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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 13th December, 2022*

+ RFA 121/2021 & CM APPL. 7373/2021

AMITA SHUKLA

..... Appellant

Through: Mr. Sunil Malhotra,
Ms. Pratibha and Ms. Namrata Saniyal,
Advocates.

versus

SHRI MADAN LAL ARORA

..... Respondent

Through: Mr. Dinesh Kumar Gupta,
Mr. Vidit Gupta and Mr. Chetan Singh,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. By way of the present appeal, the Appellant challenges the judgment dated 16.11.2019, passed by the Trial Court in CS(OS) 2438/2016. By the impugned judgment, the Trial Court has allowed the application preferred by Defendant No. 1 under Order VII Rule 11 read with Section 151 CPC. The Appellant herein was the Plaintiff in the suit before the Trial Court and Defendant No. 1 is the Respondent herein and parties are hereinafter referred as per their litigating status before the Trial Court.

2. Plaintiff filed a suit for partition, possession and permanent injunction against the Defendants claiming 1/3rd share in the Ground floor of property bearing Plot No. 93, National Co-operative Housing Building Society, Delhi (hereinafter referred to as “the suit property”). Defendant No.1 is in actual physical possession of the ground floor of the property in question claiming to have purchased the same from Defendant No.2, who was proceeded *ex parte* on 29.10.2014.

3. As per the facts set out in the plaint, one Sh. Sujan Singh S/o Sh. Shyam Singh, who was the original allottee of Plot No.93, as referred above, by virtue of registered perpetual sub-lease deed dated 15.12.1981, sold out the plot to three brothers namely, Sh. Vipin Kumar Shukla, Sh. Vijay Kumar Shukla and Sh. Anil Kumar Shukla. After raising construction on the plot, the three brothers occupied different floors of the property and in accordance with the mutual understanding, Sh. Vipin Kumar Shukla occupied the ground floor, Sh. Vijay Kumar Shukla occupied the first floor and Sh. Anil Kumar Shukla occupied the second floor and terrace.

4. After the death of Sh. Vipin Kumar Shukla on 25.09.1999 and his wife on 02.11.2005, the ground floor of the property was inherited by their son Sh. Vishal Kumar Shukla, daughter Ms. Aradhika Sharma and Smt. Shakuntala Devi, mother of Sh. Vipin Kumar Shukla, in equal shares.

5. Apprehending that her brother Sh. Vishal Kumar Shukla may dispose of the entire ground floor, ignoring her rights, Ms. Aradhika Sharma filed a suit for permanent injunction in the Trial Court against her brother Sh. Vishal Kumar Shukla and her paternal uncles, Sh. Vijay Kumar Shukla and Sh. Anil Kumar Shukla, seeking to restrain them from selling, alienating, transferring or parting with possession of 1/3rd share of the ground floor in the property. Only Sh. Anil Kumar Shukla, who is the husband of the present Plaintiff, appeared in the said case while the others were proceeded *ex parte* on 02.04.2008. The Trial Court granted interim injunction in favour of Ms. Aradhika Sharma, however, despite the said order, Sh. Vishal Kumar Shukla obtained a relinquishment deed in his favour from his grand-mother Smt. Shakuntala Devi and sold the entire ground floor to Sh. D.P. Joshi, Defendant No.2 therein, who in turn sold the same to Sh.

Madan Lal Arora, Defendant No.1 therein and Respondent herein.

6. As per the case of the Plaintiff, Ms. Aradhika Sharma being one of the legal heirs of Sh. Vipin Kumar Shukla to the extent of 1/3rd undivided share in the ground floor of the property, sold her share in favour of the Plaintiff through an Assignment Deed and GPA dated 28.03.2014, for a sale consideration of Rs.15 lakhs. On the basis of the Assignment Deed, Plaintiff, who is the wife of Sh. Anil Kumar Shukla, filed the present suit seeking partition of the ground floor of the property to the extent of 1/3rd share as well as possession and permanent injunction.

