

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No. 8 of 2017 (O&M)
Date of Decision: 21.05.2019

Tejbir and another

...Appellants

VERSUS

Ram Gopal and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Johan Kumar, Advocate
for the appellants.

Mr. Y.P. Khullar, Advocate
for respondents no. 1 and 2.

SURINDER GUPTA, J. (Oral)

Heard.

Kasumi daughter of Sukhiya widow of Gulzari @ Bhasu filed
suit seeking the relief of declaration and joint possession as follows:-

“That the plaintiff, therefore, prays that a decree for declaration to the effect that the plaintiff is a co-sharer and in joint possession to the extent of ½ in the suit land mentioned in para no. 2(a) and (b) of the plaint, be passed in favour of plaintiff and against the defendants with costs of suit. In case, the defendants do not admit the joint possession of the plaintiff in the suit land alongwith them, then a decree for joint possession as a consequential relief be also granted or any other relief which the Hon'ble Court may deem proper be also awarded.”

Suit of plaintiff-Kasumi was dismissed by learned trial Court.

She went in appeal, which was accepted by Additional District Judge,

Faridabad. Defendants in that suit filed RSA No. 3086 of 1997, which was dismissed on 12.08.2009 and Special Leave Petition against that judgment was dismissed by Hon'ble Supreme Court vide order dated 13.05.2010. One of the issues in that suit was as to whether plaintiff i.e. Kasumi daughter of Sukhiya was co-sharer in the suit land and findings on this issue were recorded in her favour. After decision of Special Leave Petition, Ram Gopal and Radhey Shyam, who were parties in the earlier suit again filed suit seeking relief of declaration and permanent injunction to the effect that judgment and decree dated 01.09.1997 passed by Additional District Judge, Faridabad in the earlier suit and judgment and decree of this Court dated 12.08.2009 as well as of Hon'ble Supreme Court in SLP be ignored. Learned trial Court held the suit as barred by principle of *res judicata* and dismissed the same. In appeal, the matter was again remanded with observation that learned trial Court while recording findings has not followed the procedure as required under the law.

The question, which arises for consideration in this appeal, is as to whether learned trial Court while recording findings on the issue that suit is barred by principle of *res judicata* or is not maintainable has adopted due process of law?

Perusal of judgment of learned trial Court shows that after framing of issues, when the case was at evidence stage, learned trial Court without affording opportunity to plaintiff or to defendants to prove that the suit is barred by principle of *res judicata* proceeded to decide the same on the basis of documents on record, which were not exhibited or tendered in evidence. The question as to whether suit is barred by principle of *res judicata* is a mixed question of law and fact and before deciding this issue

learned trial Court was required to frame specific issue, provide opportunity to parties and then record its findings. Learned lower Appellate Court has looked into this fact that learned trial Court before treating this issue as preliminary issue has not passed any order to this effect and remanded the case with direction to hold trial in respect of all the issues framed by the trial Court.

In view of facts discussed above, I am of the considered opinion that the issue as to whether suit filed by plaintiff is barred by principle of *res judicata* requires to be determined before proceeding further in the matter. The order passed by learned lower Appellate Court directing the lower Court to proceed further to decide all the issues requires to be modified to the extent that learned trial Court will frame a specific issue as to whether suit is barred by principle of *res judicata*, treat it as preliminary issue; provide opportunity to both the parties to produce evidence on this issue; and decide the same before proceeding further in the matter in accordance with law.

It is pertinent to mention that onus to prove the plea that suit is barred by principle of *res judicata* is on the defendants-appellants, as such, they will be first called to produce evidence on this issue.

This appeal stands disposed of in view of above observations.

It is, however, made clear that nothing observed in this order shall be treated as expression of opinion on merits of the case.

May 21, 2019

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No