

Smt. Shyama Devi Vs. Viith Additional District Judge, Allahabad and Others

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Court : Allahabad

Decided On : May-26-1998

Reported in : 1998(4)AWC485

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 2(2), 11 and 151 - Order 7, Rule 11; [Specific Relief Act, 1963](#) - Sections 34

Appeal No. : C.M.W.P. No. 13958 of 1998

Appellant : Smt. Shyama Devi

Respondent : Viith Additional District Judge, Allahabad and Others

Advocate for Def. : S.C., ;N.K. Sharma and ;D.N. Tyagi, Adv.

Advocate for Pet/Ap. : R.P. Tripathi and ;Ravi Kant, Adv.

Judgement :

D.K. Seth, J.

1. In this writ petition, Mr. Ravi Kant, learned counsel for the petitioner has sought for quashing the proceeding of Suit Wo. 23 of 1978, Raghuraj Prasad v. Smt. Shyama Devi, pending in the Court of Additional Civil Judge, Junior Division, VIIIth Court, Allahabad on the ground that the suit is frivolous and patently it appears on

the face of it is not maintainable. However, Mr. Ravi Kant very fairly conceded that this point was never taken in the Court below, on the other hand only when the application for amendment has been allowed and the revision thereout was dismissed, the present application has been filed.

2. In order to appreciate the contention of Mr. Ravi Kant, learned counsel for the petitioner, it is necessary to briefly refer to the facts of the case.

3. It is alleged that the suit property was recorded in the name of one Ram Narain in the records of the Nagar Mahapalika. The said Ram Narain died on 24.7.1959. The name of respondent No. 3 herein was recorded in the records of Nagar Mahapalika as successor of the deceased on 23.11.1964. On 21.12.1964, the said record mutuating the name respondent No. 3 was struck off and instead, the name of the petitioner was mutated. Thereupon respondent No. 3 filed Original Suit No. 314 of 1966 for declaration that the order dated 21.12.1964 is null and void. The said suit was filed before the 1st Additional Munsif, Allahabad. In the judgment passed in the said suit, respondent No. 3 was found not to be a member of the family of the deceased Ram Narain, Thereafter respondent No. 3 instituted a Suit No. 203 of 1971 for declaration that the plaintiff is the sole heir of Ram Narain and as such he is exclusive owner of the property and alternatively for possession. The plaint of the said suit was rejected on account of non-payment of deficit court fee within the time fixed. No appeal was preferred against the said rejection of the plaint. Neither the said order was sought to be recalled. On 9.1.1978 Suit No. 23 of 1978 was filed by the plaintiff for declaration that the plaintiff is the sole heir of late Ram Narain and Gauri Shankar and the defendant petitioner was not the heir. This suit was dismissed on 4.10.1982 being barred by Section 34 of the Specific Relief Act. An appeal was preferred by plaintiff-respondent No. 3 which was allowed on 12.10.1983 permitting the plaintiff to amend the plaint seeking further reliefs. On 11.11.1983 the plaintiff filed an application for amendment. In the meantime, the petitioner had preferred an appeal before this Court against the order dated 12.10.1983 which ultimately was dismissed by this Court on 18.12.1996. Respondent No. 3 moved another application for amendment on 28.11.1997. A further application for amendment was filed on 2.12.1997. Another application for amendment was filed on 2.1.1998. However, by an order dated 29.1.1998 the trial

court allowed the application for amendment filed on 11.11.1983. The revision thereout was dismissed by an order dated 16.3.1998 passed by the learned Additional District Judge, VIIIth Court, Allahabad. At this stage, the petitioner has come before this Court seeking the relief as mentioned above.