7. On being served with the summons, Defendant No. 2 chose not to appear and was proceeded *ex parte* on 29.10.2014, while Defendant No. 1 along with the written statement, preferred an application under Order VII Rule 11 CPC, seeking rejection of the plaint. The grounds urged in the application were manifold, including that the suit was barred by doctrine of constructive res-judicata. The plea was predicated on a prior suit instituted by the husband of the Plaintiff, Sh. Anil Kumar Shukla for partition, being ***CS(OS) 1491/2008, titled 'Sh. Anil Kumar Shukla v. Sh. Vishal Shukla and Ors.'***, before this Court against various Defendants, including Ms. Aradhika Sharma. The said suit was decreed on 06.05.2013 and Defendant No. 1 was declared as owner and in possession of the ground floor. Thus, rejection of the plaint was sought on the ground that the final decree dated 06.05.2013 was never challenged by Ms. Aradhika Sharma and the rights of Defendant No.1 qua the ground floor stood crystalized and therefore, the Plaintiff who is claiming rights to the suit property through Ms. Aradhika Sharma, will also be bound by the final decree. The suit therefore, according to Defendant No.1, was barred by constructive res-judicata and the plaint deserved to be rejected.

8. The other grounds raised in the application were that the suit was without any cause of action and the Assignment Deed as well as

the GPA executed by Ms. Aradhika Sharma were forged and fabricated and did not confer any right and title.

9. Application was opposed by the Plaintiff on the ground that under the provisions of Hindu Succession Act, 1956, all the legal heirs of late Sh. Vipin Kumar Shukla became entitled to equal shares in the property left behind by him and no single shareholder could have dealt with the shares of other co-sharers, in any manner. Since Ms. Aradhika Sharma was legally entitled to 1/3rd share, the sale/transfer of the ground floor of the property to the extent of her 1/3rd share, by her brother to Defendant No. 2, was null and void and further, she had every right to sell/transfer her share in favour of the Plaintiff. It was also urged that being a *bona fide* purchaser having paid a consideration of Rs.15 lakhs, Plaintiff is entitled to claim partition and the suit is not barred by doctrine of constructive res-judicata.

10. The Trial Court, after enumerating the essential ingredients of doctrine of constructive res-judicata embodied in Section 11 CPC, observed that Plaintiff in the present suit was claiming partition of the ground floor of the property, which formed part of the subject matter in the earlier suit being CS(OS) 1491/2008, wherein Ms. Aradhika Sharma was arraigned as Defendant No. 2 and Sh. Madan Lal Arora and Sh. D.P. Joshi were Defendants No. 7 and 6 respectively and since a final decree of partition has been passed by this Court, which was never challenged by Ms. Aradhika Sharma, the bar of res-judicata was clearly attracted. Since the Assignment Deed etc., on which the present suit is predicated, was executed after the final decree on 06.05.2013, Ms. Aradhika Sharma had no right to transfer her share to the Plaintiff. On this basis, the application Order VII Rule 11(d) CPC was allowed and the plaint was rejected.

11. Contention of the Plaintiff before this Court is that bar of res-judicata cannot be decided at the stage of an application under Order

VII Rule 11 CPC and is a triable issue. In any case, Trial Court has wrongly applied the principles of res-judicata, as the suit filed by the Plaintiff relates to ground floor of the suit property claiming 1/3rd share purchased from Ms. Aradhika Sharma and this issue was not before the High Court in the earlier suit, which related to partition of the entire suit property in three shares at the behest of one of the legal heirs of Sh. Sujan Singh. Section 11 CPC comes into play when the matter in the subsequent suit is directly and substantially in issue in the former suit between the same parties or parties under whom they or any of them claim title. Plaintiff has claimed partition of 1/3rd share in the ground floor of the property in question and this issue can only be decided after pleadings are complete and evidence is led. Arguments were also addressed on merits of the rights of Ms. Aradhika Sharma under the Hindu Succession Act, 1956 being one of the legal heirs of Sh. Vipin Kumar Shukla.

