
(2016) 2 ARC 573 : (2016) 2 ARC 475

ALLAHABAD HIGH COURT

Case No: Matters Under Article 227 No. 2832 of 2016

Sami-Ur-Rehman

APPELLANT

Vs

Smt. Pushpa Devi and
8 Others

RESPONDENT

Date of Decision: May 6, 2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) - Section 10

Citation: (2016) 2 ARC 573 : (2016) 2 ARC 475

Hon'ble Judges: Ram Surat Ram (Maurya), J.

Bench: Single Bench

Advocate: Pramod Kumar Sinha, Advocate, for the Appellant; K. Ajit, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Ram Surat Ram (Maurya), J.â€”Heard Sri Promod Kumar Sinha for the petitioner and Sri K. Ajit for the respondents.

2. This petition has been filed for setting aside the order of Civil Judge (Junior Division) dated 29.4.2014 rejecting the application of the petitioner

for staying the proceeding of Suit i.e. O.S. No. 427 of 1991 under Section 10 CPC during pendency of Second Appeal No. 2571 of 1979

(arising out of O.S. No. 571 of 1973) before this Court and the order of Additional District Judge dated 10.3.2016 dismissing the revision of the

petitioner filed against the aforesaid order.

3. The contention of the counsel for the petitioner that earlier Ram Das and others (predecessors of the plaintiffs in O.S. No. 427 of 1991) filed a

suit (registered as O.S. No. 571 of 1973) raising dispute relating to easementary right over passage in dispute. In this suit the petitioner was

impleaded as defendant-4. The trial court also framed an issue to the effect that whether defendants - 3 to 6 have any right over the passage in

dispute, and if so, its effect? As in this suit defendants - 3 to 6 had claimed their easementary right over the passage. While deciding this issue, trial

court in its judgement dated 5.1.1977 found that godown of Nanhe Bhai (father of the petitioner) situate inside the gali and after his death his heirs

were owner of godown. Now the present suit has been filed showing the petitioner as tenant of the aforesaid godowns. Although this issue as to

whether the petitioner was tenant or owner, has already been decided in O.S. No. 571 of 1973 and Second Appeal No. 2571 of 1979 is

pending. Thus the present suit is liable to be stayed under Section 10 CPC. However the court below has wrongly rejected the application of the

petitioner. He relied upon the judgement of this Supreme Court in Commissioner of Endowments and others v. Vittal Rao and others,

(2005) 4 SCC 120 , in which it has been held that ""one test is that if the issue was "necessary" to be decided for adjudicating on the principal issue

and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgement was in fact based upon that

decision then it would be res judicata in a letter case."" In the present matter O.S. No. 571 of 1973 is pending at the stage of second appeal, thus

instead of res judicata principal of Section 10 CPC will apply and suit is liable to be stayed.

4. In reply to the aforesaid arguments, the counsel for the respondents submits that O.S. No. 571 of 1973 was filed for permanent injunction

restraining the defendants - 1 and 2 from raising any construction over the passage in dispute. By way of amendment defendants - 3 to 6 were

added and in the amended plaint it has been mentioned that defendants - 3 to 6 have no concern with the matter in the suit but they are impleaded

according to order of the Court on the allegation that they are also interested party, which is not admitted. He submits that the word that

"defendants- 3 to 6 are also interested" is only confined to their interest to use the passage in dispute. There was no dispute directly or substantially

in respect of relationship of plaintiff as well as defendants - 3 to 6 or ownership of the construction which are now claimed by them. Thus issue in

the previous suit was entirely different. Issue no. 4 was not necessary for adjudicating principal issue in the suit as principal issue in the suit was

right of easement over the passage in dispute. This suit was not liable to be stayed due to pendency of second appeal. He relied upon the

judgement of Division Bench of this Court in Hathi Ram v. Hazi Mohammad, 1953 All LJ 578 (DB) in which it has been held that matter in

issue in Section 10 CPC means the entire matter in controversy and not one of several issue in the case.

5. I have considered the arguments of the counsel for the parties and examined the records.

6. According to Order 14 CPC the issues are required to be framed in respect of the material proposition of fact or law, which is claimed by one

party and denied by other party. It is the material proposition of law and facts pleaded in the plaint and written statement can be treated as matter

directly and substantially in issue. In O.S. No. 571 of 1973 material proposition of law and fact between the parties was in respect of easementary

right to use the passage in dispute. In that connection defendants- 3 to 6 were also impleaded, as the court at one stage found that they were also

interested in the passage in dispute. In previous suit title over the premises, which is now being claimed by the petitioner was not directly in issue.

