

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(207)

CR No.5166 of 2019 (O&M)
Pronounced on: 04.08.2023

Ishwar

.....Petitioner

Versus

Bhim Singh and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present: Mr. Ajay Jain, Advocate
for the petitioner.

Mr. Hemant Bassi, Advocate
for respondents No.1 and 2.

Mr. Gagan Pradeep Singh Bal, Advocate
for respondent No.3.

VIKRAM AGGARWAL, J. (ORAL)

1. The present revision petition preferred under Article 227 of the Constitution of India assails the order dated 05.08.2019 (Annexure P-5) passed by the Civil Judge (Jr. Division), Hisar, vide which the application filed by the present petitioner and the proforma respondents under Order 7 Rule 11 CPC (Annexure P-3) for the rejection of plaint was dismissed.
2. The facts, briefly put, are that the contesting respondents-plaintiffs i.e., respondents No.1 to 3 filed a suit for declaration to the effect that they are the owners in possession of agricultural land measuring 14 Kanals 1 Marla situated at Village Sandlana, Tehsil Barwala, District Hisar (fully described in the plaint) which had fallen to the share of the respondent-plaintiff No.1-Bhim Singh in partition. The prayer also was that the respondents-plaintiffs were entitled to get their names recorded in the revenue record as owners and the land was not liable to be partitioned. A declaration to the effect that the order dated 08.02.2017 passed

by the Assistant Collector 2nd Grade, Barwala, District Hisar was illegal was also sought. It was the case of the respondent/plaintiffs that they and the defendants (i.e., the present petitioners and the proforma respondents) were closely related. An oral partition had taken place amongst the brothers i.e., respondent No.1/plaintiff and the present petitioner as also their brother-Kartar Singh in the year 1976 with regard to the land of the parties and the land in dispute measuring 114 Kanals 1 Marlas came to the share of the respondent/plaintiff No.1-Bhim Singh and possession was also exchanged. Certain other averments were also made and the declaration as referred to above was sought.

3. During the pendency of the suit, an application under Order 7 Rule 11 CPC (Annexure P-3) was moved by the present petitioner/defendant. The case of the petitioner/defendant was that previously on 03.09.2016, the present petitioner/defendant and proforma respondent No.1 had filed a civil suit titled as Shamsher and others Vs. Dhup Singh and others, seeking injunction restraining the defendants therein (plaintiffs in the present case) from alienating the suit land therein on the ground that the suit land was joint and the parties were co-sharers. A plea was raised by the defendants therein (plaintiffs in the present case) namely, Bhim Singh and others that the suit had already been partitioned on the basis of an oral settlement. However, this plea was rejected by the Civil Court vide judgment and decree dated 22.02.2018 (Annexure P-2) and a specific finding was given that the plea of oral partition had not been established and the disputed land was still joint. It was averred in the application that though the Civil Suit was dismissed and injunction was not granted on the ground that no injunction could have been issued against co-sharers, a clear-cut finding with regard to the plea of oral partition was given. The appeal filed by Bhim Singh and others was stated to be pending. It was, therefore, averred that the issue with regard to the status of the

parties i.e., as to whether they were co-sharers or not had been settled in the previous case and, therefore, the same could not be permitted to be re-agitated again. Accordingly, rejection of the plaint was sought.

4. The application for rejection of the plaint was opposed by way of a reply (Annexure P-4).

5. The learned trial Court, after considering the respective stands of the parties, rejected the application. It was held that in the previous suit which was being relied upon by the petitioner/defendant, the parties were not the same. It was also held that since the judgment had not attained finality, the issue of oral partition could not be said to have been finally decided by the court and, therefore, it, it held that the principle of *res judicata* would not be applicable.

