

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

***C.O. 1806 of 2022
Dwijendranath Mondal and Ors.***

VERSUS

Shibsankar Mondal and Ors.

For the Petitioner:

Mr. Prantick Ghosh, Adv.
Mr. Prasad Bhattacharyya, Adv.

Last Heard on: August 16, 2024

Judgment on: August 23, 2024

Biswaroop Chowdhury,J:

The petitioners in this application are defendants no 1, 2 and 3 in Title suit No. 561 of 2017 pending before Learned Civil Judge (senior Division) 2nd Court at Barasat and is aggrieved by the order dated 29-04-2022 passed by the Learned Court in rejecting the application of the petitioners which prayed for rejection of the plaint on the ground of resjudicata.

The case of the petitioners/defendants nos 1 to 3 may be summed up thus.

The defendants no 1 to 3 in the Learned Court below filed petition for dismissal of suit on the ground of maintainability stating inter alia as follows:

1. The defendant no – 1 to 3 in their written statement have categorically stated that their father Bholanath Mondal during his lifetime executed two registered deed of settlement in favour of his sons, the plaintiff herein and the defendant no-6. Jitendra Nath Mondal @ Jatin Mondal jointly filed a suit being deed no – 3309 and 3310 and the said Title Suit – 116/2002 was finally disposed of by the Ld. Court of 2nd Civil Judge (Senior Division) at Barasat and in the said suit the present defendants were also the defendants.
2. In the said suit the defendant Dwijendra Nath Mandal, Jitendra Nath Mondal and Tapan Mondal jointly filed written statement sometimes in the year 1996. Previously the said suit was being no – 163 of 1995 and it was originally filed before the Ld. 3rd Court of Civil Judge (Jr. Divn.) at Sealdah and subsequently transferred to Ld. Court of 2nd Civil Judge (Sr. Divn) at Barasat and it was re-numbered as Title Suit- 116/2002.
3. In the written statement of the previous suit the defendant have distinctly stated regarding those such two deeds of settlement but the plaintiff falsely stated that he has come to know such alleged deed

from the written statement filed by the defendant sometimes in the year 2003. The plaintiff in order to avoid limitation and in order to avoid legal bar has made such false statement. The defendants have had been possessing the entire property as it has described in their registered deed of settlement by all act of possession paying rent and taxes to the competent authority.

4. That previously Title Suit – 116/2002 was a suit for partition and subsequently the said partition suit was amended with a prayer for declaration that alleged settlement deed is illegal void and not binding. The suit of the plaintiff being Title Suit 116/2002 was dismissed on contest as such present suit regarding said nature is barred by law of resjudicata. Whenever the previous title suit decided finally regarding those such two deeds of settlement further suit in respect of said documents is not tenable.

The opposite party plaintiff contested the application by filing written objection.

By order no. 21 dated 29/04/2022 Learned Court below was pleased to dispose the petition of the defendant no-1, 2 and 3/ petitioners challenging maintainability of the suit by observing as follows:

‘Upon considering the submissions made by Ld Advocates of both the sides and on perusal of the materials on record it appears that the defendants have prayed for rejection of the plaint on the ground that earlier a suit being

T.S.116/02 had been disposed off by this court wherein the deed of settlement dated 04/04/81 was challenged as in this suit.

A plaint is liable to be rejected under the provisions of Order 7 Rule 11 Civil Procedure Code if any of the following conditions are satisfied:-

- 1) If it does not disclose a cause of action.
- 2) If the relief claimed is undervalued and correct valuation has not been given despite the order of the Court.
- 3) If the relief though claimed is properly valued but if sufficient stamp is not put in the plaint despite the order of the Court.
- 4) If the suit from the statement of the plaint appears to be barred by any law.

Two more grounds were incorporated by a subsequent amendment ie. where the plaint is not filed in the duplicate and if the plaintiff failed to comply with the provisions of Order 7 Rule 9 CPC.

In order to ascertain as whether the plaint of the instant suit is liable to be rejected or not, the averments made in the plaint are alone to be looked into. The Court is not required to take into consideration the defence set up by the defendant in his written statement. A careful perusal of the plaint reveals that the same is not barred under any provision of law as claimed by the defendant. As such this court finds no reason to reject the plaint of the instant suit.

Accordingly, this court thinks it desirable to reject the instant petition at this stage.

Hence it is

ORDERED.

That the petition filed by the defendants praying for dismissal of the instant suit on the ground of non maintainability dated 12/06/2018 is hereby rejected on contest.'

The petitioner being aggrieved by the order dated 29/04/2022 passed by Learned Court below has come up with this application under Article 227 of the Constitution of India.

It is contended by the petitioner that the Learned Judge without meticulous perusal of the plaint of the present suit erroneously, passed the impugned order rejecting the application filed by the present petitioners. It is further contended that the Learned Judge failed to consider that the suit appears in the plaint to be barred by doctrine of resjudicata. It is also contended that the Learned Judge failed to consider that opposite party no-1 has also admitted in his plaint that the matter in present suit was directly and substantially in issue in the former suit and has been decided.

