

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

CS/100026/1997
IA NO: GA/5/2023(Old No:GA/2439/1997)

SARDA DEVI CHOWDHARY
VS
SUSHIL CHOWDHURY AND ORS

BEFORE:
The Hon'ble JUSTICE SUGATO MAJUMDAR
Date: 1st December, 2023

Appearance:
Mr. Debnath Ghosh, Adv.
Mr. Sarosij Dasgupta, Adv.
Ms. Shomrita Das, Adv.
...for the plaintiff

Mr. Sabyasachi Choudhuri, Sr. Adv.
Ms. Ritupama De, Adv.
Mr. Arnab Sardar, Adv.
Mr. Souryadeep Ghosh, Adv.
...for defendant nos.5 to 9.

Mr. Bimalendu Das, Adv.
Mr. Shomrik Das, Adv.
...for defendant nos. 2 to 10.

The Court: The instant application is filed by the Defendant No.5 – 9 praying for dismissal of the suit/taking of the suit from the file/permanently staying the suit; recalling/vacating the interim order dated 11/04/1997 along with other prayers.

The present suit is filed by the Plaintiff praying for declaration that the memorandum of understanding being Annexure “E” to the plaint, is null and void and is not binding on the plaintiff; declaration that the Order passed in appeal No.504 of 1992 and Appeal No.555 of 1992 are not binding on the plaintiff; permanent injunctions, mandatory injunctions along with other prayers.

The sum and substance of the instant application may be summarized as follow:

Chowdhury family owned several properties as well as shares in the Defendant No.10 company. Disputes and differences cropped up among family members for which a suit was filed in this Court which was registered as Suit No.642 of 1991. All the disputes and differences were referred to one O.P. Mittal for conciliation. Disputes and differences were resolved in terms of a written settlement dated 18/10/1991. This was Mittal Settlement.

Mittal Settlement was challenged by the Defendant No. 3 & 4 as illegal, null and void in Suit No.410 of 1992 filed in this Court. Different interlocutory orders were passed in the suit. An application was filed under Order VII Rule 11 of the Code of Civil Procedure, 1908 which was allowed in terms of the Order passed on 03/07/1992. Two separate appeals were preferred against the said Order which were registered as Appeal No.504 of 1992 and Appeal No.555 of 1992. Various interlocutory orders were passed in the appeals. The matter went up to the Supreme Court of India and appropriate order was passed.

A petition was also made under Sections 397/398 of the Companies' Act 1956 by the Defendant No.5 and his family members relating to issue and allotment of 3800 number of shares in Defendant No.10.

Appeals were listed in the Division Bench. From 18/08/1993 onwards, the Division Bench passed different orders for settlement of the

disputes. Five orders were passed by the Division Bench on 14/10/1993, 18/11/1993, 17/12/1993, 20/12/1993 and 06/01/1994. In the year 1997, two applications were taken out by Sanjay Chowdhury, the Defendant No.2 on the basis of which the Order dated 17/03/1997 was passed in Appeal No.504 of 1992. On 25/03/1997 an application was filed by Sushil Chowdhury, the Defendant No.1 for recalling the Order dated 17/03/1997. While the application was pending, the instant suit was filed in the month of April, 1997. For complete adjudication of the dispute, Division Bench added the present Plaintiff, Sharda Devi Chowdhury as a party and she was represented by her counsel. The aforesaid two appeals were disposed of in terms of an order dated 22/05/1997.

In view of the Order passed by the Division Bench dated 22/05/1997, the instant application has been filed. It is pleaded in the application that the suit is barred by the principle of res-judicata and that the suit is also barred by law. Accordingly, prayers, aforesaid, are made.

Affidavit-in-Opposition is filed by the Plaintiff refuting the contentions of the instant application except those which are matter of record. The contentions of the Plaintiff, in nutshell, are that:

Annexure "G" of the plaint in Suit No.410 of 1992 does not contain any list of properties and no list of properties was annexed to the said Mittal Settlement. However, a copy of Mittal Settlement is annexed to the instant application.

It is further contended that neither in the consent order passed by the Appellate Court nor in the Mittal Settlement there was any provision for interference with the partnership business. The said judgement and decree dated 22/05/1997, as such, neither adjudicated upon anything on the business nor the assets and properties of the Plaintiff.

Memorandum of Understanding, forming part of the plaint was not subject matter of the judgement and decree dated 22/05/1997 passed by the Appellate Court.

