
AIR 1985 HP 85 : (1985) ShimLC 88

High Court of Himachal Pradesh

Case No: Civil Revision No. 55 of 1978

Salo

APPELLANT

Vs

Munshi Ram and
Others

RESPONDENT

Date of Decision: Sept. 21, 1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Section 11

Citation: AIR 1985 HP 85 : (1985) ShimLC 88

Hon'ble Judges: V.P. Gupta, J

Bench: Single Bench

Advocate: P.N. Nag, for the Appellant; K.D. Sud, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V.P. Gupta, J.

Munshi Ram respondent 1 (hereinafter the plaintiff) filed a suit for declaration to the effect that he is the owner in possession

of the land measuring 1 kanal and 17 marlas comprising khasra No. 50 of Tika Upahu Mauza Ladwara Tehsil Kangra, as detailed in the plaint

(hereinafter called the suit land) with trees including an arjan tree situate in the suit land with permanent injunction against Salo petitioner (hereinafter

defendant No. 1) and respondents 2 to 5 (hereinafter defendants 2 to 5) to the effect that the defendants should not interfere with the plaintiffs

rights in any manner whatsoever and should not cut or remove the trees from the suit land.

2. The plaintiff alleges that he is the owner of the suit land along with the trees by way of gift and that the defendants have no concern with the land

and the trees. It is further alleged that the defendants are threatening to interfere with the plaintiffs rights and are also trying to cut or remove the

trees forcibly from the suit Sand. The defendants in spite of the repeated requests are not stopping from their illegal activities of interference and the

plaintiff is compelled to file the present suit. This suit was filed in the Court of Sub Judge Kangra on 14-8-1972.

3. Notices of the suit were issued to the defendants and the defendants contested the plaintiffs suit.

4. Defendant I, in his written statement denied the plaintiffs claim.

5. It may be mentioned that another civil suit No. 311 of 1967 (Santoo v. Chuhroo, Sali and Pratapoo) was filed by Santoo s/o Saudagar against

Chuhroo, Sail and Partapoo Sons of Lachhman on 6-9-1967 in the Court of Sub Judge Kangra regarding the land measuring 2 kanals 9 marlas

comprising khasra Nos. 50, 51 and 59 of Tika Upahu Mauza Ladwara, Tehsil Kangra and was dismissed as withdrawn with liberty to file a fresh

suit on the same cause of action by the Sub Judge Kangra on 10-7-1972. The order of the Sub Judge in Civil Suit No. 311 of 1967 was passed

for the reason that the learned counsel for Santoo wanted to withdraw the case with permission to file a fresh suit on the same cause of action. Sali

s/o Lachman (defendant in civil suit No. 311 of 1967) was not satisfied with the order of the dismissal of the suit and he filed a revision petition (C.

R. No. 46 of 1973) in this Court challenging the order of the Sub Judge dt. 10-7-1972. A learned Single Judge of this Court vide his order dt. 2-

4-1974 accepted the revision petition and modified the order dt. 10-7-1972 passed by the Sub Judge Kangra. He dismissed the plaintiffs suit with

costs after holding that the Sub Judge had acted with material irregularity in the exercise of his jurisdiction.

6. After the order of the High Court passed in Civil Revision No. 46 of 1973 on 2-4-1974, an application under Order 6 Rule 17 C.P.C. was

filed by Sali in Aug. 1974 in the present suit praying that he may be allowed to amend the written statement by raising preliminary objection with

respect to res judicata. This application allowed vide order dt. 3-9-1974 passed by the Sub Judge Kangra. As a consequence an amended written

statement was filed by Sali defendant 1 on 25-9-1974. Replication to the written statement was also filed on 28-10-1974.

7. On the pleadings of the Parties, the following issues were framed on 20-6-1975 : --

1. Whether the trees in question situate in Khasra No. 50 are owned and possessed by the plaintiff?

2. Whether the suit is barred on the principles of res judicata?

3. Relief.

Issue No. 2 with respect to res judicata was treated as a preliminary issue and the parties were allowed to lead evidence on this issue.

8. After the arguments the Sub Judge Kangra vide his order dt. 8-3-1978 decided issue No. 2 with respect to res judicata against the defendants

and held that the present suit was not barred on the principles of res judicata.

