

Maharama and anr. Vs. Ram Bux

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Court : Rajasthan

Decided On : Jul-24-1978

Reported in : 1978(11)WLN667

Judge : N.M. Kasliwal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 - Order 23, Rule 1

Appeal No. : S.B. Civil Misc. Appeal No. 17 of 1977

Appellant : Maharama and anr.

Respondent : Ram Bux

Advocate for Def. : P.N. Datt, Adv.

Advocate for Pet/Ap. : Arun Bhandari, Adv.

Disposition : Appeal allowed

Judgement :

N.M. Kasliwal, J.

1. This miscellaneous appeal is directed against an order of the Additional District Judge, Tonk, dated 4th Nov. 1976, by which he set aside the judgment and decree passed by the Munsif. Tonk, dated 20th Oct. 1975, and has remanded the case with a direction to record evidence and then to decide the case afresh.

2. The brief facts of the case are that the respondent Ram Bux filed a suit for permanent injunction against the defendant appellants on the ground inter alia that the plaintiff had a Nohra in the village Pahadi Tehsil Newai in which he had a right of passage through the land described in the plaint. The defendants be restrained by issuing a permanent injunction not to interfere with the right of way of the plaintiff and not to make any construction. It was further prayed that whatever construction the defendants have made, may be demolished by issue of a mandatory injunction. The defendants' main contention was that the plaintiff had no right of way and the land described in the plaint was the exclusive property of the defendants and as such no injunction could be issued against the defendants. It was further pleaded by the defendants that on the same ground a suit was filed by the plaintiff against the defendants in the year 1972 and the learned Munsif Tonk by his judgment dated 22nd Dec. 1972, had decided all the issues against the plaintiff and had held that the plaintiff had no right of way and as such the said judgment and decree dated 22nd Dec. 1972, was res judicata in the present suit.

3. Learned trial Court by his judgment dated 20th Oct. 1975, held the present suit to be barred by the principles of res judicata and dismissed the suit. On appeal the learned Additional District Judge, Tonk, reversed the decision of the learned trial court on the point of res judicata and has remanded the case with the direction to record evidence and decide the case on merits on all the issues. In these circumstances the present appeal has been filed challenging the order of remand passed by the learned Additional District Judge, Tonk.

4. It is contended by the learned counsel for defendant-appellants that when the Munsif, Tonk, had, vide his judgment dated 22nd Dec. 1972, decided all the issues against the plaintiff and the said decision was between the same parties and by a competent court, was clearly res judicata between the parties and the present suit on the same cause of action was not maintainable.

5. Learned counsel for the appellants has placed reliance on Fateh Singh v. Jagannath Baksh Singh, AIR 1925 PC 55, Vyankatesh Shivram Gokhale v. Krishan Bal Chavan AIR 1931 Bom 417, Sukhlal v. Bhikhi, ILR (1889) 11 All 187 (FB) and Gangappa Gurupadappa Gugwad v. Rachawwa AIR 1971 SC 442. On

the basis of the above rulings it is contended by the learned counsel that no application was filed by the plaintiff in the earlier suit under Order 23 Rule 1 C. P. C. for permission to withdraw that suit with liberty to file a fresh suit and after the decision of the suit on merits, no power was left in the said court to grant any permission for bringing a fresh suit. It was further contended that the court was functus officio to hold that the suit was premature after the same had been decided on merits.

6. Learned counsel appearing on behalf of the plaintiff respondent had vehemently contended that the judgment and decree of the earlier suit dated 22nd Dec. 1972, can by no stretch of imagination be treated to be res judicata when there was a clear direction in the said judgment and decree that the said suit was premature and the plaintiff was at liberty to file fresh suit. Strong reliance is placed on *Midnapur Zamindari Co. Ltd., v. Naresh Narayan Roy*, AIR 1922 PC 241, *Shankarlal Patwari V. Hiralal Murarka*, AIR 1950 PC 80, and *Kan-duri Naik v. Sapani Naik*, AIR 1971 Ori 218.