Pursuant to filing of this application notice was served upon all the opposite parties and Learned Advocate for opposite party no-1 appearing in Trial Court.

The opposite parties did not appear and contest this application. Thus this application was taken up for hearing in the absence of the opposite parties.

Heard Learned Advocate for the petitioners, perused the petition filed and materials on record. Learned Advocate for the petitioners submits, that the Learned Trial Court erred in not allowing the petition filed by the petitioners when the suit is not maintainable. Learned Advocate draws attention to the order passed by Learned Court below and submits that the learned Court failed to apply its mind to the facts of the case.

In the instant case as the petition of the petitioners before Learned Court below was for an order dismissing the suit on the ground of resjudicata, at the very outset it is necessary to consider the provision contained in Section 11 of the Code of Civil Procedure which defines Resjudicata. Section 11 CPC contains the following provisions regarding 'Resjudicata'.

11. Resjudicata – 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, claiming 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 the 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 provision 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 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 resjudicata 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.

Thus upon considering the provision relating to ‘Res judicata’ it will appear that in order to decide as to whether a suit is barred by Resjudicata a Court will have to consider the pleadings of the parties to the suit which is before it as well as the pleadings of the parties in a previously instituted suit the judgment delivered in the previous suit and the parties in both the suits.

A decision of the Hon’ble Supreme Court makes the position more clear.

In the case of Syed Mohd. Salie Labbai by LRS AND Others VS Mohd Hanifa By LRS and others reported in AIR-1976 Supreme Court P-1569, the Hon’ble Court observed as follows:

‘7 In the light of these arguments of the parties and the history of a the case, we would now proceed to decide the points in controversy in this case. We

would first deal with the question of res judicata. In support of this plea the defendants have relied on Exts. B-5 to B-9, B-12, B-16, B- 28, B-30, B-31 and B-73 in support of their case that these judgments constitute and operate as res judicata, and particularly judgments given in those suits which were brought in representative capacity under Order 1, Rule 8 of the Code of Civil Procedure. Before we analyse these judgments, it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved-

- (1) that the litigating parties must be the same;
- (2) that the subject-matter of the suit also must be identical;
- (3) that the matter must be finally decided between the parties; and
- (4) that the suit must be decided by a court of competent jurisdiction.

8. In the instant case according to the plaintiffs / respondents the identity of the subject-matter in the present suit is quite different from the one which was adjudicated upon in the suits which formed the basis of the previous litigation. In our opinion the best 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 suits, and then to find out as to what had been decided by the judgments which operate as res judicata. Unfortunately however in this case the pleadings of the suits instituted by the parties have not at all been filed and we have to rely upon the facts as mentioned in the judgments themselves. It is

well settled that pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment. We would also like to note what the High Court has said on the question of res judicata. The High Court found that although the litigation between the parties lasted for a pretty long time it was never decided whether all or any of the suit properties constituted a public trust. Both the parties appear to have taken extreme stands but even despite the fact that the previous judgments contained an incidental finding that the mosque was a public property and so was the burial ground, the effect of these findings was nullified in 1939 when the High Court held that even if the properties in dispute were the exclusive properties of the Labbais, this expression was not meant to indicate that they were their private properties. This, in our opinion, clearly shows that the public character of the wakf or of the mosque was never in issue. The High Court on this point found as follows:

"We are, therefore, of the view, that the issue as to whether the properties constituted a public trust having been never raised and decided between the parties in any of the prior suits, O.S. No. 9 of 1956 on that question was not barred by res judicata. The finding of the Court below in this regard is affirmed."

The Trial Court had also negated the plea of res judicata taken by the defendants'

Apart from considering the provision of Resjudicata it is also necessary to consider the provision regarding pronouncement of judgment on all issues as provided under Rule 2 Order XIV of the Code of Civil Procedure.

Rule 2 Order XIV of the Code of Civil Procedure provides as follows:

Rule 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 that 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.

In the instant case the Learned Court below dismissed the petition of the petitioner praying for dismissal of the suit on the ground of resjudicata, by treating the petition as petition under order 7 Rule 11 of the Code of Civil Procedure when nowhere in the said application it is stated that it is a petition under Order 7 Rule 11 CPC. Learned Court below erred in confining itself to the averments in the plaint only when the issue of resjudicata has to be

decided upon considering the pleadings of the plaint, and written statement of the present suit, as well as the pleadings in the plaint and written statement of former suit, the judgment delivered in the former suit and the parties in the present suit and former suit. Nowhere in the order of the Learned Court there is specific observation and decision as to whether the suit is barred by resjudicata or not. Thus the order of the Learned Court below cannot be sustained and the same should be set aside.

Hence this Revisional Application stands allowed. Order dated 29/04/2022 passed by Learned Civil Judge Senior Division 2nd Court at Barasat in Title suit no 561 of 2014 is set aside. The matter is remitted back to the Learned Trial Court to reconsider and decide the application dated 12/06/2018 filed by the petitioners/Defendants no 1 to 3 in accordance with law by a reasoned order.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)