

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:-

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Madhuresh Prasad

F.A. 146 of 2022

CAN 2 of 2023

With

COT 46 of 2015

Ashok Kumar Bhagat&Ors.

Versus

Shanti Debi @ Santi Devi &Ors.

For the appellants : Mr. Uttiya Ray
Mr. Arnab Mondal
Ms. Malabika Roy Dey

For the State respondents :Mr. Sourav Sen
Mr. Triptimoy Talukder
Mr. Abhiraj Tarafdar

Heard on : November 28, 2023
Judgment on : February 6, 2024

Madhuresh Prasad, J.:

1. The plaintiff in the suit is the appellant in the instant proceedings.
2. The plaintiffs approached the Court seeking a declaration that the lands within Schedule 'A' is part of ancestral dwelling house purchased from the funds earned through the coparcenary business of the plaintiff's father. Relief has also been sought with respect to tenancy rights of Schedule 'B' property consisting of two godown-

cum-shoprooms. They have also claimed share in the gold ornaments, 45 Bhories 6 annas and cash specified in Schedule 'C', as also a share in the movable assets as specified in Schedule 'D'.

3. The plaintiffs made out a case that one Oudh BehariBhagat carried on coparcenary business governed by the MitaksharaSchool, along with his three sons Ram Nagiana Prasad Bhagat, RameswarProsadBhagat and Ram Chandra ProsadBhagat. Upon demise of Oudh BehariBhagat on 14.01.1939, Ram Nagiana Prasad Bhagat became the 'karta'. The three brothers along with Barunibala Devi, their mother, became coparceners.

4. The **Schedule 'A'** property was purchased by a Registered Deed dated 05.04.1955 from funds of the joint family business and was thrown in the common stock of the property, being enjoyed by all. Ram Chandra ProsadBhagat, one of the brothers died in 1959, where after his $\frac{1}{4}$ th share devolved upon Barunibala Devi. It is alleged that the same property was assessed and recorded by the Burdwan Municipality in the name of Ram Nagiana Prasad Bhagat with RameswarProsadBhagat as a joint owner in 1960-61. The plaintiff has asserted that Ram Nagiana Prasad Bhagat, himself had submitted this property as joint property in two arbitration proceedings which culminated in awards dated 16.03.1978 and 16.03.1979. Further case of the plaintiff is that Barunibala Devi gifted her total moiety share and whatever self-acquired property she had to Ram Kumari Devi (plaintiff No. 6), wife of RameswarProsadBhagat on 13.07.1979.

5. In so far as **Schedule 'B'** property is concerned, the plaintiff claimed that Maharaja Dhiraj of Burdwan, who was also shebait of the estate had inducted Oudh BehariBhagat as tenant and after his demise, the tenancy rights devolved upon the three brothers and the mother. The ownership of the premises, however, has vested in J & R Hutchison Private Limited (Proforma Defendant No. 8) who are now receiving the rent. The successor shebait of Burdwan Raj has also been arraigned as Defendant No. 7.

6. In so far as **Schedule 'C'** property is concerned, the plaintiff claimed that balance of the sale proceeds, being Rs. 37,000/-, was received in the hands of Ram Nagiana Prasad Bhagat, from the sale of some estate of Oudh BehariBhagat. After his demise the proceeds are lying with his legal heirs, namelydefendants No. 1 to 5. Together the plaintiffs claim 5/12th share in Schedule 'C' property. Schedule 'C' and Schedule 'D' properties are both derived from one Bhagogani Devi, wife of BrindabanBehariBhagat aunt of Ram Nagiana Prasad Bhagat and RameswarProsadBhagat the same includes the above noted sale proceeds of Plot No. 3200 and remaining gold ornaments.

7. **Schedule 'D'** properties are some sundry movable items also said to be derived from the same Bhagogani Devi.

8. The cause of action as stated by the plaintiff is that taking advantage of non-inclusion of the scheduled properties in Title Suit No. 79 of 1986 - 113 of 1979, earlier filed by Ram Nagiana Prasad Bhagat, the defendants, legal heirs and representatives of Ram Nagiana Prasad Bhagat are trying to sell the Schedule 'A' property,

transfer the tenancy rights in Schedule 'B' property and denying share to the plaintiffs in the Schedule 'C' and 'D' properties as also denying the marriage expenses for marriage of the plaintiff's daughter.

9. The defendants on the other hand have by filing a written statement denied the claim of the plaintiff regarding their being any unity of title and/ or possession over the Schedule 'A' land. It is specific case in the W.S. that the predecessor of the defendants had instituted partition suit being Title Suit No. 79 of 1986. The present plaintiffs, in the said suit had claimed the present Schedule 'A' property to be their joint property. Such claim was disallowed. The plaintiffs therefor are now estopped from raising a plea in respect of the same suit premises which was a matter directly in issue in the earlier proceedings and specifically disallowed. The claim of the plaintiffs regarding Schedule 'A' property being acquired from the funds of the coparcenary business, as 'Karta' by Ram Nagiana Prasad Bhagat and other claims raised in the plaint have specifically been denied. Regarding Schedule 'B' property the entire pleading of the plaintiffs in the present suit has specifically been denied. The claim regarding sale of Late Oudh Behari Bhagat's Gaddi Ghargiving rise to sale proceeds of Rs. 37,000/- (Schedule 'C' property) and claims arising therefrom have also specifically been denied. Existence of Schedule 'C' and 'D' property is denied by the defendants. It is their specific case that alleged Bhagogani Devi was not having any such property. Therefore, the story of such property coming in the hands of

Ram Nagiana Prasad Bhagat was unsustainable and denied. Regarding Schedule 'B' property, the defendants have claimed the same to be a tenancy of Ram Nagiana Prasad Bhagat individually without any concern with other brothers or the joint family. The alleged rent receipt in the name of Oudh Behari Bhagat has been denied as false and fabricated, being prepared in collusion with the landlords after the disposal of the previous suit, maliciously. Regarding Schedule 'A' property the defendants have stated the same to be acquired and exclusively possessed by Ram Nagiana Prasad Bhagat for his own benefit without any collusion or connection with the plaintiff or any other decendants of Oudh Behari Bhagat. This land was transferred in favour of his daughter by a registered Deed of Gift dated 10.07.1979 and possession was also delivered. Thereafter, the donees are in actual physical possession thereof to the exclusion of all others. The alleged entry of the plaintiff's name in the Municipal Assessment Register in the year 1960-61 and 1980-81 has been denied as a forged and fabricated one, being a product of collusion with the employees and officers of the Burdwan Municipality. They have also denied the existence of nucleus of any joint family in the hand of Ram Nagiana Prasad Bhagat. The alleged award given by the arbitrators has also been denied as a concocted one. In this regard specific stand has been taken that the very same plaintiffs who are defendants in the previously instituted suit had denied the fact of appointment of any arbitrators and refused to admit or act upon the alleged award, on which they are now seeking

to place reliance. The claim of the present plaintiffs, as defendants in the earlier suit regarding the scheduled properties of this suit being ejmali property was decided as issue Nos. 2, 4 and 5 in the earlier suit. The findings in this respect was against the present plaintiffs and upheld up to the High Court. The plaintiffs, as defendants in the previous suit having failed to prove the scheduled properties as ejmalihis filed the present suit raising the same claim, which is barred by the principles of *res judicata* under Section 11 of the Code of Civil Procedure. The defendants have also stated that Barunibala Devi was fully dependent upon the predecessors of the present defendants. Plot No. 360, 361, 362 and 361/460 was purchased in the name of the defendant's dependent mother by a registered Kobala dated 26.10.1953 out of their independent income, from their respective separate business and is being possessed jointly.

10. The Trial Court, keeping in background the case of the respective parties frame the following issues:-

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Issues

1. *Is the suit maintainable in its present form?*
2. *Whether the plaintiffs have any cause of action to file this suit?*
3. *Is the suit barred by limitation?*
4. *Is the suit barred by principle of *res judicata*?*
5. *Is the suit bad for defect of parties?*
6. *Is the suit property valued and stamped?*
7. *Whether the suit is barred by the provision of Benami Transaction Prohibition Act?*
8. *Is the suit barred u/S 34 of Specific Relief Act?*
9. *Whether the suit property is the joint property of the parties to the suit?*
10. *Are the plaintiffs entitled to get the decree as prayed for?*
11. *To what other relief, if any, is the plaintiff entitled?*”

11. The parties thereafter led evidence, which was examined by the Trial Court and issue Nos. 1, 3, 4, 5 and 7 were considered together

by the Trial Court. The Trial Court has rightly found the fact of previous Title Suit bearing No. 79 of 1996 to be admittedly contested and decided between the same parties. The predecessor of the present plaintiffs were defendants in the said suit, wherein the predecessor of the present defendant was the plaintiff. In so far as the plea of the present suit being barred by *res judicata* the Trial Court has found that the predecessors-in-interest of the present plaintiffs have mentioned the present scheduled properties as joint property of the parties. Such finding is based on perusal of certified copy of the written statement filed in the earlier suit, (Exhibit 12). The plaintiffs therein, however, did not include the scheduled properties in the schedule of the plaint (Title Suit No. 79 of 1986). It is also nobody's case that evidence was adduced during the trial in that suit to establish Schedule 'A' properties to be joint property. It is also not the present plaintiff's case that they had raised any counter claim in respect of the scheduled properties. Considering these facts, the Trial Court has thus rightly concluded that the scheduled 'A' properties was not directly or substantially in issue and was not part of the cause of action in Title Suit No. 79 of 1986. There is also no decision with respect to the present scheduled properties in Title Suit No. 79 of 1986. The Trial Court has thus rightly held the present suit not to be covered by bar under Section 11 of the Civil Procedure Code. The essential conditions so as to constitute *res judicata* are by now well established. There is no ambiguity in this regard and the legal position is settled that for the bar under Section 11 of the

C.P.C. to come into play the matter in the present suit is required to be the same which was directly and substantially in issue, either actually or constructively in the former suit; between the same parties or under whom the claim is being raised in the present suit. Needless to say, the decision in the former suit must necessarily be that of a Court of competent jurisdiction. Only if in this background the matter has been heard and finally decided in the earlier suit, the bar of *res judicata* would be attracted. The doctrine of *res judicata* has been considered by the Hon'ble Apex Court, time and again. The doctrine has been explained to include the decision of a Court on questions of law which attain finality to operate as *res judicata*. Elaborating on this doctrine, the Hon'ble Apex Court in the case of **Dr. SubramanianSwamy Vs. State of Tamil Nadu and Others** reported in **(2014) 5 SCC 75** has considered scope and application of the doctrine keeping in background the literal meaning of the expression. This Court considers it useful to reproduce extracts from the judgment, relevant to the present case, as follows:-

"39. The scope of application of doctrine of res judicata is in question. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments". Res judicata pro veritate accipitur is the full maxim which has, over the years, shrunk to mere "res judicata", which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence interest reipublicae ut sit finis litium (it concerns the State that there be an end to law suits) and partly on the maxim nemo debet bis vexari pro una et eadem causa (no man should be vexed twice over for the same cause).

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42. This Court in Satyadhyan Ghosal v. Deorajin Debi [AIR 1960 SC 941] explained the scope of principle of res judicata observing as under : (AIR p. 943, para 7)

"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is

judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter—whether on a question of fact or a question of law—has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.”

From this decision, it is obvious that applicability of the doctrine of *res judicata* is subject to fulfilment of the conditions elaborated by the Apex Court in the said judgment. Inapplicability of the doctrine otherwise, as in the instant case is also discernible from the said decision, as also decision of the Apex Court in the case of **State of Rajasthan and Others Vs. Jeev Raj and Others Reported in (2011) 12 SCC 252** Paragraph 13 of this decision reads as follows:

“13. It was highlighted that the judgment of the trial court dated 30-6-1982 is also a nullity since there was no discussion on merits with regard to the validity of allotment dated 23-4-1969. Though it was pointed out by the counsel for the respondents that it was hit by the principle of res judicata as clarified by the counsel for the appellants, the principle of res judicata shall only apply if there is discussion or finding on the same subject-matter. A perusal of the decree of injunction that had been passed on 23-4-1969 (sic 30-6-1982) shows that it did not advert to the merits of the case at all. It is also not in dispute that the subject-matter, namely, the validity of allotment dated 23-4-1969 has not been gone into.”

12. In view of the foregoing consideration we find no infirmity in the conclusion of the Trial Court that the present suit is not hit by Section 11 of C.P.C.