In terms of the judgement and decree dated 22/05/1997, it was held that the orders passed in Appeal No.504 of 1992 and Appeal No.55 of 1992 are binding on the Plaintiff. But, according to the Plaintiff, the said judgement and decree is not binding on the Plaintiff.

Properties, business and co-ownership of the Plaintiff are neither affected by Mittal Settlement nor by the decree dated 22/05/1997.

According to the Plaintiff, the suit is maintainable and the instant application is liable to be dismissed.

Before advertng to the rival pleading and submissions made by the Learned Counsels, it would be convenient to consider the plaint case so that all the rival submissions and pleadings can be appreciated in proper perspective.

The plaint case is that:

The Defendant no.1 Sushil Chowdhury is the husband of the Plaintiff; the Defendant No.2 Sanjay Chowdhury is her son; the Defendant No.3, Devraj Chowdhury is her father-in-law; the Defendant No.4 Triveni

Devi Chowdhury is her mother-in-law; the Defendant No.5 Binod Kumar Agarwal is her brother-in-law; the Defendant No.6 is the wife of the Defendant No.5; the Defendant No.8 and 9 are two partnership firms and the Defendant No.10 is a company registered under Companies' Act, 1956.

The Plaintiff purchased various properties out of her *stridhana* which belong to her absolutely. The Plaintiff is also partner of various partnership businesses along with other defendants. The Defendant No.8 and 9 are the partnership concerns where the Plaintiff is a co-partner along with other defendants. Since the Plaintiff is a partner of the Defendant No.8 and 9, she has right, title and interest in the said partnership businesses and properties. But the Defendant No.5 dominates the said trade and businesses and derives incomes therefrom.

In the year 1991 disputes and differences cropped up between the Defendant No.1 and the Defendant No.3 for which Suit No.642 of 1991 was filed. The Plaintiff was arrayed as defendant in the said suit. The suit was settled.

Subsequently, disputes and differences cropped up between the Defendant No.1, 3 and 5. This dispute was settled at the intervention of the family friends and an agreement was arrived at. The Plaintiff was not a party to that agreement.

On 01/05/1992, the Defendant No.5, 6 and 7 initiated proceeding under Sections 397/398 of the Companies' act, 1956 in the Company Law

Board of competent jurisdiction. During pendency of such proceeding in the Company Law Board, the Defendant No.3 and 4 filed a suit being Suit No.401 of 1992 against the present Defendant No.1, 2, 5 and 10. This suit was for cancellation of reconciliation.

On 26/07/1993, the Company Law Board dismissed the petition on the ground of pendency of the Suit No.401 of 1992. Suit No.401 of 1992 was dismissed in terms of the Order dated 03/07/1992. Against the order appeals were preferred by the Defendant No.3 & 4.

The Plaintiff obtained copies of the orders dated 18/08/1993, 15/09/1993, 14/10/1993, 18/11/1993, 17/12/1993 and 20/12/1993 passed in the pending appeals. The Plaintiff came to learn from the said orders that the disputes and differences were amicably settled though the Plaintiff was not made a party to the settlement. Since the Plaintiff was not a party in the appeals, the settlement is not binding on the Plaintiff.

On or about 25/02/1997 the Defendant No.2 made an application in the pending appeals wherein it was mentioned that a memorandum of understanding dated 19/01/1994 was purportedly made between the Defendant No.1 and Defendant No.2. On the basis of the same, certain prayers were made before the Division Bench. The purported memorandum of understanding dated 19/01/1994 is not binding on the Plaintiff since the Plaintiff is not a party and the same is null and void so far as the Plaintiff is concerned. It is contended in the plaint that the order passed by the Division Bench is not binding on the Plaintiff. In

this perspective the Plaintiff filed the instant suit with prayers as above mentioned.

Mr. Chowdhury, the Learned Counsel appearing for the present Petitioners being the Defendant No.5 – 9 argued first that the instant suit is barred by the principle of *res judicata* and analogous principles.

It is submitted that pendency of the suit was brought to the notice of the Division Bench for which the present Plaintiff was added as party in the appeals. Referring to the judgement of the Division Bench Mr. Chowdhury argued that the Division Bench considered all the issues raised in the instant suit and passed reasoned order. The Division Bench discussed why the present Plaintiff should be debarred from filing a suit separately and should be barred from filing a separate suit asserting her right, title and interest independently. . It is further submitted by him that an appeal is continuation of a suit. Any order passed in an appeal would have the same effect as the suit. As if the order was passed in a previously instituted suit. In nutshell, referring to the Division Bench judgement, Mr. Chowdhury submitted that since all the issues raised in the plaint was decided conclusively by the Division Bench, the instant suit is barred by the principle of *res judicata* and analogous principles. Whether decree was drawn up or not is a matter to be seen at the time of execution. The judgement of the Division Bench decided the issues and the same is in operation constituting a binding precedent. Mr. Chowdhury relied upon the decisions of the Supreme Court of India in ***Malluru Mallappa (Dead) vs Kuruvathappa & Ors [(2020) 4 SCC 313]*** and ***Sri Hari Hanuman Das Totala vs Hemant Vithal Kamat & Ors. [(2021) 9 SCC 99]***.

