

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR-1400-2019 (O&M)
Date of decision : 07.02.2023

Umesh Kumar & Anr.

... Petitioner(s)

Versus

Satish Jain

... Respondent(s)

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Anshul Gupta, Advocate
for the petitioners.

Mr. Nikhil Sabharwal, Advocate for
Mr. Pandit Mattewal, Advocate
for the respondent.

ALKA SARIN, J. (ORAL)

The present revision petition has been filed under Article 227 of the Constitution of India challenging the order dated 20.02.2019 whereby the application filed by the defendant-petitioners under Order 14 Rule 1 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) for framing of preliminary issue qua maintainability of the suit on the basis of the principles of limitation, *res judicata* and under Order 2 Rule 2 CPC, has been dismissed.

The Trial Court vide the impugned order dated 20.02.2019 dismissed the application on the ground that the question of limitation is a mixed question of law and fact and the question whether the suit was barred by principles of *res judicata* and under Order 2 Rule 2 CPC could not be gone into without evidence being led.

Learned counsel for the defendant-petitioners would contend that the plaintiff-respondent has been filing multiple cases against the defendant-petitioners and hence the suit itself was barred by the principles of *res judicata*. It is further the contention that earlier an application under Order 7 Rule 11 CPC was filed which was dismissed by the Trial Court on 07.04.2017. Aggrieved by the said order, CR No.3458 of 2017 was filed which was dismissed vide order dated 29.11.2018 with an observation that the issue qua maintainability can be pressed as a preliminary issue, if need be.

Learned counsel for the plaintiff-respondent submitted that the suit is not barred by the principles of *res judicata* or Order 2 Rule 2 CPC. Regarding the objection about limitation raised by the defendant-petitioners he has relied upon the judgment of the Hon'ble Supreme Court in the case of **M/s Mongia Realty and Buildwell Private Limited Vs. Manik Sethi [2022 (1) RCR (Civil) 844]** to contend that the issue of limitation is a mixed question of law and fact and that unless the issue of limitation is based on an admitted fact, it cannot be decided as a preliminary issue.

Heard.

Section 11 of CPC reads as under :

“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.”

Order 2 Rule 2 CPC reads as under :

“2. Suit to include the whole claim - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in

respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation - For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

It is trite that in order to prove that the suit is barred by the principles of *res judicata* and under Order 2 Rule 2 CPC, pleadings of the earlier case/judgments passed in the said cases all need to be led in evidence before a finding can be arrived at that the suit is barred by the principles of *res judicata* and under Order 2 Rule 2 CPC. Further, in the case of **M/s Mongia Realty and Buildwell Private Ltd.** (supra), Hon’ble Supreme Court has held as under :

“12. The issue as to whether the claim of the appellant is barred by limitation cannot be isolated from the nature of the transactions between the parties. In any event, whether the plea of the appellant as set up in paragraph 5 of the plaint is proved would depend upon

evidence adduced at the trial. The course of action which was followed by the learned trial Judge of directing the parties to address arguments on the issue of limitation was irregular. The issue of limitation in the present case would require evidence to be adduced.

13. Order 14, Rule 2 of the CPC stipulates that when issues of both law and facts arise in the same suit, the Court may dispose the suit by trying the issue of law first. For this purpose, the provision specifies two questions of law, which are (i) jurisdiction of the Court; and (ii) a bar to the suit created by any law for the time being in force. The provision is extracted below :

- 2. Court to pronounce judgment on all issues -*
- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. (2) Where issues both of law and of fact arise in the same suit, and the Court is of 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 the issue relates to -*
- (a) the jurisdiction of the Court, or*
- (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 the decision on that issue.

14. Before this Court in Nusli Neville Wadia v. Ivory Properties, (2020) 6 SCC 557, the issue was whether the issue of limitation can be determined as a preliminary issue under Order 14, Rule 2 . The three-judge bench of this court observed that if the issue of limitation is based on an admitted fact, it can be decided as a preliminary issue under Order 14 Rule(2)(b). However, if the facts surrounding the issue of limitation are disputed, it cannot be decided as a preliminary issue. This Court observed as follows:

51. [...] As per Order 14, Rule 1 , issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order 14, Rule 2 . In Order 14, Rule 2(1), the court may decide the case on a

preliminary issue. It has to pronounce the judgment on all issues. Order 14, Rule 2(2) makes a departure and the court may decide the question of law as to jurisdiction of the court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.

52. In a case, question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order 14, Rule 2(2)(b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order 14, Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post

amendment in the year 1976.”

Even in the present case, the question whether the suit is barred by limitation or barred by principles of *res judicata* and Order 2 Rule 2 CPC cannot be gone into without evidence being led. That being so, maintainability cannot be treated as a preliminary issue. It is an admitted case that the issue qua maintainability has already been framed by the Trial Court.

In view of the above, I do not find any illegality or infirmity in the impugned order passed by the Trial Court. The present revision petition, which is wholly devoid of any merits, is accordingly, dismissed. Pending applications, if any, also stand disposed off.

**(ALKA SARIN)
JUDGE**

07.02.2023
Yogesh Sharma

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO