Deva Ram And Another vs Ishwar Chand And Another on 16 October, 1995

Equivalent citations: 1996 AIR 378, 1995 SCC (6) 733, AIR 1996 SUPREME COURT 378, 1995 (6) SCC 733, 1995 AIR SCW 4210, (1995) 7 JT 641 (SC), 1997 SCFBRC 84, 1998 (1) ALL CJ 361, 1995 (2) REVLR 353, (1996) REVDEC 73, (1996) 1 ALL WC 403, (1996) 1 MAD LJ 88, (1996) 1 CIVLJ 343, (1996) 1 ICC 636, (1996) 1 APLJ 65, (1995) 4 SCJ 245, (1996) 1 GUJ LH 701, (1996) 27 ALL LR 53, (1997) 1 ALL RENTCAS 286

Author: Kuldip Singh

Bench: Kuldip Singh

PETITIONER:
DEVA RAM AND ANOTHER

Vs.

RESPONDENT:
ISHWAR CHAND AND ANOTHER

DATE OF JUDGMENT16/10/1995

BENCH:
AHMAD SAGHIR S. (J)
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AHMAD SAGHIR S. (J)
KULDIP SINGH (J)

CITATION:
1996 AIR 378 1995 SCC (6) 733
JT 1995 (7) 641 1995 SCALE (6)18

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T S.SAGHIR AHMAD,J.

The legal proceedings for land comprising Khata Khatauni No.45/63, Khasra No.348 [Area 34.9 bighas] situate in Village Chuling, Distt. Kinnaur in the State of Himachal Pradesh was initiated by the appellants (defendants) before the Compensation Officer, Pooh, for certain relief but when their application seems to have been contested by respondents [plaintiffs], it was withdrawn on August 24, 1971. Thereafter, the present respondent's father Shri Padam Ram, who is since dead and is represented by the respondents, came forward with a suit for recovery of a sum of Rs.6,300/- as sale price for the aforesaid land against the present applicants on the ground that by document dated September 1, 1976 [referred to as 2nd September, 1976 at some places in the record], the land in question of which he was the owner was transferred to the appellant which the appellants had promised to pay on November 11, 1976 but they did not pay the amount and continued to remain in possession which they should have surrendered for having not paid the above stipulated amount.

The suit was contested by the appellants on the grounds inter alia that they were tenants under the plaintiffs, namely Padam Ram, and were already in possession. They also pleaded that the document dated September 1, 1976 was obtained by fraud and undue influence and was, in any case, void being against the provisions of Himachal Pradesh Tenancy and Land Reforms Act under which they have become owners of the land.

A number of issues were framed in this suit, one of which, namely, issue No.5, read as under:

> "5. Whether the defendant is in possession of the suit land as tenant under the plaintiff since samvat 2005 as alleged?"

The suit was dismissed by the Trial Court (Senior-Sub- Judge, Kinnaur) by Judgment and order dated January 15, 1981 with the findings, inter alia, that the agreement was without consideration and was hit by the provisions of Section 91 of the Himachal Pradesh Tenancy and Land Reforms Act. It also recorded a finding on Issue No.5 that the defendants were tenants of the land in suit under the plaintiff since Samvat 2005.

The judgment of the Trial Court was upheld by the learned Additional District Judge, Shimla in an appeal filed by the plaintiff which was dismissed with the findings that the land in question was at no stage sold by the plaintiffs- respondents to the present appellants and consequently the plaintiffs were not entitled to recover Rs.6,300/- from the appellants as sale price as the document in question was only an agreement for sale and not a sale-deed. The lower appellante court also specifically reversed the finding of the Trial Court on Issue No.5 and held that the defendants had failed to prove themselves to be tenants of the disputed land under the plaintiff. Those legal proceedings terminated at that stage.

The plaintiff, however, initiated new proceedings by filing Suit No. 91/1/1982 for possession against the present appellants on the basis of the title, pleading inter alia that they were the owners of the land in question and the defendants, namely, the present appellants who had already been held in the earlier suit that they were not the tenants of the land in suit, were not entitled to retain possession.

