



CRP.No.4105 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.01.2023

Pronounced on : 11.01.2023

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

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1.Pullaiyannan
2.Perumal
3.Chinasamy
4.Pachiappan

... petitioners

Vs.

1.Kunjanna Gounder @ Kunji Gounder
2.Myleeammal
3.Subramanian

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order of the District Munsif Court at Mettur dated 01.12.2015 in IA.No.323 of 2012 in OS.No.123 of 2010.

For Petitioners : Mr.P.Valliappan

For Respondents: Mr.A.Sundaravadanan

ORDER

This civil revision petition has been filed to set aside the fair and decretal order of the District Munsif Court at Mettur dated 01.12.2015 in



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IA.No.323 of 2012 in OS.No.123 of 2010, thereby allowed the petition to frame a preliminary issue with regard to maintainability and also applicability of the provisions of Sections 10 to 12 of CPC and to try the same as preliminary issue.

2. The petitioners are the plaintiffs and the respondents are the defendants. The petitioners filed suit for declaration and permanent injunction in respect of the suit properties. While pending the suit, the respondents filed application under Order XIV Rule 2 of CPC r/w Sections 10, 11 & 12 and 151 of CPC to frame a preliminary issue with regard to maintainability of the suit and also applicability of the provisions of Sections 10 to 12 of CPC and to try the same as preliminary issue and the same was allowed. Aggrieved by the same, the present civil revision petition has been filed.

3. The learned counsel for the petitioners would submit that the application filed under Order XIV Rule 2 of CPC is not at all maintainable in respect of the issues relating to Sections 10, 11 and 12 of CPC. The provision is very clear that except the question of law, legal issues with regard to the facts cannot be framed as preliminary issue. In particular, the issue of *res judicata* cannot be decided as a preliminary issue when there is a mixed question of facts



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and law or a question of law that requires trial. He further submitted that already the respondents filed petition under Section 11 of CPC to dismiss the suit on the ground of *res judicata* in IA.No.1371 of 2010. It was dismissed by the trial court by order dated 19.08.2011. Once again, the respondents filed petition on the very same ground to treat the same as a preliminary issue. In support of his contention, he relied upon various judgments of the Hon'ble Supreme Court of India.

4. Per contra, the learned counsel for the respondents would submit that they are absolute owners of the lands comprised in survey No.204/1 to an extent of 1 acre 18 cents and in survey No.204/3 to an extent of 7 acres 38 cents situated at Olaipatty Village with a right of cart track in the lands of the petitioners herein in survey No.204/2. In fact, the respondents already filed suit in OS.No.248 of 2001 on the file of the District Munsif Court, Mettur for declaration and consequential permanent injunction as against the petitioners herein with regard to the lands comprised in survey No.204/3 and also 204/1 situated at Olaipatty Village. Further, they also filed another suit in OS.No.174 of 2001 on the file of the Sub Court, Mettur in order to protect their rights with regards to the cart track. Thereafter, the suit in OS.No.174 of 2001 on the file of



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the Sub Court, Mettur was transferred to the file of the District Munsif Court, Mettur and renumbered as OS.No.149 of 2004. The suit in OS.No.149 of 2004 was decreed in their favour and in view of the said decree, the suit in OS.No.248 of 2001 is dismissed. Aggrieved by the same, the petitioners preferred appeal suit in AS.No.25 of 2009.

4.1 In the appeal suit, the petitioners filed IA.No.39 of 2010 seeking for remand of the suit for fresh disposal with the present suit filed by them in OS.No.123 of 2010. In the said application, they categorically admitted that the issues involved in the present suit as well as the suit filed by the respondents are one and the same and parties are also one and the same. Therefore, it is hit by principles of *res judicata*. Hence, the respondents filed petition under Section 11 of CPC to dismiss the suit by applying the principles of *res judicata*. It was dismissed. However, after filing the application by the petitioners in IA.No.39 of 2010 in AS.No.25 of 2009, the respondents were constrained to file the present petition to frame the preliminary issue with regards to provision under Sections 10 to 12 of CPC. Therefore, the trial court rightly allowed the petition and it does not warrant any interference by this Court.



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5. Heard, Mr.P.Valliappan, the learned counsel for the petitioners and

Mr.A.Sundaravadanan, the learned counsel for the respondents.

6. The respondents are the defendants in the suit filed by the petitioners for declaration and permanent injunction in respect of the properties comprised in survey No.204/2 inclusive of the right of using the cart track that branches from panchayat road starting from the land comprised in survey No.270/1B and continuing through survey No.205/7 and after reaching survey No.204/3 turns towards north and runs through survey No.204/2 and reaches survey No.204/1. The cart track is demarcated as A,B,C,D & E in the rough plan annexed with the plaint. While pending the suit, the respondents filed petition under Section 11 of CPC to reject the plaint by applying the principles of *res judicata*. It was dismissed by order dated 19.10.2011 on the ground that no particulars have been pleaded by the respondents and all the averments in the affidavit filed in support of the petition are bald and vague. The respondents also failed to state the issues involved in the appeal suit filed by the petitioners in AS.No.25 of 2009. The respondents also failed to prove that the facts in issue in the present suit has been directly and substantially was in issue in the previous suit between the same parties in respect of the very same property.