13. The Trial Court has also decided the issue of limitation in favour of the present plaintiffs and held the present suit not to be barred by

limitation since the present plaintiffs, who were defendants in Title Suit No. 79 of 1986, had to wait for disposal of the earlier suit and appeal arising therefrom which appeal was finally disposed of on 20.09.1995. The present suit was filed thereafter. We are unable to agree with the conclusion of the Trial Court on this issue for the most apparent reason that the Trial Court has held that the cause of action based on the scheduled properties in the instant proceedings was neither raised, considered or decided in the earlier suit (Title Suit No. 79 of 1986). Thus, the finding that the present plaintiff has sufficient cause because they were waiting for the conclusion of the proceedings arising out of the Title Suit No. 79 of 1986 so as to hold the issue of limitation in favour of the plaintiffs, is clearly unsustainable, since the cause of action in the present suit, was not an issue in the earlier Title Suit No. 79 of 1986.

14. We are also of the considered view that the Trial Court has rightly rejected the plea of the defendants that all the necessary coparceners have not been impleaded in the present suit and that the present suit is not maintainable for mis-joinder/ non-joinder of proper and necessary parties. Such finding requires no interference as such objection is based on *nonest* reasons since the defendants have not given any details of the alleged coparceners who have been left out from the arraign of parties in the present suit.

15. The Trial Court has considered issues No. 2, 6, 8 and 9 together, in the present suit wherein the most important question whether the suit property is joint property, or not has also been

considered by the Trial Court. The Trial Court has considered the evidence in this regard, including deposition of Defendant No. 3, who as D.W.1 in the present suit has admitted that in the previous suit she had deposed as witness on behalf of her father. The deposition has been marked as Exhibit 10 to the present suit wherein she has categorically stated that the family was covered by Mitaksharalaw of inheritance. The present plaintiff has also submitted a copy of registered forms, but the same has not been exhibited. One letter dated 02.07.1993 issued by the Central Bank of India (Exhibit 9) is supporting the existence of a cash credit account in that bank, in the name of the firm 'Beni Prasad Bhagat Ram Swarup Ram'. Relying upon Exhibit 2, certified copy of decree of SCC Suit No. 321 of 1957 the Trial Court has found the name of Ram Nagiana Prasad Bhagat to be mentioned as karta and manager of this business. The letter of Central Bank of India dated 02.07.1993 (Exhibit 9) also discloses that on 02.08.1954 a cheque of Rs. 2200/- was issued in favour of Maharaja Dhiraj of Burdwan, who had settled the Schedule 'A' property as shebait of RadhaBallavji Thakur in his personal capacity. The original settlement deed has been produced by the defendant and marked as Exhibit 'D' in the present suit. The Trial Court has thus concluded on this score that Schedule 'A' property was purchased from the funds of the coparcenary business of predecessor of the parties to the present suit the finding is also fortified by oral testimony in the suit regarding the fact that this

Schedule 'A' property is bounded by wall and amalgamated with the residential house of the plaintiffs.

16. Having held so the Trial Court has proceeded to consider the admitted position that the present defendants were in possession of Schedule 'A' property. The same was transferred by Ram Nagiana Prasad Bhagat in favour of his daughters defendants No. 1 to 5 by a registered Deed of Gift bearing No. 5639 of the year 1979 (Exhibit 'E') to this suit. There is no prayer for cancellation of this deed in the present suit. The present plaintiffs having elected not to make any such prayer and seek such relief which they were able to seek, and, therefore, cannot seek a declaration with respect to the Schedule 'A' properties, as such prayer is barred under Section 34 of the Specific Relief Act.

17. This conclusion of the Trial Court requires consideration keeping in background recent decision of the Hon'ble Apex Court in the case of ***Akkamma and Others vs. Vemavathi and Others reported in (2021) 18 SCC 371***. The Hon'ble Apex Court by this Judgment has made it clear that the requirement of Section 34 of the Specific Relief Act is to make prayer for declaration as well as consequential relief. We find that in the instant case the plaintiff has prayed for declaratory relief in respect of Schedule 'A' property as well as permanent and temporary injunction not to sell, transfer any portion of the same. Relief on the second count in the instant case would fail on merit having regard to the specific case of the defendants that a Deed of Gift (Exhibit 'E') with respect to Schedule