This suit was resisted by the appellants on the ground that the Buit was barred by Order II Rule 2 of the Code of Civil Procedure and that it was barred by time as they were in possession over the land in question since samvat 2005 and had become owners of the land in suit by adverse possession.

The Trial Court, namely, Senior Sub-Judge, Kinnaur at Kalpa, dismissed the suit by judgment and order Dated April 21, 1984 with the finding that the suit was barred by the principles of Order II Rule 2 and was beyond time. In appeal, decided by the Distt. Judge, Shimla, on March 31, 1986, the findings recorded by the Trial Court were reversed and the suit was decreed with the findings that it was not barred by Order 2 Rule 2 of the Civil Procedure Code nor was it beyond time.

The appellants then filed a second appeal in the High Court of Himachal Pradesh which by its judgment dated July 8, 1994 dismissed the appeal and that is how the matter is before us now.

Learned counsel for the appellants has contended that the findings recorded by the District Judge that the suit of the respondents was not barred by Order 2 Rule 2 of the Civil Procedure Code was erroneous and the appellants having already been held to be tenants under the respondents by the Trial Court in the earlier suit, the suit for possession was not maintainable and ought to have been dismissed by the District Judge as also by the High Court as was done by the Trial Court, it was also contended that the findings recorded by the Trial Court on the status of the appellants in the previous suit that they were tenants of the land in suit should still be treated to hold the field notwithstanding its reversal by the lower appellate court as the lower appellate court, had ultimately decided the appeal in their favour with the result that they being the successful party had no occasion to file the appeal and challenge the findings. In this situation, it is contended, the findings of the trial court cannot be treated to have been reversed.

We will deal with Order 2 Rule 2 of the Civil Procedure Code first. It provides as under:

> "R.2. Suit to include the whole claim. (1) Every suit shall include the whole of the claim which the plaintiff be entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
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> Relinquishment of part of claim.
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> (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several reliefs.

(3) a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted."

A bare perusal of the above provisions would indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit as Order 2 Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause.

In Palaniappa Chettiar v. Alagan Chettiar & Ors., A.I.R. 1931 P.C.228, it was laid down that the plaintiff cannot be permitted to draw the defendant to court twice for the same cause by splitting up the claim and suing, in the first instance, in respect of a part of claim only.

What the rule, therefore, requires is the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate causes of action. If, therefore, the subsequent suit is based on a different cause of action, the rule will not operate as a bar. [See Arun Lal Gupta & Ors. v. Mriganka Mohan Sur & Ors. : A.I.R.1975 S.C.207; State of Madhya Pradesh v. State of Maharashtra & Ors. : A.I.R. 1977 S.C.1466; Kewal Singh v. Mt.Lajwanti : A.I.R. 1980 S.C. 161].

In Sidramappa v. Rajashetty & Ors. : A.I.R. 1970 S.C.1059, it was laid down that if the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the latter namely, the subsequent suit, will not be barred by the rule contained in Order II Rule 2, CPC. In Gurbux Singh v. Bhura Lal (A.I.R. 1964 S.C.1810), it was observed:

> "In order that a plea of a bar under 0.2 R.2(3). Civil Procedure Code should succeed the defendant who raises the plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis, it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar."

In view of the above, what is to be seen in the instant case is whether the cause of action on the basis of which the previous suit was filed, is identical to the cause of action on which the subsequent suit giving rise to the present appeal, was filed. If the identity of causes of action is established, the rule would immediately become applicable and it will have to be held that since the relief claimed in the subsequent suit was omitted to be claimed in the earlier suit, without the leave of the court in which the previous suit was originally filed, the subsequent suit for possession is liable to be dismissed as the appellants, being the defendants in both the suits, cannot be vaxed twice by two separate suits in respect of the same cause of action.