Another limb of argument of Mr. Chowdhury is that the plaint should be rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908 as being barred by law. It is in his argument that the expression “law” contemplated in Order VII Rule 11 of the Code of Civil Procedure, 1908 is not only codified law; the scope of the expression law is much wider. Law means judge-made law as much as statutory law. Therefore, according to him, the plaint should be rejected as barred by law. ***Hermes Marines Ltd. Vs Capeshore Maritime Partners FZC [(2016) SCC Online Guj 8686]*** is relied upon.

Per contra Mr. Ghosh argued for the Plaintiff that plea of *res judicata* cannot be a ground of rejection of plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908. Plea of *res judicata* cannot be maintained under the said provision in relation to a decree which was passed subsequent to the institution of a suit which is sought to be dismissed on the basis of this principle. Moreover, plea of *res judicata* cannot be decided without ascertaining what was the matters in issue in the previous suit. He strenuously argued that while deciding the fate of a plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908, only the averments made in the plaint should be looked into. There is no scope to look backward or forward. No amount of evidence can be looked into. Therefore, according him, the plea that the plaint should be rejected, is not tenable. Mr. Ghosh referred to ***Sri Hari Hanuman Das Totala vs Hemant Vithal Kamat & Ors. [(2021) 9 SCC 99]***.

It is further argued that effect of partition decree which has not been taken to a logical conclusion by getting the property partitioned by metes and bounds cannot be cited as *res judicata* in a proceeding under Order VII Rule 11 (d) of the

Code of Civil Procedure, 1908. ***Kamala vs K.T.Eshwara SA [(2008) 12 SCC 661]*** is relied upon.

The next point of argument of Mr. Ghosh is that the decree dated 22/05/1997 deals with immovable properties the value of which is more than Rs.500/-. On 22/05/1997, subsequent to filing of the present suit, the Division Bench passed the alleged decree in terms of the orders dated 15/09/1993, 14/10/1993, 18/11/1993, 17/12/1993 and 20/12/1993 in partial modification of Mittal Settlement being Annexure “G” of the present plaint. Any decree or order including compromise decree creating new right, title and interest *in presenti* in immovable properties exceeding value of Rs.100/- is compulsorily registerable and should be stamped accordingly. The decree is neither stamped nor registered for which the decree passed by the Division Bench hits the provisions of the Stamp Act and the Registration Act. As such, the decree is inadmissible as evidence. ***N.N Global Mercantile (P) Ltd. Vs Indo Unique Flame Ltd. [(2023) 7 SCC 1]*** and ***Bhoop Singh vs Ram Singh Major & Ors [(1995) 5 SCC 709]*** are relied upon.

The next limb of argument is that the Defendant himself has admitted that the alleged decree dated 22/05/1997 is rendered infructuous and nugatory because of absence of schedule of the properties. Therefore, the alleged decree cannot be relied upon to dismiss the instant suit or reject the plaint.

The next point argued on behalf of the Plaintiff is that invalidity of a decree can be set up at any point of time, even at the stage of execution or collateral proceeding. Neither consent nor waiver nor acquiescence can make a null decree

proper. ***Harshad Chimanlal Modi vs DLF Universal [(2005) 7 SCC 791]*** is relied upon.

A further point canvassed on behalf of the Plaintiff is that the decree dated 22/05/1997 was not drawn up and completed and has not been put into execution or enforced as the same is barred by limitation as on this date.

I have heard rival submissions.

Although the various prayers are made in the petition, the main thrust of argument is that the plaint should be rejected being barred by the principle of *res judicata* and analogous principle as well as being barred by law. In the petition itself, it is canvassed that the plaint should be rejected being barred by law. The instant petition is, strictly speaking, not filed under Order VII Rule 11 of the Code of Civil Procedure, 1908. There is no prayer in so many words that the plaint should be rejected. But that itself is not a ground to ignore the pleas raised on this because the parties are aware of the pleas and argued on this point. Courts should not take any hyper-technical approach. Substance of the application is more important to consider. Moreover, it is duty of a court to consider the issue whether a plaint should be rejected or not in order to nip at bud any frivolous plea. In ***Sopan Sukhdeo Sable v. Asstt. Charity Commr. [(2004) 3 SCC 137]*** this point was elaborately explained by the Supreme Court of India:

“Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a

written statement. Instead, the word “shall” is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13.”

