(2019) 08 CHH CK 0207

Chhattisgarh High Court

Case No: First Appeal No. 374 Of 2016

Radheshyam Soni And Ors		APPELLANT
	Vs	
Devendra Kumar And Ors		RESPONDENT

Date of Decision: Aug. 30, 2019

Acts Referred:
Code Of Civil Procedure 1908 â€" Section 11, 96, Order 2 Rule 2

Citation: (2019) 08 CHH CK 0207

Hon'ble Judges: Ram Prasanna Sharma, J

Bench: Single Bench

Advocate: Somnath Verma, Malay Jain, R.S. Patel

Final Decision: Dismissed

Judgement

Ram Prasanna Sharma, J

1. This first appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against judgment/ decree dated 07.09.2016 passed by District

Judge, Dhamtari (C.G.) in Civil Suit No. 23A/2016, wherein the said court dismissed the suit filed by the appellants/ plaintiffs for possession of shop

shown in the map as ABCD attached with the plaint and for compensation.

2. As per the appellants/ plaintiffs, the appellants instituted a suit on 21.10.2003 against the respondents for obtaining vacant possession of the shop as

mentioned above and for compensation for illegal possession. The house and adjacent shop is situated at Baniyapara, Dhamtari which belong to

ownership and title of plaintiffs Late Madhav Soni and Late Tokhan Lal Soni @ Jhaduram. Jhaduram died in the year 1993 leaving behind legal heirs

who inherited his property and were living jointly in the coparcenaries property. On 20.11.1996, the legal heirs executed registered partition-deed.

Accordingly, the appellants were allotted the shop in question. In the month of April, 1998, the defendant possessed the suit property forcefully. It is

pleaded that mother of the appellants executed a will in favour of the plaintiffs and bequeathed her share. When the appellants told the respondents to

leave possession, the respondents instituted a Civil Suit No. 363-A/1998 on 27.04.1998 against the appellants and others seeking relief of declaration

and permanent injunction which was partly decreed. Second appeal was preferred by Late Madhav Soni which is pending as Second Appeal No. 441

of 2003 before this Court. The trial court dismissed the suit filed by the appellants on the ground that the suit is hit by principle of res judicata.

3. Learned counsel for the appellants submits as under:-

(i) Earlier suit was not filed for possession of shop and as issue of possession was not decided in earlier suit, the trial court ought to have decided this

issue.

(ii) In the previous suit, the appellants were defendant, therefore, provisions of Order 2 Rule 2 of C.P.C., 1908 is not applicable. Finding on this count

by the trial court is not sustainable.

(iii) The trial court has not interpreted Section 11 of the C.P.C., 1908 in its true perspective. Though the fact which had been determined in previous

suit need not be considered, but for relief of possession in the instant suit is maintainable and liable to be decreed.

4. On the other hand, learned counsel for the respondents submits that the suit filed by the appellants is clearly hit by principle of res judicata,

therefore, finding arrived at by the trial court is not liable to be interfered while invoking jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused the record in which judgment and decree has been passed.

6. First question for consideration before this Court is whether the principle of res judicata is applicable in the present case. From record, it is clear

that the appellants in the present case were defendants in the earlier suit and they filed written statement in the previous suit. The pleading regarding

dispossession from the shop was also pleaded in the previous suit. They could have filed counter claim in the said suit, but that is not done. Section 11

of the C.P.C., 1908 reads as under:-

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.

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 provisions 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.

7. The earlier court was competent for trying the suit for possession also.

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. It means issue of possession was also directly and substantially an issue in the previous suit, therefore, the same

issue cannot be reagitated in subsequent suit.

8. The trial court has discussed the entire issue and recorded finding that the issue between the parties regarding present suit is already decided in

earlier Civil Suit No. 363/1998 in which the judgment/ decree is passed on 10.07.2002, therefore, the suit is not maintainable as the same is hit by

principle of res judicata. After reassessing, this Court has no reason to record contrary finding.

Argument advanced on behalf of the appellants is not sustainable.

9. Accordingly, the appeal is liable to be dismissed. The decree is passed against the appellants and in favour of the respondents on the following

terms and conditions:-

(i) The appeal is dismissed with cost.

(ii) Parties to bear their own costs.

(iii) Pleaders' fee, if certified be calculated as per certificate or as per schedule whichever is less.

(iv) A decree be drawn accordingly.