We have already noticed in the earlier part of the judgment that the previous suit was filed for recovery of a sum of Rs.6300/- as sale-price of the land in suit which was dismissed with the finding that the document on which the suit was filed was not a sale deed but was a mere agreement for sale and, therefore, the amount in question could not be recovered as sale-price. That document, thus, constituted the basis of the suit.

The subsequent suit was brought by the respondents for recovery of possession on the ground that they were the owners of the land in suit and were consequently entitled to recover its possession. The cause of action in the subsequent suit was, therfore, entirely different. Since the previous suit was for recovery of sale-price, the respondents could not possibly have claimed the relief of possession on the basis of title as title in that suit had been pleaded by them to have been transferred to the defendants [appellants]. The essential requirement for the applicability of Order 2 Rule 2, namely, the identity of causes of action in the previous suit and the subsequent suit was not established. Consequently, the District Judge as also the High Court were correct in rejecting the plea raised by the appellants with regard to Order 2 Rule 2 of the Civil Procedure Code.

Learned counsel for the appellants next contended that the finding recorded by the Trial Court in the previous suit on Issue No.5 that the appellants were the tenants of the land in suit under the respondents since Samvat 2005 should be treated to be still available to them and on that basis they can legally plead that the suit of the respondents for possession of the land in suit was liable to be dismissed. It is contended that the finding on Issue No.5 was reversed by the lower appellate court in an appeal which was ultimately decided in their favour and, therefore, it was not possible for them to challenge the findings of the lower appellate court in any higher forum for the simple reason that an appeal under Section 96, or, for that matter, under Section 100 of the Civil Procedure Code, lies only against a decree and not against a finding. In this situation, it is contended, the appellate judgment insofar as it relates to the finding on Issue No.5, is liable to be ignored. It is pointed out that if this is done, the original findings recorded by the Trial Court on the status of the appellants that they are the tenants of the land under the respondents, would revive and operate as res judicate against the respondents who cannot be granted the relief of possession.

We may, at the very outset, point out that in the subsequent suit, the appellants in their capacity as defendants did not plead the rule of res judicata. As a matter of fact, they did not in their written statement even refer to the findings recorded by the Trial Court in the previous suit nor did they claim that they were tenants of the land in suit under the respondents. Their main defence was that they were in possession over the land in suit since Samvat 2005 and had, therefore, acquired title by adverse possession. They also pleaded that the suit was barred by time and was, in any case, not maintainable in view of the provisions contained in Order 2 Rule 2 of the Civil Procedure Code. The appellants, thus, raised an altogether new defence and did not plead that they were tenants under the respondents. Consequently, an issue whether the appellants were tenants of the land in dispute was not framed and, therefore, there was no occasion to refer to the findings recorded in the previous suit.

Rule of res judicata is contained in Section 11 of the Civil Procedure Code, Benefit of all its Explanations, namely, Explanations I to VIII, Section 11 is quoted below:

> "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 and such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."
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> "Res judicata Pro Veritate Accipitur" is the full maxim which has, over the years, shrunk to mere "Res Judicata".

Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "Interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "Nemo debet bis vexari pro una at eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the Court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

In the previous suit, which was instituted by the respondents, an issue, namely, Issue No.5 was framed on the status of the appellant as to whether they were the tenants of the land in suit under the respondents but in the subsequent suit this issue was not raised as the appellant who were the defendants in the subsequent suits did not plead that they were the tenants under the respondents. What they pleaded was that they were in possession since a long time namely from Samvat 2005 and had, therefore, acquired title by adverse possession. Consequently, in the subsequent suits, the issue which was raised and tried in the previous suit was not raised, framed or tried and no finding, therefore, came to be recorded as to whether the defendants were tenants of the land in suit. It is true that the instant suit which is the subsequent suit, is between the same parties who had litigated in the previous suit and it is also true that the subject matter of this suit, namely, the disputed land, is the same as was involved in the previous suit but the issues and causes of action were different. Consequently, the basic requirement for the applicability of rule of res judicata is wanting and, therefore, in the absence of pleadings, in the absence of issues and in the absence of any finding, it is not open to the learned counsel for the appellants to invoke the rule of res judicata on the ground that in the earlier suit it was found by trial court that the appellants were the tenants of the land in dispute under the respondents.

