(1957) 07 AHC CK 0009

Allahabad High Court

Case No: Civil Revision No. 550 of 1952

L. Nem Kumar Agarwal		APPELLANT
	Vs	
Nem Kumar and Another		RESPONDENT

Date of Decision: July 24, 1957

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 2, 10, 11
- Evidence Act, 1872 - Section 115

Citation: AIR 1958 All 207 : (1957) 27 AWR 728

Hon'ble Judges: Takru, J; Desai, J

Bench: Division Bench

Advocate: Gopi Nath, for the Appellant; Hari Swarup, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Mukerji, J.
This is an application in revision which has been argued with great care and thoroughness by Mr. Gopi Nath, on the one hand, and by Mr. Hari Sarup, on the other. The question that has been raised is one of some difficulty as also of considerable importance.

2. An application was made in an appeal for staying that appeal because the matter in issue in that appeal was a matter directly and sub-stantially in issue in an earlier instituted appeal.

3. What the real test for applying Section 10 is has been differently laid down by different High Courts. Two decisions of this Court were cited before me, one reported in Hathi Ram Vs. Hazi Mohammad, , and another reported in Sri Bhola Prasad Vs. Srimati Jagpala and Another, . Neither of these two cases really touches the point before me. Mr. Gopi Nath argued that the real test to be applied was one

of res judicata, that is, if the earlier suit or appeal was going to operate as res judicata in respect of the second suit or appeal, then in such a case Section 10 was bound to be applicable. I have myself found some difficulty in accenting this test of res judicata.

For one thing, res judicata may apply even in cases where a point is not raised by parties and it may also operate in cases where a point though not material to the decision of the case is yet raised by parties, gone into and decided by a Court. Now, in my view, such matters though they may operate as res judicata would not fall strict-ly speaking within the purview of Section 10. As I have said earlier the question that arises is one of some difficulty and, I therefore, consider it desirable that the question arising in this case be decided by a Bench of two judges. I accordingly direct that the record of this case be laid before the Hon''ble Chief Justice for the constitution of such a Bench.

Desai, J.

4. This is an application for revision of an order passed by the District Judge, Mainpuri, in civil appeal No. 143 of 1950 pending before him refusing to stay its hearing during the pendency of civil appeal No. 191 of 1949 filed by the applicant himself and pending before the learned District Judge.

5. In 1948 the applicant instituted a suit against the opposite party for possession over a car; the suit was registered as suit No. 21 of 1948. It was pleaded in the suit by the applicant that he was the owner of the car having purchased it in Delhi with his own money, that he lent it for a certain period to the opposite party and that the opposite party had not returned it. The suit was contested by the opposite party with the pleas that he himself was the owner of the car having purchased it in Delhi with his own money but in the name of the applicant, that he was the owner of a shop known as "Sasta Kisan Loha Store", that the applicant worked in the shop as the manager, and that his claim to the car was a false one.

6. The issues that were framed by the trial Court were whether the applicant was the owner of the car, whether the opposite party had purchased it benami in the name of the applicant and whether the applicant had lent it to the opposite party. No dispute arose out of the pleadings about the interest of the applicant in the shop; whatever interest might have been claimed by him in the shop was wholly irrelevant for the purposes of the suit brought by him because he did not claim title to the car on account of his Interest in the shop and no issue also was framed about his interest in the shop. The shop was referred to by the opposite party in his written statement but only for the purpose of showing his relationship with the applicant and explaining how the car happened to be purchased benami in the name of the applicant.

7. The suit was dismissed, the trial Court holding that the car belonged not to the applicant, but to the shop ''Sasta Kisan Loha Store''.

8. The applicant filed an appeal which is civil appeal No. 191 of 1949. In this appeal, the learned District Judge framed an issue as to who was the owner of the shop and to whom the car belonged and referred it to the trial Court for a finding, but it also directed that the trial Court should not record fresh evidence so lone as civil appeal No. 143 of 1950 was not decided. This civil appeal No 143 of 1950 arose out of another suit No. 22 of 1948 instituted after suit No. 21 of 1948 by the opposite party against the applicant for rendition of accounts of the shop. It was claimed by the opposite party that the applicant was em-ployed by him as manager of the shop whereas the applicant claimed in his written statement that he was a partner in the shop. That suit was dismissed by the same trial Court; it held that the applicant was a partner in the shop.

The applicant filed an appeal, which is appeal No. 143 of 1050 against the refusal of the trial Court to award him costs of the suit and the opposite party has filed a cross-objection challenging the correctness of the finding that the appli-cant was a partner and not manager of the shop. In appeal No. 143 of 1950 the applicant applied to the learned District Judge for its stay u/s 10, C.P.C., on the ground that the matter directly and substantially in issue was also a matter directly and substantially in issue in the previous appeal No. 191 of 1949. The learned District Judge refused to stay proceedings and hence this revision application.

9. This application came up originally before our brother Mukerji, who thought that on account of certain conflict in decisions the matter, required decision by a bench of two Judges.

10. It cannot be doubted that the issue framed in civil appeal No. 191 of 1949 as to who was the owner of the shop was irrelevant in suit No. 21 of 1948 and was unnecessarily and wrongly framed by the learned District Judge. The issue did not arise at all out of the pleadings; the simple case of the applicant was that he was the owner of the car and had lent it to the opposite party and that the opposite party had failed to return it. All that was to be decided was whether the car belonged to him; if he failed to prove that it belonged to him, it was wholly unnecesary to find to whom else it belonged, whether It belonged to the opposite party or to the shop and if to the shop, whether the applicant was a partner in it or a servant or manager.