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7. On perusal of the affidavit filed in support of the application in IA.No.323 of 2012 revealed that the respondents filed suit in OS.No.149 of 2004 and OS.No.248 of 2001. In the said suits, the following issues were involved:

(a) Whether the respondents have acquired title by prescription of easementary right over the suit cart track going through survey No.204/2?

(b) Whether the suit cart track actually runs through survey Nos.270/1B, 204/3 and 204/2 as alleged by the petitioners herein?

8. Whereas in the suit filed by the petitioners is for declaration declaring their title in respect of the land comprised in survey No.204/2. Therefore, both the prayers are different and issues are also different one. In fact, the earlier application filed to dismiss the suit by applying the principles of *res judicata* was dismissed by the court below in IA.No.1371 of 2010 by the fair and decretal order dated 19.08.2011. Thereafter, the respondents once again filed petition under Order XIV Rule 2 read with Sections 10 to 12 and 151 of CPC to frame a preliminary issue with regard to the maintainability and also applicability of the provisions of Sections 10 to 12 of CPC and to try the same as preliminary



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issue even prior to deciding the other issues. It is relevant to extract the provision

under Order XIV Rule 2 Sub Rule 2(b) of CPC hereunder:

(b) A bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit , postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with decision on that issue”

9. Thus it is clear that the Court may try an issue relating to the jurisdiction of the Court or to the legal bar to the suit as a preliminary issue but this is more in the nature of a discretion rather than a duty and the Court is not bound to try any issue despite the provision contained in sub rule 2 of Rule 2 of Order XIV of CPC. The words “it may try” are clearly indicative of the fact that discretion is given to the Court and no duty is cast upon the Court to decide any issue as a preliminary issue. It also lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the court or a bar to the suit created by any law for the time being in force. Therefore, the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue



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and where the decision on issue depends upon the question of fact, it cannot be tried as a preliminary issue

10. The provisions of Order XIV Rule 2 are part of the procedural law, but the fact remains that such procedural law had been enacted to ensure expeditious disposal of the lis and in the event of setting aside the findings on preliminary issue, the possibility of remand can be avoided, as was the language prior to the unamended Order XIV Rule 2. If the issue is a mixed issue of law and fact, or issue of law depends upon the decision of fact, such issue cannot be tried as a preliminary issue. In other words, preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the Court or the bar to the suit is made out, the Court may decide such issues with the sole objective for the expeditious decision. Thus, if the Court lacks jurisdiction or there is a statutory bar, such issue is required to be decided in the first instance so that the process of civil court is not abused by the litigants, who may approach the civil court to delay the proceedings on false pretext. That apart, already the respondents filed petition under Section 11 of CPC to dismiss the suit by applying the principles of *res judicata* and the same was dismissed by the court below. Therefore, the present



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application is barred by principles of *res judicata* since already the same issue was decided by the trial court.

11. The learned counsel for the respondents vehemently contended that already the petitioners filed appeal suit as against the decree passed in OS.No.149 of 2004 in AS.No.25 of 2009, in which they also filed application in IA.No.39 of 2010 praying to remand the suit for fresh disposal along with the present suit filed by them. As stated supra, the prayer in both the suits are completely different one and as such, the said application was already dismissed by the appellate court. Therefore, the said appeal is nothing to do with the present suit and it has to be tried separately. In fact, the trial court already framed issues and when the suit is ripened for trial, the respondents filed the present application. Therefore, the issue of *res judicata* is a mixed issue of fact and law and it cannot be decided as a preliminary issue. It has to be decided on proper pleadings and evidence of parties. The issue of law can be decided as a preliminary issue, whereas the mixed issue of fact and law cannot be decided as a preliminary issue. Thus, this Court is of the view that the trial court has committed illegality in deciding the issue of *res judicata* as a preliminary issue. As such, the impugned order cannot be sustained and it is liable to be set aside.



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12. Accordingly, the fair and decretal order of the District Munsif Court at Mettur dated 01.12.2015 in IA.No.323 of 2012 in OS.No.123 of 2010 are set aside and this civil revision petition is allowed. There shall be no order as to costs.

11.01.2023

Speaking/non-speaking

Index : Yes/No

Internet : Yes

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G.K.ILANTHIRAIYAN, J.
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To
The District Munsif Court at Mettur

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