12. Counsel for the Defendant No. 1, *per contra*, supported the impugned judgment and argued that the principles of constructive res-judicata were clearly attracted in the present case and the suit was barred by law. The final decree passed by this Court was never challenged by Ms. Aradhika Sharma and the Plaintiff who claims right to the ground floor in the suit property is also bound by the final decree. Once Defendant No. 1 has been held to be owner in possession of the ground floor of the suit property, in the previous suit, it was not open to the Plaintiff to claim rights on the basis of an Assignment Deed executed by Ms. Aradhika Sharma when the latter has herself lost the right in the property.

13. I have heard learned counsels for the parties and examined their contentions.

14. The primordial question that arises for consideration before this Court is whether the issue of a suit being barred by principles of res-

judicata embodied in Section 11CPC can form a ground for rejection of the plaint under Order VII Rule 11 CPC.

15. The issue, in my view, is no longer *res integra*. In a recent judgment in ***Srihari Hanumandas Totala v. Hemant Vithal Kamat and Others*, (2021) 9 SCC 99**, the Supreme Court has held as follows:

“18. Section 11 CPC enunciates the rule of res-judicata : a court shall not try any suit or issue in which the matter that is directly in issue has been directly or indirectly heard and decided in a “former suit”. Therefore, for the purpose of adjudicating on the issue of res-judicata it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on res-judicata, before referring to res-judicata as a ground for rejection of the plaint under Order 7 Rule 11. R.C. Lahoti, J. (as the learned Chief Justice then was), speaking for a two-Judge Bench in V. Rajeshwari v. T.C. Saravanabava [V. Rajeshwari v. T.C. Saravanabava, (2004) 1 SCC 551] discussed the plea of res-judicata and the particulars that would be required to prove the plea. The Court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the “former suit” while adjudicating on the plea of res-judicata : (SCC pp. 556-57, paras 11 & 13)

“11. The rule of res-judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

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13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res-judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Mohd. Salie Labbai v. Mohd. Hanifa [Mohd. Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780] the basic method to decide the question of res-judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res-judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh v. Bhooralal [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of res-judicata and the plea of estoppel under Order 2 Rule 2 of the

Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy. of State for India in Council [Kali Krishna Tagore v. Secy. of State for India in Council, 1888 SCC OnLine PC 17 : (1887-88) 15 IA 186 : ILR (1889) 16 Cal 173] pointed out that the plea of res-judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.”

(emphasis supplied)

19. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether res-judicata can be the basis or ground for rejection of the plaint. In *Kamala v. K.T. Eshwara Sa* [*Kamala v. K.T. Eshwara Sa*, (2008) 12 SCC 661], the trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. S.B. Sinha, J. speaking for the two-Judge Bench examined the ambit of Order 7 Rule 11(d) CPC and observed : (SCC 668-69, paras 21-22)

“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.”

(emphasis supplied)

20. *The Court further held : (Kamala case [Kamala v. K.T. Eshwara Sa, (2008) 12 SCC 661] , SCC p. 669, paras 23-25)*

“23. The principles of res-judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”

(emphasis supplied)

21. *The above view has been consistently followed in a line of decisions of this Court. In Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust [Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, (2012) 8 SCC 706 : (2012) 4 SCC (Civ) 612] , P. Sathasivam, J. (as the learned Chief Justice then was), speaking for a two-Judge Bench, observed that : (SCC pp. 713-14, paras 10-11)*

“10. ... It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order 7 Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.

11. This position was explained by this Court in Saleem Bhai v. State of Maharashtra [Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557] , in which, while considering Order 7 Rule 11 of the Code, it was held as under : (SCC p. 560, para 9)

'9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.'

It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the court to scrutinise the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property [Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184] and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express [Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100].”

16. From the aforesaid passages, it becomes palpably clear that: (A) rule of res-judicata is a rule of estoppel by judgment, based on public policy, that there should be finality to litigation and no one should be vexed twice for the same cause; (B) principles of res-judicata when attracted would bar another suit under Section 12 CPC, however, this is a mixed question of law and facts, requiring not only examination of the plaint but other evidence, including the order passed in the earlier suit and may be taken either as a preliminary issue or at the final hearing, but cannot be determined at the stage of Order VII Rule 11 CPC; and (C) for purpose of deciding an application under clauses (a) and (d) of Rule 11 of Order VII CPC,

averments in the plaint are germane and pleas set up by Defendant as a defence would be wholly irrelevant.