The applicant could succeed in his suit only by establishing that he himself was the owner; that issue was framed by the trial Court and the finding had gone against him. The learned District Judge in appeal had to see whether the finding of the trial Court was correct or not. The applicant could not claim a decree for possession of the car on the footing that it belonged to the shop and that he was a partner in the shop except by amending his pleadings because there can be no departure from the pleadings except by amendment.

11. Shri Gopi Nath did not contend that the issue arose out of the pleadings or was relevant or necessary to be framed and gone into it before the appeal could be decided, but he contended that whether the issue was rightly or wrongly framed, so long as it was framed, Section 10 would apply, and that the test for deciding whether Section 10 applied or not is whether the decision in the previous suit will operate as res judicata in the subsequent suit. For this latter proposition he relied on a number of authorities such as Trikamdas Jethabhai Vs. Jivraj Kalianji, , Jinnat Bibi Vs. Howrah Jute Mill Co. Ltd., . Durgaprasad Vs. Kantichandra Mukerji, and AIR 1947 154 (Nagpur)

Section 10 requires that a suit must be stayed if the matter directly and substantially in issue in it is also directly and substantially in issue in a previous suit that is pending. The criterion for deciding whether the subsequent suit be stayed or not is whether there is identity of the matters, directly and substantially in issue in the two suits; if there is, the subsequent suit must be stayed and if there is not, it will not be stayed. For the applicability of the principle of res judicata also it has to be decided whether the matter in the subsequent suit was directly and substantially in issue in the earlier suit in which the decision was given.

To say that Section 10 will apply if the decision in the earlier suit would operate as res judicata in the subsequent suit, does not at all advance the solution of the problem because it will still have to be decided whether the matter in issue in the subsequent suit was directly and substantially in issue in the earlier suit. Whether the decision in the previous suit will operate as res judicata in the subsequent suit cannot be decided without deciding whether the matters in issue in the two suits are directly and substantially the same. Therefore, the test laid down in these authorities does not serve any useful purpose; on the other hand it makes the problem more involved and the solution, circuitous.

As we said earlier, the Court should confine itself to the question whether there is identity of the matters directly and substantially in issue in the two suits. We find that in the present case there was no such identity. In the suit brought by the applicant, the question was simply of his ownership of the car; the question of his Interest in the shop did not arise at all. The subject-matter of the other suit brought by the opposite party was the shop and the interest of the applicant in it; that suit had nothing to do with the car or the personal property of the applicant. The matters that arose directly and substantially in the two suits were not identical and Section 10, C.P.C., did not apply.

12. Shri Gopi Nath was obliged to rely upon the test, because he realised that the question of the applicant''s connection with the shop was not a matter that directly and substantially was in issue in the earlier suit, and wanted to avail himself of the proposition that even though an issue does not arise out of the pleadings, if it is framed and a decision is given on it, the decision will operate as res Judicata when the same issue arises in a subsequent suit. The proposition was laid down in AIR

1932 50 (Privy Council) Mst. Satwati and Another Vs. Kali Shanker and Others, and Ajai Verma Vs. Ram Bharosey Lal and Others, . If an issue though not directly arising out of the pleadings is framed and a decision is actually given on it, it may be that the decision will operate as res Judicata when the same issue arises in a subsequent suit.

This is on the principle that a party having allowed an issue to be framed and having invited the Court, or allowed it without protest, to decide it is estopped, after the decision on it has gone against him, from pleading that it did not arise directly and substantially in the suit and that therefore, the decision did not operate as res judicata. A decision on an issue given in one suit operates as res Judicata in a subsequent suit only if the issue arose in the previous suit directly and substantially.

If an issue does not arise out of the pleadings, the matter covered by it cannot be said to be a matter directly and substantially in issue in the suit and when a finding on the issue is given and it is claimed by a party that it operates as res judicata, the claim can be met by the other party by showing that the issue did not arise directly and substantially in the previous suit. The other party, however, may be estopped by his own conduct from pleading so, in which case the only obstacle in the way of the decision operating as res judicata would disappear.

This is the basis of the decision which lay down that a decision demanded or allowed to be given on an irrelevant issue will operate as res judicata in a subsequent suit. The decision will operate as res judicata only when the other party is estopped from pleading that the issue did not arise directly and substantially in the previous suit; so long as he is not estopped, it cannot operate as res judicata. In the present case the opposite party has not so far been estopped and we cannot assume that he will be estopped. There can be no estoppel unless a decision has actually been given.

The issue has been framed, but we cannot proceed on the assumption that a finding will be given, because it is open to one party or the other to have the issue cancelled, in which case no finding will be given and there will be no possibility of any decision operating as res judicata. It is also open to the Court suo motu to cancel the issue. We may proceed on the assumption that an issue directly and substantially arising in a suit will be decided but not on the assumption that an irrelevant issue erroneously framed will be decided. So long as the opposite party is not estopped, he can contend that it relates to matter that was not directly and substantially in issue in the suit.

13. The view that we take is confirmed by the fact that the applicant himself did not apply for stay of the proceedings in the subsequent suit No. 22 of 1948. If Section 10 applies now, it applied even more when the suit No. 22 of 1948, was pending and the applicant must have certainly applied for stay of the proceedings.

14. No error or irregularity has been committed by the learned District Judge by refusing to stay the proceedings. The revision is, therefore, dismissed with costs.