Let us now consider the plea regarding the effect of an adverse finding recorded by the court against a party in whose favour the suit or the appeal is ultimately decided.

It is provided in Section 96 of the C.P.C. that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeal from the decision of such court. So also, Section 100 provides that an appeal shall lie to the High Court from every decree

passed in appeal. Thus sine qua non in both the provisions is the "decree" and unless the decree is passed, an appeal would not lie under Section 96 nor would it lie under Section 100 of the Civil Procedure Code. Similarly, an appeal lies against an "order" under Section 104 read with Order 43 Rule 1 of the Civil Procedure Code where the "orders" against which appeal would lie have been enumerated. Unless there is an "order" as defined in Section 2(14) and unless that "order" falls within the list of "orders" indicated in Order 43, an appeal would not lie.

Thus, an appeal does not lie against mere "findings" recorded by a court unless the findings amount to a "decree" or "order". Where a suit, is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue, has no right of appeal and he cannot question those findings before the appellate court. (See Ganga Bai v. Vinay Kumar & Ors. : (1974) 3 S.C.R.882).

In Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy [A.I.R. 1922 P.C.241]. It was observed as under:

> "Their Lordships do not consider this will be found an actual plea of res judicata, for the defendants, having succeeded on the other plea had not occasion to go further as to the finding against them: but it is the finding of a court which was dealing with facts nearer of their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellant to displace the finding, a duty which they have now been able to perform."

Similar view was also expressed in an earlier decision in Run Bahadur Singh v. Luchokoer [1885 ILR 11 CAL.301 (P.C.)].

The Oudh Chief Court in Pateshwar Din & Anr. v. Mahant Sarjudas (A.I.R. 1938 Oudh 18) held that where a decree in previous suit is wholly in favour of a person and gives him all the reliefs sought for by him, he has no right of appeal against the decree so as to enable him to contest any adverse finding against him in such suit. Hence, such adverse finding cannot operate as res judicate as against him in a subsequent suit.

The High Court of Andhra Pradesh in Bansi Lal Ratwa v. Laxminarayan & Anr. [1969 (2) Andhra Weekly Reporter] and the Full Bench of the High Court of Patna in Arjun Singh & Anr. v. Tara Das Ghosh & Anr. [A.I.R. 1974 Patna 1] have taken the view that an appeal would not lie against mere adverse finding unless such finding would constitute res judicata in subsequent proceedings. We are, however, not concerned with this aspect of the matter in the present case nor are we concerned with the earlier aspect as the plea of res judicata having not been raised in the written statement, the appellant cannot be permitted to raise the plea here.

In view of what we have held above, the points convassed before us are decided against the appellants.

We, however, cannot overlook the fact that the appellants are in possession over the land in suit for a considerably long time and the respondents themselves at one stage had pleaded (in the previous

suit filed by them) that the land had already been sold to the appellants and that the appellants were liable to pay the sale consideration of Rs. 6,300/- to them. It is strange that inspite of the findings having been recorded by the trial court in their favour that they were the tenants of the land in suit under the respondents, the appellants did not raise that plea in the subsequent suit filed by the respondents for recovery of possession. May be, because the finding was set aside by appellate court. Why this was not done is not within our jurisdiction to enquire. All that we can say is that the area of the land of the suit is 34.9 bighas and interest of justice would be met if a compact area of 10 bighas is left with the appellants and the decree for possession is made executable only in respect of the remaining area namely an area of 24.9 bighas. The appellants shall be treated as Protected Tenants in respect of ten bighas of land. The Tehsildar concerned shall partition the land between the parties as directed by us. The appellants shall surrender the area failing to the share of the respondents within one months of the order of Tehsildar. The order of the Tehsildar shall be final. The judgment of the courts below including that of the High Court shall stand modified to that extent.

The appeal is partly allowed to the extent indicated above but without any order as to costs.