

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Biswaroop Chowdhury

C.O. 3839 of 2022

Choleman Mandal & Ors.

Vs.

Jalal Biswas & Ors.

For the petitioners : Mr. Sandip Das

Last Heard on : 18.12.2023

Delivered on : 22.12.2023

Biswaroop Chowdhury, J:

The petitioners before this Court are the defendants in a partition suit and is aggrieved by the order dated 20.09.2022 passed by Learned Civil Judge (Senior Division), Bongaon in Title Suit No.12 of 2016.

The case of the petitioners before the Learned Court below may be summed up thus:-

1. The opposite No.1 and 2 of the present application filed a suit for partition and registered the same before the Learned Civil

Judge (Senior Division), Bongaon, North 24 Parganas vide Title Suit No. 34 of 2014 against the petitioners and others.

2. The petitioners entered appearance in the said suit.
3. On December 01, 2015 Learned Civil Judge (Senior Division), Bongaon, North 24 Parganas was pleased to dismiss the said title suit no. 34 of 2014 for default.
4. In suppression of the fact of dismissal of Title Suit No.34 of 2014 for default the opposite No.1 and 2 brought another suit for partition on the self same subject matter before Learned Civil Judge (Senior Division), Bongaon, North 24 Parganas, being Title Suit No.12 of 2016.
5. The alleged case of the opposite party Nos.1 and 2 as would appear from the plaint of Title Suit No.12 of 2016 is almost verbatim with that of plaint of Title Suit No.34 of 2014 save and except the change of the defendant No.10 in the array of the plaint and the purported cause of action as cited in paragraph No.7 thereof.
6. The petitioner pursuant to the institution of suit being Title Suit No.12 of 2016 filed application under Order 7 Rule 11 of the Code of Civil Procedure for dismissal of Title Suit No.12 of 2016.

7. The Learned Civil Judge (Senior Division), Bongaon by order No.63 dated 20.09.2022 was pleased to reject the application under Order 7 Rule 11 of the Code of Civil Procedure.
8. The petitioner being aggrieved by the order dated 20.09.2022 passed by Learned Trial Judge has come up with the instant application.

It is the contention of the petitioner that the Learned Court below should have held that the opposite party No.1 and 2 previously filed the suit for the self same cause of action but the same was dismissed and should have held that the present suit is barred under the law. It is further contended that the Learned Court below should have held that the principles of *res judicata* is applicable and ought to have allowed the prayer of the petitioners. Pursuant to filing of this application notice was issued upon the opposite parties. As opposite parties did not appear the matter was heard in their absence.

Heard Learned Advocate for the petitioner perused the petition filed and materials on record. In the instant case as the issue is with regard to rejection of application under Order 7 Rule 11 C.P.C which was filed on the ground of *res judicata* it is necessary to consider the provisions contained in Order 7 Rule 11 and Section 11 of the Code of Civil Procedure.

Order 7 Rule 11 of the Code of Civil Procedure provides as follows:-

Rejection of plaint- The plaint shall be rejected in the following cases-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provisions of Rule 9.

Thus upon reading the provision contained in Rule 11 of Order 7 of the Code of Civil Procedure it will appear that when the plaint does not fulfill the requirement laid down under the said rule or from reading of the plaint the suit appears to be barred by

any law the plaint shall be rejected. Thus it is from the reading of the plaint itself the court has to come to the conclusion as to whether the plaint shall be rejected under Rule 11 of Order 7 of the Code of Civil Procedure. In the case of **Bhau Ram vs. Janak Singh & Ors.** reported in **AIR 2012 S.C 3023** the Hon'ble Supreme Court observed that while considering an application under Order VII Rule 11 C.P.C the court has to examine the averments in the plaint and the pleas taken by the defendants in the written statement would be irrelevant.

In the instant matter nowhere in the application under Order 7 Rule 11 C.P.C the petitioner has been able to show that the application is made on any of the ground provided under the Clauses of Rule 11 Order 7 of the Code of Civil Procedure for which the plaint should be rejected.

Now with regard to the issue of *res judicata* as contended by the petitioners it is necessary first and foremost to consider the provision of *res judicata* as contained in Section 11 of the Code of Civil Procedure:-

S.11 Res judicata - 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

a 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.

Explanation I.- The expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI.- Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

Upon considering the provision contained in Section 11 of the Code of Civil Procedure it will appear that the principles of *res judicata* applies with regard to either deciding a particular issue or a suit as a whole.

Thus in order to ascertain as to whether a suit is not maintainable on the grounds of *res judicata* the pleadings of the former suit, the issues framed and the findings on the said issues are to be taken into consideration before arriving at a finding.

In the case of **Erach Boman Khovar V Tukaram Shridhar Bhat and Anr.** reported in **AIR 2014 S.C 544** the Hon'ble Supreme Court observed that to attract the doctrine of *res judicata* it must be manifest that there has been conscious adjudication of an issue. A plea of *res judicata* cannot be taken aid of unless there is an expression of an opinion on the merits.

In the case of **C. Ramulu V C.Anjaneyulu** reported in **2014(1) Civil L.J 917 (AP)** the Hon'ble Court observed that where the previous suit was a simple suit for permanent injunction which was dismissed after trial there was no definite finding as to the plaintiffs title to the suit property in the previous suit. There was neither an issue on title in the previous suit nor a finding on title of the plaintiff in the previous suit. The only issue framed in the previous suit was whether plaintiff was entitled to permanent injunction as prayed for. Therefore the judgment of previous suit could not operate as *res judicata* in the present suit filed by plaintiff for the reliefs of declaration of his title to the suit property and for possession of the same.

In the case of **Yadaviah vs. State of Telangana** reported in **AIR 2023 S.C 3736** Para-43 the Hon'ble Supreme Court observed as follows:-

“By now it's a globally settled principle of common law jurisprudence that only determination which are fundamental would result in the application of doctrine of *res judicata*. Only those findings without which the court cannot adjudicate a dispute and also form the vital cog in the reasonings of a definite conclusion on an issue on merits, constitute *res judicata* between the same set of parties, in subsequent proceedings. However in the process of arriving at a final conclusion, if the Court makes any incidental, supplemental or non-essential observations which are not fundamental to the final determination, the

same would not tie down the hands of courts in future.”

Upon considering the petition of the petitioners under Order 7 Rule 11 of the Code of Civil Procedure nowhere it appears that either of the conditions mentioned in the provision of Order 7 Rule 11 C.P.C exists, neither from the petition filed it is clear as to how the suit is barred under the principles of *res judicata*. As *res judicata* involves both questions of law and fact the issue can be best decided upon trial on evidence. As the petitioners have already filed written statement the ISSUE of *res judicata* may be decided at the trial on evidence.

Thus this Court does not find any error in the order dated 20.09.2022 passed by the Learned Trial Court, for which this application should not be allowed.

Hence it is ordered that this Revisional Application stands disposed. Order dated 20.09.2022 passed by Learned Civil Judge (Senior Division), Bongaon in Title Suit No.12 of 2016 is affirmed. However it is made clear that this Court has not gone into merits of the suit and all points are left open to be decided at the time of trial. It is also made clear that this order shall also not prevent the parties to make necessary application in accordance with law.

[Biswaroop Chowdhury, J]