17. Relevant it is to note that in the aforesaid judgment, the Supreme Court laid down the principles to determine whether a suit is barred by res-judicata and held as under:

“25.3. To determine whether a suit is barred by res-judicata, it is necessary that (i) the “previous suit” is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit.”

18. A Co-ordinate Bench of this Court in ***Sh. Sundar Singh v. Ajay Pal Singh & Ors.***, in ***C.R.P. 92/2021***, following the judgment in ***Srihari Hanumandas Totala (supra)*** has also taken a view that the objection of res-judicata is ordinarily not to be taken as a ground for rejection of plaint under Order VII Rule 11 CPC and at best could be taken up as a preliminary issue. It is also settled that while deciding the application under Order VII Rule 11 CPC, it is only the plaint which has to be seen in its demurrer along with the documents and the defence of the Defendant is irrelevant.

19. In the present case, two things clearly emerge, firstly, although no doubt, this Court has passed a decree holding Defendant No. 1 to be the owner in possession of the ground floor of the suit property, however, the fact remains that the said suit was filed by Sh. Anil Kumar Shukla for partition of the entire suit property, claiming right to the second floor. From the plaint filed in the earlier suit, it is clear that Sh. Anil Kumar Shukla had averred that he was in possession of the second floor along with terrace and since there was an apprehension that Defendant No. 1 therein i.e. Sh. Vishal Kumar Shukla has or is disposing his rights in the property, Plaintiff was no longer interested in remaining a joint owner of the property. In this

backdrop, suit was filed seeking partition of the property in three equal shares amongst the three brothers, i.e. legal heirs of late Sh. Sujan Singh. The Court decreed the suit declaring the Plaintiff therein to be the owner and in possession of second floor and terrace and Defendant No. 1 herein as owner and in possession of the ground floor. No issue with respect to the rights of Ms. Aradhika Sharma, who is admittedly the daughter of Sh. Vipin Kumar Shukla to 1/3rd share of the ground floor was framed or decided. Applying the judgment in *Srihari Hanumandas Totala (supra)*, since the issue in the present suit was not directly and substantially in issue in the former suit and nor was the earlier suit between the same parties, in my view, the principles of constructive res-judicata would not be attracted and the Trial Court has erred in allowing the application filed under Order VII Rule 11 CPC. It is not disputed by Defendant No.1 that Ms. Aradhika Sharma is a legal heir of late Sh. Vipin Kumar Shukla or that the latter died intestate.

20. Counsel for the Plaintiff is also right in his submission that none of the crucial questions having a bearing on the right of Ms. Aradhika Sharma, i.e. the right of Sh. Vishal Kumar Shukla to sell the entire ground floor, without any authorization or relinquishment from Ms. Aradhika Sharma, relinquishment by Smt. Shakuntala Devi in favour of Sh. Vishal Kumar Shukla etc. were in issue in the earlier suit. In fact, it was also pointed out during the course of arguments that DDA had refused to pass an order of substitution in favour of Sh. Vishal Kumar Shukla in the absence of disclosure of all the legal heirs of Sh. Vipin Kumar Shukla and therefore, the question of the share of Ms. Aradhika Sharma is still undecided.

21. The appeal accordingly succeeds and is allowed. The impugned order dated 16.11.2019 is set-aside and the suit is restored to its original position at the stage at which it was pending, when the

application under Order VII Rule 11 CPC was allowed and the plaint was rejected. The Trial Court shall proceed with the suit and/or any other application(s) which were pending, in accordance with law.

22. Copy of this order be forwarded to the concerned Trial Court so that the Trial Court record can be requisitioned.

23. Appeal along with pending application is hereby disposed of.

JYOTI SINGH, J

DECEMBER 13, 2022/shivam