This principle is reiterated in **Popat and Kotecha Property v. State Bank of India Staff Assn. [(2005) 7 SCC 510]** by the Supreme Court of India. Therefore, this Court has scope to consider whether the plaint, in the instant case, is liable to be rejected or not.

Mr. Chowdhury argued at length, referring to the Judgement of the Division Bench dated 22/05/1997 that all the issues involved in the present suit had already been decided by the Division Bench barring the instant suit under the principle of *res judicata*.

It is settled law that while considering an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 only plaint should be looked into; no extraneous material should be looked into. In so many decisions the Supreme Court of India harped upon this again and again. In **Srihari Hanumandas Totala’s case**, relied on by both the Counsels, it is again reiterated that to reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to. To argue the point of *res judicata*, Mr. Chowdhury extensively referred to the judgement of the Division Bench which is extraneous to the plaint. In **Srihari Hanumandas Totala’s case** the Supreme Court of India was considering the point

whether a plaint can be rejected on the basis of the principle of *res judicata*. It was observed, referring to previous authorities:

“25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarised as follows:

25.1. To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to.

25.2. The defence made by the defendant in the suit must not be considered while deciding the merits of the application.

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.”

25.4. Since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decision in the “previous suit”, such a plea will be beyond the scope of Order 7 Rule 11(d), where only the statements in the plaint will have to be perused.”

Therefore, in view of the specific facts and circumstances of this case the plaintiff cannot be rejected being barred by the principle of *res judicata*.

As stated above the Defendant no. 5 – 9 has canvassed and that the suit is barred by law. Perusal of the plaint shows that the appeals were pending at the time of institution of the suit. This is evident from averment made in Para 26 of the plaint. It is averred in the plaint that the Plaintiff was not made a party to the pending appeals; that there was a family settlement in terms of the Order of the Division Bench dated 18.08.1993, 15.09.1993, 14.10.1993, 18.11.1993, 17.12.1993 and 20.12.1993. The principal prayers in the suit are passing of declaratory decree that memorandum of understanding referred to in the plaint dated 19th January, 1994 (as referred to in Para 31 of the plaint) passed in the pending appeals is illegal, null and void and not binding on the Plaintiff and declaratory decree that order passed in appeal no. 504 of 1992 and 555 of 1992 are not binding. In other words, on the one hand, a settlement arrived that in a pending appeal is challenged on the other hand propriety of the order of the superior court is challenged in the instant suit. All the prayers for injunction are ancillary only. It is manifest on plain reading of the plaint that a settlement was arrived at and ordered by the Division Bench which is challenged in the instant suit. Order XXIII Rule 3(A) specifically bars any suit to set aside a decree on the ground that compromise on which the decree is based was not lawful.

On the other hand, by challenging the order of the Division Bench with a prayer to declare the orders as null and void, the Plaintiff invites this Court to embark on the task of scrutinizing the propriety of such orders, inviting consequently to assume the role of a Revisional or Appellate Court which is not vested by law. The

averments made in the plaint along with the prayers invite this Court to exercise a jurisdiction not vested upon this Court. A Single Judge Bench cannot examine the propriety of the order of the Division Bench. Although the Learned Counsel for the Plaintiff argued that propriety of the decree can be challenged at any stage there is no principle or proposition or provision of law which vests the Single Judge's Bench with the authority to scrutinize the superior courts order. The Constitution of India provides for remedies against the final order of the Division Bench barring thereby exercise of jurisdiction by this Court as invited to do in the instant suit. Such exercise is barred by law. In view of express provision and specifically used of the word "shall" a Court has a duty to examine the plaint and reject the same in appropriate case as in this one. As stated above, ratio of **Sopan Sukhdeo Sable's** case and **Kotecha Property's** case postulates this principle. It is germen in the plaint, discernable on plain reading itself that the suit is barred by law. Therefore, the plaint is rejected under Order VII Rule 11(d).

GA No. 5 of 2023 is disposed of. Accordingly, the instant suit is also disposed of, along with pending applications, if any.

Let the decree be drawn up.

(SUGATO MAJUMDAR, J.)