‘A’ property have been executed by Late Ram Nagiana Prasad Bhagat during his lifetime in favour of his daughter, and since the plaintiffs have not prayed for any relief in respect of the Deed of Gift (Exhibit ‘E’). It is also worth consideration at this stage that the case of the defendants is that based on the Deed of Gift (Exhibit ‘E’), possession was also delivered by Late Ram Nagiana Prasad Bhagat during his lifetime. In such circumstances, in absence of any challenge to the Deed of Gift (Exhibit ‘E’) the consequential relief prayed for with respect to Schedule ‘A’ properties is bound to fail and the declaratory relief, even if granted would not be executable, there being no assail to the Deed of Gift (Exhibit ‘E’). However, since a declaratory relief along with consequential relief have been prayed for we find the conclusion of the Trial Court regarding prayer with respect to Schedule ‘A’ property not being maintainable, to be unsustainable. We, therefore, consider it apposite to quote extracts from Judgment of the Apex Court in the case of **Akkamma and Others (supra)**, as follows:-

“...24. The trial court came to a positive finding that the original plaintiff was the owner of the suit property. But it held that in absence of declaration of relief of possession by the plaintiff, declaration of title cannot be granted. We have already expressed our disagreement with this line of reasoning. It seems to be a misconstruction of the provisions of Section 34 of the 1963 Act. The trial court and the High Court have proceeded on the basis that the expression “further relief” employed in that proviso must include all the reliefs that ought to have been claimed or might have been granted. But in our view, that is not the requirement of the said proviso. This takes us to the corollary question as to whether the 1987 suit could have been held to be barred under the principle contained in Order 2 Rule 2 of the Civil Procedure Code, 1908. In our opinion, the said provisions of the Code would not apply in the facts of this case, as the denial of legal right in the 1987 suit is

pegged on two alleged incidents of 15th and 25-2-1987. These allegations can give rise to claims for declaration which obviously could not be made in the 1982 suit. The claim for declaratory decree could well be rejected on merit, but the suit in such a case could not be dismissed invoking the principles incorporated in Order 2 Rule 2 of the 1908 Code.

25. The High Court has proceeded on the footing that in the subject suit, the original plaintiff must have had asked for relief for recovery of possession and not having asked so, they became disentitled to decree for declaration and possession. But as we have already observed, the proviso to Section 63 of the 1963 Act requires making prayers for declaration as well as consequential relief. In this case, if the relief on second count fails on merit, for that reason alone the suit ought not to fail in view of aforesaid prohibition incorporated in Section 34 of the 1963 Act.

...”

18. In so far as Schedule ‘B’ property is concerned, the Trial Court relying upon the two treasury challans (Exhibit ‘a’ and exhibit ‘b’) standing in the name of Ram Nagiana Prasad Bhagat regarding tenancy of the Schedule ‘B’ property directly in his favour has rightly held that the same cannot be considered as evidence to establish that this property was earlier let out to Oudh Behari Bhagat, or not. Claim of the plaintiff with respect to Schedule ‘B’ property has thus rightly been rejected by the Trial Court.

19. In so far as the Schedule ‘C’ and ‘D’ property are concerned, the Trial Court has considered the lack of evidence to establish the claim of the gold ornaments or Rs. 37,000/- arising out of any joint family property. The Trial Court has also considered the fact that the two arbitration proceedings relied upon by the present plaintiffs (Exhibit 5) does not in any way support the case of the plaintiffs since there is no signature of the parties on the award of the arbitration proceedings wherein no witness was examined. There is also nothing in the judgment of the previous suit to show that the award was

relied upon or was even marked as an Exhibit in the earlier suit. The Trial Court has thus rightly discredited the two awards, sought to be relied upon by the present plaintiffs.

20. In view of consideration above we uphold the conclusion of the Trial Court on the merit of the claim made in the plaint but we record our disapproval on the findings with reference to the issue of non-maintainability of the suit and the relief with respect to Schedule 'A' property being barred by Section 34 of the Specific Relief Act. This aspect we have discussed above with reference to recent decision of the Hon'ble Apex Court in the case of **Akkamma and Others (supra)**. Relying on this decision we find the Trial Court's conclusion on this point to be unsustainable. Since, the plaintiff has failed to prove his claim on merit, we do find reasons to interfere with the ultimate decision by which the suit was dismissed.

21. We, therefore, find no reason to interfere with the dismissal of Title Suit No. 1 of 2012 vide Judgment dated 20.09.2014 by the Trial Court.

22. The appeal is thus dismissed.

(Madhuresh Prasad, J.)

I agree.

(Harish Tandon, J.)