4. Mr. D. N. Tyagi, learned counsel assisted by Mr. N. K. Sharma, learned counsel for respondent No. 3 opposes the said case on the ground that on merits it appears that the subsequent suit is not barred by res judicata and as such cannot be treated to be an abuse of process of law in order to attract the contention of Mr. Ravi Kant that the proceeding being an abuse of process of law on the face of it, it should be quashed. On the other hand, he contends that this is a question to be gone into by the Court below and has come to a particular finding that as to whether the suit is barred by res Judicata as has been sought to be urged by Mr. Ravi Kant. He relies on various decisions as to the nature and extent of res Judicata and when the said principle applies and contends that on the basis of the ratio decided, in the facts and circumstances of the case, the principle of res Judicata does not apply since the scope of different decisions are altogether different though the parties and property involved may be same. The question of res Judicata according to him is on the basis of relief sought for and the issue decided and being the issues which are called upon to be decided in such proceeding. Therefore, according to him this petition should be dismissed.

5. I have heard Mr. Ravi Kant learned counsel for the petitioner Shri D. N. Tyagi, learned counsel for respondent No. 3 at length.

6. Plaint of Suit No. 314 of 1966, is annexed as Annexure SCA-I to the supplementary counter-affidavit filed on behalf of respondent No. 3. In the said plaint, cause of action was alleged to have arisen on 21.12.1964 and on 4.8.1965. On the basis of such cause of action, the relief was sought to the extent that the order dated 21.12.1964 passed by the Nagar Mahapalika is not binding on the plaintiff and that his name should be mutated instead of the name of petitioner herein. In the said suit along with the Nagar Mahapalika, the petitioner was made party. The pleadings as has been made out in the plaint shows that the respondent No. 3 as plaintiff therein had claimed absolute title to the property on

the death of said Ram Narain as heir to the deceased. In the said suit, it was open to him to pray for declaration of such right or title in respect of the property but he has himself omitted to incorporate such prayer which he is precluded if he does not do so in view of proviso to Section 34 of the Specific Relief Act. Be that as it may, issues were framed in the said suit on the basis of the pleadings. Issue No. 3 was framed as to whether the order dated 21.12.1964 was illegal and not binding on the plaintiff. While Issue No. 6 was framed as to whether the plaintiff was a member of the family of Ram Narain. In fact in order to grant the relief as prayer for in the said plaint, it was necessary to find out as to whether the right claimed by the plaintiff as owner of the property against the defendant has been able to prove that he has right, title and interest so as to get the order dated 21.12.1964, recording the name of the defendant, in the records of the Nagar Mahapalika, cancelled. These issues were gone into and decided by the Judgments and decree dated 15.12.1970 passed in Suit No. 314 of 1966, holding inter alia that the recording of the name of the petitioner by the Nagar Mahapalika was not illegal and that the plaintiff was not the member of the family of Ram Narain.

7. This decree had reached its finality and the question whether the plaintiff-respondent No. 3 is a heir of deceased Ram Narain or not can only be decided if he happens to be a member of the family and not otherwise. If it is decided that he is not a member of the family, then there is no question of his being a heir of Ram Narain.

8. From the reading and the relief sought for in the suit, it appears that in order to grant relief it was necessary to adjudicate upon the right, title and interest of the plaintiff as claimed by him in the plaint vis-a-vis that of the defendant and therefore, it was an issue germane in the context of the facts and circumstances of the case in order to grant the relief in the said suit. Thus, the said issue having been decided as between the plaintiff and the defendant, it is very much binding on the parties since it is not disputed in all the three suits that the parties and properties were same.

9. In the second suit being Suit No. 203 of 1971, in the plaint, which is Annexure-2 to the writ petition, it is alleged in paragraph No. 36 that the cause of action arose

on 21.12.1964 and 24.7.1959 being the date on which Ram Narain had died. Thus, the cause of action in the first suit and the second suit with regard to 21.12.1964 appears to be common.

10. The relief in the second suit that was asked is for declaration the plaintiff is the sole heir of the Ram Narain and exclusive owner of the property in dispute. This very issue was not specifically mentioned in the first suit where the issue was as to whether he was a member of the family which is little wider than the Issue in the second suit. Unless a person is member of a family, he cannot be heir of the deceased. Therefore, this issue appears to have been covered by the first suit particularly when the cause of action was the same namely recording of name of the petitioner in the record of the Nagar Mahapalika.