6. Aggrieved by the said order, the present revision petition has been filed.

7. I have heard learned counsel for the parties and have perused the paper book.

8. Learned counsel for the petitioner strenuously urged that the order vide which the application under Order 7 Rule 11 CPC was dismissed is not sustainable. Reference was made to the provisions of Order 7 Rule 11 CPC and it was stated that the current suit would be barred by law as the said question of oral partition already stood decided amongst the same parties by way of judgment dated 22.02.2018 (Annexure P-2). Learned counsel submitted that the provisions of Order 7 Rule 11 CPC are not exhaustive and the Court has inherent powers to see that frivolous or vexatious litigants are not permitted to consume the time of the Court.

9. Learned counsel submitted that a meaningful reading of the plaint as a whole has to be there and clever drafting creating illusions of cause of action cannot be permitted. Learned counsel further submitted that in view of the clear findings arrived at by the Civil Court in the judgment dated 22.02.2018 (Annexure P-2), the plaint is liable to be rejected. In support of his contentions learned counsel relied upon the judgment of the Hon'ble Supreme Court in ***K. Akbar Ali Vs. K. Umar Khan and others, 2021 (2) R.C.R (Civil) 287*** and ***Dahiben Vs. Arvindhbai Kalyanji Bhanusali (Gajra) (D) through LRS and others, Civil Appeal No. 9519 of 2019 (arising out of SLP (Civil) No. 11618 of 2017), d/d 09.07.2020.***

10. On the other hand, learned counsel for the respondents submitted that for the purposes of rejection of plaint, only the contents of the plaint have to be examined and a plain reading of the plaint would show that the same is not liable to be rejected. Learned counsel further contended that the plea of *res judicata* cannot be taken at the stage of rejection of plaint and, therefore, a plaint cannot be rejected on the said ground. Learned counsel also contended that the present suit, the plaint of which is sought to be rejected is a suit for declaration whereas the previous suit, the judgment in which has been relied upon by the petitioner was a suit for permanent injunction which too was dismissed. Learned counsel have placed reliance on the judgments of the Hon'ble Supreme Court in ***Kamala and others Vs. K.T. Eshwara SA and others, (2008) 12 Supreme Court Cases 661 and Popat and Kotecha Property Vs. State Bank of India Staff Association, Appeal (Civil) 3460 of 2000, d/d 29.08.2005*** and judgment of this High Court in ***S.S.Ahluwalia Vs. S.P.S. Ahluwalia and others, 2012 (4) RCR (Civil) 50.***

11. I have considered the submissions made by learned counsel for the parties.

12. Order 7 Rule 11 CPC deals with rejection of plaint. In the present case, the petitioner is invoking Order 7 Rule 11(a) and (d) CPC. Before advertng to the merits of the case, the law on the subject needs to be examined. In a very recent judgment titled as ***Srihari Hanumandass Totala Vs. Hemant Vithal Kamat and others, 2021(3) RCR (Civil) 768***, the Hon'ble Apex Court has held that a plaint cannot be rejected on the ground of *res judicata*. It was held by the Hon'ble Apex Court that if a plaint is to be rejected, it is the statement in the plaint which will have to be construed. The Hon'ble Apex Court held that the Court, while deciding such an application, must have due regard only to the statements in the plaint. It was held that whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case. Still further, while examining the definition of *res judicata* as defined by Section 11 CPC and while relying upon a judgment of the Hon'ble Apex Court in ***V. Rajeshwari vs. T.C. Saravanabava (2004) 1 SCC 551***, the Hon'ble Apex Court noticed that the rule of *res judicata* does not strike at the root of the jurisdiction of the Court trying the subsequent suit and in fact, it is a rule of *estoppel* by judgment based on public policy that there should be a finality to litigation and no one should be vexed twice for the same cause. It was also held that not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and the judgment in the previous case. The Hon'ble Apex Court then referred to a number of cases in which the particular issue was as to whether *res judicata* can be the basis or ground for rejection of plaint. After discussing the entire law on the