7. I have given my careful consideration to the arguments advanced by the learned counsel for both the parties. Section 11 C. P. C. lays down the principles of res judicata according to which '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,' There is no dispute that in case the direction in the earlier judgment as regards holding the suit being premature and that the plaintiff was at liberty to file a fresh suit, would not have been there it was res judicata for the fresh suit. Thus the only controversy remains as to the fact of the following directions contained in the previous decree dated 22nd Dec. 1972,

'Suit is dismissed with costs against the plaintiff in favour of the defendants The suit is premature. The plaintiff is at liberty to file fresh suit.'

As regards the power of a court to allow the plaintiff to withdraw the suit with liberty to file a fresh suit the only provision contained in C. P. C. is under Order 23 Rule 1 C. P. C. Such power is not absolute and can only be exercised when an application in this regard is made by the plaintiff and the court is satisfied that a suit must fail by reason of some formal defect or that there were sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. The learned Counsel for the respondent has not been able to show that any application for withdrawing the suit with liberty to file a fresh suit was filed by his client in the earlier suit. There is no mention of such application in the previous judgment and it so seems that the Court while holding the suit to be premature granted a liberty to the plaintiff to file fresh suit. This direction is contained in the last portion of the judgment. In this view of the matter when there was no formal application under Order 23 Rule 1 C. P. C. for withdrawal of the suit, such remark cannot amount to a permission to bring fresh suit under Order 23 Rule 1 C. P. C. It can also not be inferred that the court while granting such permission was alive with the grounds contained in Order 23 Rule 1. I am fortified in my above view by the decisions of *Fateh Singh v. Jagannath Baksh Singh*, AIR 1925 PC 55, and *Robert Watson & Co. v. The Collector of Zillah Rajshahye*, *Dost Mohamed Khan Chowdhry*, *Ranee Anundomoye* and *Horace John Abbott* (1869-70) 13 Moo Ind App 160 (PC),

8. As regards the direction holding the suit to be premature strong reliance is placed by the learned counsel for the plaintiff-respondent upon *Shankarlal Patwari v. Hiralal Murarka* AIR 1950 PC 80. Their Lordships in the said case held that where a court held that the suit was not maintainable by reason of failure to comply with Section 80 C. P. C. the findings given on merits were obiter and did not support the plea of *res judicata* either in favour of or against the party. I need not detain myself any longer in view of a final pronouncement on the said question by their Lordships of the Supreme Court in *Gangappa v. Rachawwa's* case AIR 1971 SC 442. Their Lordships had also taken into consideration the case reported in *Shankarlal Patwari's* case, AIR 1950 PC 80 and have explained it. The following observations of their Lordships in the above case conclude the above controversy :--

'No doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiff's cause of action is against a Government and the plaint does not show that notice under S, 80 of the Civil P. C. claim-ing relief was served in terms of the said Section it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. But, where the plaint on the face of it does not show that any relief envisaged by Section 80 of the Code is being claimed, it would be the duty of the Court to go into all the issues which may arise on the pleadings including the question as to whether notice under Section 80 was necessary. If the Court decides the various issues raised on the pleadings, it is difficult to see why the adjudication of the rights of the parties, apart from the question as to the applicability of Section 80 of the Code and absence of notice thereunder should not operate as res judi-cata in a subsequent suit where the identical questions arise for deter-; mination between the same parties.

9. The finding in the earlier suit that it was premature cannot be considered to be a decision on a preliminary issue so as to render the finding on the other issues, merely obiter or surplusage. In case the court was inclined to dismiss the suit merely on the ground of being premature, it ought not to have given a decision on merits on all issues. In these circumstances, the trial Court was right in holding that the judgment and decree dated 22nd Dec. 1972, between the parties was res judicata and the lower appellate Court was wrong in setting aside the judgment of the trial Court.

10. In the result, this appeal succeeds, the judgment of the learned Additional District Judge, Tonk, dated 4th Nov. 1976, is set aside and that of the trial Court dated 20th Oct. 1975, as maintained. In the facts and circumstances of the case the parties are left to bear their own costs throughout.