11. The plaint of second suit stood rejected by reason of non-payment of deficit court-fee. The fact that the parties and the suit property involved are same and that the suit was rejected on the ground of non-payment of court-fee is not disputed. Order VII, Rule 11 of the Code of Civil Procedure empowers the Court to reject the plaint on the grounds mentioned therein--one of which is failure on the part of the plaintiff to make good the deficit court-fees if the plaint is written on paper insufficiently stamped within the time fixed by the Court.

12. Admittedly the plaint was rejected under Order VII, Rule 11 of the Code. An order rejecting the plaint is a decree as defined in Section 2(2) which while defining the decree deemed to include the rejection of plaint. Therefore, the said rejection of the plaint being a decree, the issue which ought to have been raised shall be deemed to have been raised and decided against even if it is not raised on account of the principle of constructive res Judicata as enunciated in Explanation XV of Section 11 and, therefore, the said issue involved in the second suit may also be deemed to have been decided as against the plaintiff-respondent No. 3. The rejection of a plaint being decree stands altogether on a different footing when the suit is dismissed for default without attracting the mischief of Section 11 of the Code. Section 11 of the Code postulate the application of mischief provided therein only in case where the issue has been raised and has been finally decided by a Court competent to try the subsequent suit and that such

issues were directly or substantially in issue in a former suit in respect of the same subject-matter between the same parties or claiming litigating under the same title. All other ingredients have been admitted to be inexistent excepting that the issue was not involved as contended by Mr. Tyagi, learned counsel for respondent No. 3. He has not disputed that other ingredients were not satisfied in the present case. He had confined his argument only on the ground that the present issue involved in the third suit was not an issue in the first and second suit. He relies on the decisions in the case of *Het Ram Konodia v. 11th Additional District Judge, Kanpur and others*, AIR 1995 All 77 ; *Devon Ram and another v. Ishwar Chand and another*, AIR 1996 SC 378 ; *Rajendra Kumar v. District Judge, Jaunpur*, AIR 1996 All 178 and *P. M. A. Metropolitan v. Moran Mar Marthoma*, AIR 1995 SC 2001, and contends that it is not only necessary to find out that issue was directly or substantially in issue but it is also required to be found that it was so to be decided in the said suit as well.

13. So far as the proposition laid down by the ratio decided in the said decision cited by the learned counsel for the respondent No. 3 are concerned, there is no doubt about the legal proposition and those are well-settled principle of law with regard to which there cannot be any two opinion. Mr. Tyagi, contended that the issue which was decided in the first suit was not necessary to be decided therein. Therefore, the said decision cannot operate as *res judicata*. He then contends that so far as the second suit, the issue was, never heard nor finally decided, neither the issue was so firm, and therefore, the principle of *resjudicata* is not attracted.

14. In view of the provision as provided in Explanation IV, it is no more open to Mr. Tyagi to contend that in the second suit issues were not heard, and finally decided. Inasmuch as Explanation IV provides that 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. This explanation recognises the ratio decided in various decisions which laid down the principle of constructive *res judicata*. Thus, the issue as to the question whether the plaintiff-respondent No. 3 is heir of Ram Narain and exclusive owner of the suit property denying the title of defendant thereto is very much a matter which ought to have been made ground of attack in the said suit. Whether raised or not it

should be treated to operate as res judicata. Admittedly, the right of the plaintiff was denied in the first suit and also in the second suit. Since the second suit had also suffers a decree by virtue of rejection of the plaint in view of definition as contained in Section 2(2) of the Code, the said decree have also deemed to have been decided the issue in view of Explanation IV of Section 11.

15. The rejection of the plaint being a decree, it was open to him to prefer an appeal against the said decree. It was also open to him to apply for setting aside the said decree under Section 151 of C.P.C. But the plaintiff has not taken any step and has allowed the decree to become final. Thus, both these points had been in issue in the earlier two suits.

