

(1988) 04 PAT CK 0043

Patna High Court

Case No: Civil Revision No. 1878 of 1985

Ram Sanjiwan Singh

APPELLANT

Vs

Bhola Prasad Thakur and Others

RESPONDENT

Date of Decision: April 27, 1988

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11, 115

Citation: (1990) 38 BLJR 835

Hon'ble Judges: S.B. Sinha, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

S.B. Sinha, J.

This revision application is directed against an order dated 13-9-1985 passed by Shree K.K. Chaubey, Munsif, Sikrahna at Motihari in Title Suit No. 138 of 1982, whereby and where under, the learned Court below has refused to decide the issue of res judicata as a preliminary issue on the ground that in view of the facts and the circumstances of the case it was not possible for him to decide the issue at that stage.

2. In view of the point of law involved in this civil revision application, it is not necessary to state the facts in details. Suffice it to say that the Opposite party No. 1 instituted a suit for eviction of opposite party Nos. 2 and 3 from the house in suit as described in Schedule 1 appended to the plaint as also for decree for arrears of rent. According to the petitioner, although he was not a party to the said suit but having come to learn thereof he filed an application for adding himself, as a party therein which was allowed. He, thereafter, filed a written statement contending inter alias, therein that the question with regard to the title in relation to the land in suit was the subject matter of an earlier suit being title suit No. 95 of 1964. The said suit was dismissed. The petitioner has further asserted that the aforementioned decree was

challenged in first appeal before District Judge which was allowed and the judgment of the appellate court was affirmed by this Court in Second Appeal. According to the petitioner, delivery of possession of the land in question was also obtained in execution of the decree passed in the aforementioned appeal. The petitioner, therefore, contends that in view of the judgment and decree passed in the aforementioned Title suit No. 95 of 1964, the same operates as res judicata so far as the title suit No. 138 of 1982 is concerned. Before the learned court below both the parties filed various documents-However, the petitioner did not file the judgment of this Court in Second Appeal No. 669 of 1974 but filed the judgment of the first appellate court only. The learned court below after taking into consideration the submissions made by the parties observed as follows:

The suit land and the house was not the subject-matter of title suit No. 95/64. Hence, I find that these things cannot be examined at this stage and no finding can be reached upon the examination of the material available before the court and so I hold and decide that the suit cannot be hit by the law of res judicata at this stage and so there is no merit in the petition of the defendant and hence, it is, hereby rejected. The matter will be decided at the time of final hearing of the suit by framing an issue on this point.

3. Plainly enough, the learned Court below by his impugned order has expressed his inability to decide the question of res judicata at that stage without taking into consideration the other evidences which might be brought on the record at the time of trial.

4. Mr. Bhupendra Narain Sinha, the learned Counsel appearing on behalf of the petitioner, submitted that by passing the impugned order, the learned Court below has refused to exercise his jurisdiction vested in him under Order XIV, Rule 2(2) of the Code of Civil Procedure.

5. The learned Counsel in this connection has drawn my attention to a decision of this Court Sawaria Brothers v. Gupta and Co. reported in 1984 BLJ 389. The learned Counsel further cited a Division Bench decision of Madras High Court [Mitsubishi France Vs. Neyveli Lignite Corporation Ltd. and Another](#), . The learned Counsel further submitted that regard being had to the principle and object of enactment of the provisions of Section 11 of the Code of Civil Procedure, it was incumbent upon the learned Court below to decide the preliminary issue as to whether the suit was barred by res judicator No. Order XIV, Rule 2 of the CPC reads as follows:

Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the court is of opinion, that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to:

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

6. The provisions of Order XIV, Rule 2, C.P.C. has undergone a radical change by Act No. 104/76 which came into force with effect from 1-2-1977. In terms of the provisions of the said Rule, a discretionary power has been vested in the trial court to decide an issue as a preliminary issue. As a matter of fact from the tenor of the said provision, it is evident that the determination of a suit on a preliminary issue is really an exception to the general rule as by reason of Sub-rule (2) of Rule 2 of Order XIV of the Code of Civil Procedure, the Court is enjoined upon to pronounce judgment on all the issues involved in the suit.

7. Sub-rule (2) of Rule 2 of Order XIV confers a discretion upon the trial court to decide issue as a preliminary issue provided he is of the opinion that the case of any part thereof may be disposed of on an issue of law only and if the said issue relates to the jurisdiction of the court; or if a bar of the suit created by any law for the time being in force, the Court may try such issue first. The very fact that the Legislature has chosen to use the words "may try that issue first" ; clearly goes to show that a discretionary power has been conferred upon the Court concerned to decide any question of jurisdiction or an issue that the suit is barred by a reason of provisions of any other law and the said provision is not imperative in nature. In view of the fact that in the instant case, the court has framed the issue of res judicata and even made an attempt to decide the same as a preliminary issue, clearly goes to show that he had exercised the jurisdiction vested in him by law but because of the difficulties which he has been facing in deciding the complicated question of res judicata without the evidence being led by the parties, he passed the impugned order. In my opinion, this can neither be said to be illegal nor the court can be said to have committed a material irregularity in exercise of his jurisdiction.

8. So far as the case of Sawaria Brothers v. Gupta and Co., (supra) is concerned, true it is that in that decision it has been held that this Court may interfere with an order for the purpose of saying whether the discretion has been exercised according to the principle of justice or not. But unfortunately in that case although an earlier decision of this Court in [Dhirendranath Chandra Vs. Apurba Krishna Chandra and Others](#), , was referred to but the same was neither distinguished nor the ration thereof was considered in its proper perspective.

9. The aforementioned judgment of this Court in Dhirendranath Chandra v. Apurba Krishna Chandra and Ors., (supra) is an authority for the proposition that in a case where the court refused to exercise its jurisdiction to decide an issue as a preliminary issue, the High Court in exercise of its jurisdiction u/s 115 of the CPC will

not interfere therewith. It has been clearly held in that decision that Order XIV, Rule 2 confers a discretion upon the Court and the said provision is not mandatory in nature.

10. Although there appears to be some conflict in the aforementioned two decision!, I am bound by the earlier decision. Further, as mentioned hereinbefore in Sawaria Brothers case this aspect of the matter has not been dealt with at all. I also find that in the decision in Dharendra Nath Chandra's case, this question has specifically been dealt with which has not been done in Sawaria Brother's case.

11. It is now well settled that in case of a differences between decision of two Co-ordinate Benches, one should follow the earlier decision. Reference in this connection may be may be made to [Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others](#), , Sri Venkateswara Rice Ginning and Groundnut Oil Mill Contractors Company and Ors. v. State of Andhra Pradesh and Ors. and in 1987 BLT 340, (Yogendra Lal v. Bihar State Electricity Board and Ors. where this Court has come to the aforementioned conclusion after taking into consideration various decisions of the Supreme Court. The decisions of Madras High Court relied upon by the learned Counsel is of no assistance whatsoever. In that case the Division Bench of the Madras High Court was disposing of a preliminary issue itself in the original suit and, therefore, therein, the question of interpretation of Section 115 vis-a-vis the Order XIV, Rule 2 of the CPC did not arise.

12. Taking into consideration all aspects of the matter, I am of the view that this Civil Revision is not maintainable and as such it is dismissed. In the facts and circumstances of the case, however, there shall be no order as to costs.