9. Dissatisfied with this order of the Sub-Judge, Sali, defendant has filed the present revision petition.

10. I have heard the learned counsel for the parties and have gone through the records.

11. In the amended written statement Salo defendant has raised preliminary objection in the following terms : --

Civil Revision No. 46 of 1972 against the order dt. 10-7-1972 passed in C. S. Santoo v. Sali, has been accepted by the High Court on 2-4-

1974 and suit of Santoo s/o Munshi has been dismissed. The questions in dispute are res judicata and the present suit cannot proceed.

Sali defendant 1 has again raised a similar objection of res judicata in paras 4 and 6 of the amended written statement. In replication to the

amended written statement, the plaintiff has denied the fact that the previous litigation between the parties is res judicata. The plaintiff has further

alleged that he was not a party in the previous litigation and that the previous decision cannot amount to res judicata.

12. It is admitted by the learned counsel for the parties that there was no final adjudication of any disputes in the previous suit No. 311 of 1967

which was dismissed as withdrawn. In the trial Court suit No. 311 of 1967 was dismissed as withdrawn with liberty to file a fresh suit on the same

cause of action, but this order was modified in revision (C. R. No. 46 of 1973) and the suit was simply dismissed as withdrawn.

13. For applying the principles of res judicata the following conditions are necessary : --

(a) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the previous suit.

(b) The former suit must have been between the same parties or between the parties under whom they or any of them claim.

(c) Such parties must have been litigating under the same title in the former suit.

(d) Such matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

14. Thus the questions in controversy which are directly and substantially in the issue in the subsequent suit should have been directly and

substantially in issue in the former suit and the same should have been heard and finally decided in the former suit. Even a matter which might and

ought to have been made a ground of defence or attack in the former suit can be treated to be a matter directly and substantially in issue in the

former suit. This is (he principle of constructive res judicata.

15. Unless a suit or an issue is heard and finally decided in the former suit, the same cannot be held to be res judicata in a subsequent suit.

16. The learned counsel for the plaintiff further contends that the cause of action in the present suit is different than the cause of action upon which

the previous suit No. 311 of 1967 was filed. I need not go into this question because in the facts and circumstances of the present case, the matter

cannot be treated to be res judicata u/s 11 C.P.C. for the simple reason that the previous suit No. 311 of 1967 was not dismissed after having

been heard and finally decided.

17. In AIR 1958 Patna 95 (Sheikh Habibulla v. Jamuna Singh) it was held that the dismissal of a suit on the ground of abatement cannot operate

as res judicata though a second suit on the same cause of action will of course be barred, the reason being that res judicata essentially arises out of

a decision given on merits while a bar against fresh action is founded on the provision of law as laid down in the Civil P.C. and not necessarily on

an order which is tantamount to a final decision on merit though it is true that for certain purposes that order may operate as judgment.

18. In Sheodan Singh Vs. Smt. Daryao Kunwar, it was held that if the decision in the former suit is not on merits, then the case cannot be said to

have been heard and finally decided. The examples of such cases could be that the former suit was dismissed by the trial Court for want of

jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness or on the

ground that the suit was badly framed, or on the ground that a technical mistake, or for failure on the part of the plaintiff to produce probate or

letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security

for costs, or on the ground of improper valuation or for failure to pay additional Court fee on a plaint which was undervalued or for want of cause

of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res

judicata in a subsequent suit.

19. In the present case, suit (No. 311 of 1967) was earlier dismissed by Sub Judge Kangra because the witnesses were not present and process

fee and diet money had not been paid. The learned counsel, therefore, sought permission to withdraw the case with permission to file a fresh suit

on the same cause of action and this request of the counsel was accepted by the Sub-Judge Kangra. The order was challenged in revision (C. R.

No. 46 of 1973) and a learned Single Judge did not accept the request of the counsel regarding liberty to file the fresh suit and dismissed the

plaintiffs suit with costs. Thus the suit No. 311 of 1967 was dismissed and the evidence of the plaintiff was not present and the same had not been

summoned. Such a dismissal cannot be said to be a dismissal on merits.

20. In view of the above discussion, it is held that the present suit is not barred on the principles of res judicata and the Sub Judge has rightly

decided issue No. 2 against the defendant. As a consequence the present revision petition is dismissed. The file be sent to the court of Sub Judge

Kangra at the earliest. The parties are directed to appear in the court of Sub Judge Kangra on 15-10-1984. The Sub Judge shall proceed with the

case and try to decide the suit at the earliest.