16. In the third suit, the plaint here is Annexure-3 to the writ petition. Cause of action as disclosed in paragraph 21 was said to be same as of 21.12.1959, the date of death of Ram Narain and on 21.12.1964 being the date on which the name of the petitioner was mutated in the records of the Nagar Mahapalika while adding one more date as 8.1.1978. On the basis of the same cause of action which was involved in earlier two suits, the relief that was sought in the third suit is for declaration that the plaintiff is the sole legal heir and successor and legal representative of Ram Narain and Gauri Shankar and the defendant is not their heir. Thus, the issue involved in the third suit is the same except one Gauri Shankar was indicted. But that will not change the position since the defendant had been claiming to be the heir of Ram Narain. Therefore, the issue involved in the third suit is also same as was involved in the earlier two suits. From the perusal of three suits it appears that the defendant-widow had been subjected to long drawn litigation right from 1966 by the plaintiff despite having been unsuccessful in the earlier two suits which clearly indicates that the proceeding was being proceeded with the abuse of process. He had himself allowed the opportunity at his own hand to be lost on the earlier occasions and had accepted the decrees in the first and second suits as discussed above and therefore, he was estopped on the principle of res judicata to reopen the same issue in respect of the same property between the same party. On the face of it, it is sure an abuse of process of law.

17. In such circumstances. Mr. Ravi Kant learned counsel for the petitioner relying on the decision in the case of Smt. Raj Kapoor v. Civil Judge, Kanpur and others. 1987 ALJ 137, contends that though the said question was not raised in the trial court but in the facts and circumstances of the case, this Court can intervene and quash the proceeding.

18. In considering the said contention, it may be necessary to refer to the process of third suit which was dismissed by the trial court on the ground that it was not maintainable being barred by Section 34 of the Specific Relief Act by judgment and decree dated 4.10.1982 and thereafter an appeal was preferred which was allowed by an order dated 12.10.1983 permitting the plaintiff to amend the plaint and then successive applications for amendment have been made respectively on 11.11.1983, 28.11.1997, 2.12.1997 and 2.1.1998. Only one amendment application dated 11.10.1983 has been allowed while the other applications were kept pending. For 20 years the suit has been proceeding against the defendant and respondent No. 3 had been keeping the widow on her toes and tenterhook right from 1966 namely, almost- for 32 years without being serious in the matter of conducting of his case and assertion of his right which is apparent from the facts as discussed above.

19. Thus it appears that this is also one of the case as was the case in the decision referred to in the decision of Smt. Raj Kapoor (supra). If the proceeding appears to be an abuse of judicial process which affects the judicial reputation taking advantage of technicality. In that event it is open for this Court while exercising power of superintendence over the subordinate judiciary so as to guide the subordinate Judiciary and keep them within the bounds of their jurisdiction. It seems that the entire process has been adopted by the plaintiff only to harass the widow who has been made to fight in Court for the last 32 years when on the face of it, it appears that the respondent No. 3 had already lost his ground. He deliberately did not include the relief which could have been included in the first suit namely with regard to the declaration that he is the sole heir of Ram Narain and exclusive owner of the property. Then again the Court was called upon to decide the title of the respondent No. 3 in order to grant the relief sought for by him in the first suit since without which such relief could not be granted to him. Having

omitted to do so in the first suit, he has tried to do the same in the second and third suit and that too which also stood dismissed at one point of time being barred under Section 34 of the Specific Relief Act which was sought to be corrected through amendment that too after the decree was passed and only when the appeal was allowed.

20. .For all these reasons following the decision in the case of Smt. Raj Kapoor (supra) I am in agreement with the ratio decided by the learned single Judge therein.

21. For the foregoing reason the plaint and the proceeding in Suit No. 23 of 1978, pending before the Additional Civil Judge, Junior Division. VIIIth Court, Allahabad, is hereby set aside.

22. The writ petition is thus allowed. However, there will be no order asto cost.

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