Previous suit is entirely on different proposition and also in respect of different matter and the incidental finding recorded in the previous suit will not

bar for institution of second suit.

7. Section 10 CPC, which requires stay of second suit is quoted below :- ""Section 10 CPC.- No Court shall proceed with the trial of any suit in

which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under

whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction

to grant the relief claimed, or any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction,

or before the Supreme Court.

8. A Full Bench of this Court in *Ram Charan v. State of U.P.*, AIR 1979 All. 114 (FB), in which it has been held that Section 10 C.P.C. will

apply only if all the issues in the two matters are the same i.e., the entire subject matter of the two suits are identical. Judgment in *Hathi Ram's*

(supra) has been approved. This Court in *Smt. Meena Bhandari v. Sri Krishna Kumar*, 2000 (1) ALR 337, held that four conditions are to

be satisfied for staying the proceeding under section 10 of the Code of Civil Procedure, namely:

(1) that the matter in issue in the second suit is also directly and substantially in issue in the first suit.

(2) that the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title;

(3) that the Court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit;

(4) that the previously instituted suit is pending (a) in the same Court in which the second suit is brought, or (b) in any Court in India, or (c) in any

Court beyond the limits of India established or continued by the Central Government, or (d) before the Supreme Court.

Again in *Gaya Din v. Incharge Sessions and District Judge*, 2006 (64) ALR 429, it was held that another yardstick may be adopted for

staying the proceeding of subsequent suit in pursuance to section 10 of the Code of Civil Procedure and that is as to whether in case the previous

suit is finally decided, the subsequent suit shall be barred by *res judicata*. In case, the relief claimed in both the suits are different then the

proceeding of subsequent suit shall not call for interference in pursuance to power conferred by section 10 of Code of Civil Procedure.

9. Principles contained under Section 10 and Section 11 C.P.C. are the same. In order to bar trial of subsequent suit, issue in earlier suit must be

directly and substantially in issue. Supreme Court in Sajjadanashin Sayed Md. B.E. Edr. v. Musa Dadabhai Ummer, AIR 2000 SC 1238,

held that it will be noticed that the words used in Section 11 CPC are ""directly and substantially in issue"". If the matter was in issue directly and

substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions

have however held that if a matter was only ""collaterally or incidentally"" in issue and decided in an earlier proceeding, the finding therein would not

ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

As pointed out in Halsbury's Laws of England (Vol. 16, para 1538, 4th Edn.), the fundamental rule is that a judgment is not conclusive if any

matter came collaterally in question [R. v. Knaptoft Inhabitants, 107 ER 610; Heptulla Bros. v. Thakore, (1956) 1 WLR 289 (PC); or if

any matter was incidentally cognisable [Sanders (otherwise Saunders) v. Sanders (otherwise Saunders), (1952) 2 All ER 767.

A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal

issue. The expression ""collaterally or incidentally"" in issue implies that there is another matter which is ""directly and substantially"" in issue. A matter

in respect of which relief is claimed in an earlier suit can be said to be generally a matter ""directly and substantially"" in issue but it does not mean

that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was

directly and substantially"" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the

case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was ""necessary"" to be

decided for adjudicating on the principal issue and was decided, it would have to be treated as ""directly and substantially"" in issue and if it is clear

that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. One has to examine the plaint, the written

statement, the issues and the judgment to find out if the matter was directly and substantially in issue *Ishwer Singh v. Sarwan Singh*, AIR 1965

SC 948 and *Syed Mohd. Salie Labbai v. Mohd. Hanifa*, AIR 1976 SC 1569. It is not to be assumed that matters in respect of which issues

have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular

issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts

of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision."" Same

view has been taken in *Commissioner of Endowments v. Vittal Rao*, (2005) 4 SCC 120, relied upon by the counsel for the petitioner. These

principles have approved by a larger Bench of Supreme Court in *Sri Gangai Vinayagar Temple v. Meenakshi Ammal*, (2015) 3 SCC 624.

10. In *Ramji Gupta v. Gopi Krishan Agrawal*, AIR 2013 SC 3099, it has been held that in order to operate as res judicata, the finding must be

such that it disposes of a matter that is directly and substantially in issue in the former suit, and that the said issue must have been heard and finally

decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly in

issue in the case, cannot be made the basis for a plea of res judicata. A question regarding title in a small cause suit may be regarded as incidental

only to the substantial issue in the suit, and therefore, when a finding as regards title to immovable property is rendered by a Small Cause Court,

res judicata cannot be pleaded as a bar in the subsequent regular suit for the determination or enforcement of any right or interest in the immovable property.

11. In view of the aforesaid discussions, the petition is dismissed.