application under Order 7 Rule 11(d) CPC and ultimately held that the plaint was not liable to be rejected under Order 7 Rule 11(d) CPC. However, liberty was given to the applicant to raise an issue of maintainability of the suit before the concerned trial Court and it was observed that the trial Court would consider whether a preliminary issue should be framed and if it was so, it should be decided within a period of three months. An outer limit was also fixed for final adjudication of the suit. Since this judgment of the Hon'ble Apex Court refers to the entire law on this particular issue, culls out the guiding principles for deciding an application under Order 7 Rule 11(d) CPC and crystallizes the issue, it would be important to reproduce the findings of the Hon'ble Apex Court and the same are as under:-

"16. Order 7 Rule 11(d) of CPC provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". Hence, in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case. Before proceeding to refer to precedents on the interpretation of Order 7 Rule 11(d) CPC, we find it imperative to refer to section 11 of CPC which defines res judicata:

"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."

17. section 11 of the CPC enunciates the rule of res judicata : a court shall not try any suit or issue in which the matter that is directly in issue has

*been directly or indirectly heard and decided in a 'former suit'. Therefore, for the purpose of adjudicating on the issue of res judicata it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on res judicata, before referring to res judicata as a ground for rejection of the plaint under Order 7 Rule 11. Justice R. C. Lahoti (as the learned Chief Justice then was), speaking for a two Judge bench in **V. Rajeshwari v. T.C. Saravanabava (2004) 1 SCC 551** discussed the plea of res judicata and the particulars that would be required to prove the plea. The court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the 'former suit' while adjudicating on the plea of res judicata:*

"11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

*13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in **Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780]** the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in **Gurbux Singh v. Bhooralal [AIR 1964 Supreme Court 1810 : (1964) 7 SCR 831]** placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on*

*the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in **Kali Krishna Tagore v. Secy. of State for India in Council [(1887-88) 15 IA 186 : ILR 16 Cal 173]** pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit."*

18. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether res judicata can be the basis or ground for rejection of the plaint. In *Kamala & others v. KT Eshwara Sa* (2008) 12 SCC 661, the Trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. Justice S B Sinha speaking for the two judge bench examined the ambit of Order 7 Rule 11(d) of the CPC and observed:

"21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the

realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."

Reverting to the facts of the present case, a bare reading of the plaint (Annexure P-1) does not give any clue about any previous litigation. There is absolutely no reference to the same. The contents of the written statement or any other document or even those of the application for rejection of plaint to this effect especially in the absence of pleadings in the plaint cannot be gone into. Under the circumstances, the plaint could not have been rejected on the ground that it was barred by the principle of *res judicata*. The learned trial Court erred in discussing as to how the case of the plaintiff was not hit by the principle of *res judicata* as it was not required to be done so at that stage. However, the decision of the trial Court, in so far as it dismissed the application for rejection of plaint cannot be faulted, though the reasons given for the same were erroneous.

13. I have gone through the judgments relied upon by learned counsel for the parties. In so far as the judgments relied upon by learned counsel for the petitioner are concerned, there is no quarrel with the fact that there has to be a meaningful reading of the plaint and that frivolous or vexatious litigations should not be permitted to consume the time of the Court. However, in the considered opinion of this Court, these judgments would not be applicable to the facts of the present case in view of what has been observed in the preceding paragraphs and also in view of the decision of the Hon'ble Apex Court referred to above.

In view of the aforementioned facts and circumstances, I do not find any merit in the present revision petition and the same is accordingly hereby dismissed. However, liberty is granted to the petitioner to raise an issue of maintainability of the suit before the trial Court. If it is so done, the trial court

plea of *res judicata* and, in case, a preliminary issue is so framed, the same would be decided within a period of three months from the date it is framed.

Pronounced on 04.08.2023
Rekha

(VIKRAM AGGARWAL)
JUDGE

Whether speaking/reasoned : *Yes/No.*
Whether reportable : *Yes/No.*