

16 **04.12.
2023**

Ct. No. 04

Ab

**SAT 21 of 2022
IA No. CAN 1 of 2022**

**Goutam Rana
Vs.
Pradip Singha @ Pradip Kumar Singha and others.**

**Mr. Rabindranath Mahato,
Mr. Aritra Sankar Ray.**

... for the appellant.

The instant second appeal arises from a judgment and decree passed by the first appellate court reversing the judgment and decree of the trial court holding that the suit filed by the plaintiff/appellant for declaration of right, title and interest in respect of the property on the premise that the deed of gift executed by the donor is not legally valid, is not maintainable in view of the embargo created under Order IX Rule 9 of the Code of Civil Procedure.

It is undeniable that the selfsame plaintiff/appellant instituted a Title Suit 17 of 1990 for declaration of right, title and interest in respect of the subject property impleading the persons claiming their right, title and interest on the basis of the purported deed of gift purportedly executed by the donor herself. The donor was impleaded as first defendant, who, according to the plaintiff/appellant, categorically and candidly took a stand that the deed of gift is not valid in the eye of law, yet such defence having surfaced in the said suit, the plaintiff/appellant allowed such suit to be dismissed for non-prosecution/default on 7th February 1997.

After a gap of few years, the present suit is filed seeking the selfsame relief i.e. declaration of right, title and interest in respect of the subject property and that the deed of gift is not valid in the eye of law, which was initially decreed by the trial court on the ground that

since the issues were not finally decided in an earlier suit, there is no fetter and/or bar in instituting a subsequent suit. However, the appellate court after noticing the language employed under Order IX Rule 8 and 9 of the Code arrived at a conclusion that the subsequent suit is based upon the same set of facts containing the identical relief is not maintainable.

The Counsel for the appellant submits that the moment issues have not been finally determined by the court, the principle of *res judicata* or the estoppel does not come to play and, therefore, the appellate court has committed a grave error in holding that the suit is not maintainable. It is further submitted that there is a distinction between the issues and the cause of action, which cannot be intermingled nor infused within one core and, therefore, the appellate court ought to have taken into account that the bar of the subsequent suit can only apply provided the subsequent suit is based upon the selfsame cause of action. He, thus, submits that it is a fit case where the appeal should be admitted having involved substantial question of law.

It is no longer *res integra* that the issues framed in a judicial proceeding have its independent and separate existence in relation to the disputes involved therein and if decided finally shall attract the principle of *res judicata* enshrined under Section 11 of the Code in a subsequent suit.

The principle of *res judicata* is based on the public policy of the country that every litigation must achieve finality and the issues, which have already been decided by the court finally, should not be reopened nor the person can be permitted to re-agitate the same in a subsequent proceeding. It is one of the cardinal facets of an estoppel based on an issue and commonly refers to as issue estoppel.

We had no hesitation in our mind that the principle of *res judicata* applies within the four corners of the

provisions incorporated in this regard under Section 11 of the Code, but we hastened to add that we are also conscious and aware of the principle of maintainability of the suit and the embargo created by the statutory provisions. The bar to institute a further suit cannot be treated as akin to a principle of *res judicata*, as in former case it strikes at the root of the competence of the court to entertain such suit. On the other hand, the principle of *res judicata* being the mixed question of fact and law depends upon the quality of the evidence produced before the court and the determination or ascertainment of the issues involved in the earlier suit and bringing a parity in the issue involved in a subsequent suit.

It is fallacious to bring both the concepts within a singular bracket when undeniably both operate in a different sphere or in other words, in different circumstances. Order IX Rule 8 of the Code postulates that on a day when the suit is fixed for hearing, the defendant appears but the plaintiff does not appear, the court may either adjourn the hearing or may proceed to dismiss the suit. Order IX Rule 9 of the Code creates an embargo in institution of a subsequent suit based on the cause of action being similar to that of the earlier suit in the event the suit is dismissed under Rule 8 of Order IX of the Code.

Our attention is drawn to Exhibit-5 being the order by which the earlier suit was dismissed for default. It is clearly revealed therefrom that on the day when the earlier suit was dismissed for default, the defendants appeared and, therefore, such dismissal was under Rule 8 of Order IX of the Code and attracts an embargo created under Rule 9 of Order IX of the Code.

So far as the cause of action and the issues are concerned, it is undeniable that the cause of action has not been defined in any statute rather traces its origin and its advancement through a common law principle. It is uniformly defined as bundle of facts pleaded by a

plaintiff in support of the relief claimed therein inviting the court to adjudicate thereupon. It cannot be a stray fact or date, but the entire facts pleaded in the pleading are required to be deciphered upon which the relief is claimed.

The earlier suit was instituted on the premise that the right, title and interest in respect of a subject property has been shrouded by an act of the defendants claiming their independent right, title and interest to the exclusion of the plaintiff on the basis of a deed of gift executed by the donor. The cause of action relates to denial of title by the defendants on the strength of a deed of gift and, therefore, the issues, which might have involved in the earlier suit, would have been on the basis of the aforesaid facts. The subsequent suit is also instituted claiming a right, title and interest de hors the deed of gift and, therefore, we do not find any difficulty in applying the principles of bar recognized in Order IX Rule 9 of the Code.

Though feebly, it is sought to be contended that the parties in both the suits were different, we do not intend to go into the aforesaid aspect, but the moment we find that the plaintiff/appellant pleaded that his title has been denied based on the deed of gift, the cause of action in both the suits cannot be segregated, separated as it remains similar and identical and, therefore, we do not find that the instant appeal involves substantial question of law and the same is hereby dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

In view of the dismissal of the appeal itself, the connected application being CAN 1 of 2022 has become infructuous and the same is also dismissed.

There shall, however, be no order as to costs.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)

