 5 to resurrect the claim to decide the maintainability of the suit on the principle of res-judicata albeit as preliminary issue.

7. Primarily no issue can be decided as preliminary issue, if it involves a mixed question of fact and law. Admittedly in the instant case, at the first instance, trial Court observed that the principle of res-judicata is a mixed question of fact and law, which is binding on parties.

8. Order 14 Rule (2) reads as under:

“2. Court to pronounce judgment on all issues

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

9. It is clear from reading of this provision that Court can dispose of the case or part thereof on issue of law only if such issue relates to (a) jurisdiction of the Court; or (b) bar to a suit is created by any law. In other words, if disputed questions of fact and law are involved, it cannot be disposed of as preliminary issue.

10. This very issue has fallen for consideration in **RAMESH B DESAI Vs. BIPIN VEDILAL MEHTA**¹ on scope of power of Court under Order 14 Rule 2 CPC, by following earlier decision in **MAJOR S.S.KHANNA**, Supreme Court held as under:

“**13.** Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in *Major S.S. Khanna v. Brig. F.J. Dillon* [(1964) 4 SCR 409 : AIR 1964 SC 497] and it was held as under: (SCR p. 421)

“Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try

¹ (2006) 5 SCC 638

those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit.”

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.”

11. Furthermore, this provision vests discretion in the Court. In the case on hand, at the earlier point of time, trial Court exercised its discretion and held that issue of res-judicata is a mixed question of law and fact, directed the IA to be taken up along with the suit. In the same suit, it is not open to take a different view and to consider the same issue as preliminary issue. Merely because, Court has framed an additional issue on ‘res-judicata’ is no ground to take up the same as preliminary issue. Thus, order against which this revision is filed is not sustainable and it is accordingly set aside. Revision is allowed. Having regard to the same, miscellaneous petitions, if any pending, are closed. No costs.

P NAVEEN RAO, J

DATE:20.02.2018
TVK

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