VAISH AGGARWAL PANCHAYAT

v.

INDER KUMAR AND OTHERS

(Civil Appeal No.2089 of 2015)

AUGUST 25, 2015

[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]

Code of Civil Procedure, 1908 – s.11 and Or.7 r.11(d) – Rejection of plaint – Decree dated 19.9.1998 in favour of respondent Nos.1 and 2 – While pending execution, objection filed by the appellant, claiming to be owner of the property – Objection rejected – Thereafter, appellant filing application for setting aside the judgment and decree dated 19.9.1998 and for stay of execution – Dismissed – Appellant further filing suit for declaring the judgment/decree dated 19.9.1998 and the subsequent sale deed as null and void with consequential relief of permanent injunction – Application by respondent Nos.1 and 2 under Or.7 r.11 CPC – Trial court allowed the application – Appeal allowed by appellate court– High Court allowing the revision held that the suit was barred by principle of res judicata *– On appeal, held: In the facts of the case, the suit is not barred by the principle of* res judicata *– It is not* prima facie *discernible from the plaint that it lacked any cause of action or was barred by any law – There should have been trial, with regard to all the issues framed.*

Allowing the appeal, the Court

HELD: The allegations in the plaint are absolutely different from the earlier objections in the application. There is an asseveration of fraud and collusion. There is an assertion that in the earlier suit a decree came to be passed because of fraud and collusion. Even if the

plaint is read keeping in mind the cleverness and deftness in drafting, yet it is not *prima facie* discernible from the plaint that it lacks any cause of action or is barred by any law. On a perusal of the plaint alone, it cannot be said that the suit is barred by the principle of *resjudicata*. In such a fact situation, the High Court has fallen into error by expressing the view that the plea of resjudicata was obvious from the plaint. In fact, a finding has been recorded by the High Court accepting the plea taken in the written statement. In the obtaining factual matrix, there should have been a trial with regard to all the issues framed. [Para 17] [650-A-C]

V. Rajeshwari v. T.C. Saravanabava **2003 (6) Suppl. SCR 927: (2004) 1 SCC 551;** *Kamala and others v. K.T. Eshwara SA and others* **2008 (7) SCR 39: (2008) 12 SCC 661;** *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust* **(2006) 5 SCC 658;** *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust* **(2006) 5 SCC 662 – referred to.**

Case Law Reference

2003 (6) Suppl. SCR 927	**referred to.**	**Para 11**
2008 (7) SCR 39	**referred to.**	**Para 13**
(2006) 5 SCC 658	**referred to.**	**Para 14**
(2006) 5 SCC 662	**referred to.**	**Para 14**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2089 of 2015.

From the Judgment and Order dated 06.09.2007 of the High Court of Punjab and Haryana at Chandigarh in C.R. No. 3695 of 2006.

With

C.A. No. 2091 of 2015

Mahabir Singh, K.V. Vishwanathan, Preeti Singh, Gagan Deep Sharma, Nikhil Jain, Sachin Jain, Dr. Kailash Chand, Adeeba Mujahid, Balaji Srinivasan for the appearing parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J. The facts relevant to be stated for the adjudication of the present appeal are that the contesting respondent Nos. 1 and 2 – Inder Kumar and Yogendra Kumar, had filed a Civil Suit bearing No. 806 of 1993 against Krishan Chand Gupta, respondent No. 5, and Ved Prakash, original respondent No. 3, for a decree of specific performance of agreement to sell in respect of land measuring 20 kanals with the consequential relief of permanent injunction. The suit was decreed by the learned Civil Judge (SD), Kurukshetra by judgment and decree dated 19.9.1998 and no appeal was preferred against the same. Subsequently, the Respondent Nos. 1 and 2 sought execution of the decree and during its pendency, the Petitioner, Vaish Aggarwal Panchayat (society), filed objections claiming that it is the owner of the suit land by way of gift deeds dated 5.3.1997 and 6.3.1997 executed by Ved Prakash and Banarsi Dass. The objections filed by the Society were rejected vide order dated 4.11.2000. Thereafter, the Society filed an application for setting aside the judgment and decree dated 19.9.1998 and for stay of the execution, which was dismissed vide order dated 19.4.2001 and the appeal filed by the society against the same was also dismissed vide judgment dated 1.10.2004.

3. In the meantime, a suit for declaration bearing no. 333/03 of 2001 was filed by the Society for declaring the judgment and decree, dated 19.9.1998 passed in Civil Suit No. 806 of 1993 by the Civil Judge (SD), Kurukshetra, and the subsequent sale deed dated 30.1.2001 and mutation No. 2450 as illegal,

A null and void with the consequential relief of permanent injunction. The present respondent Nos. 1 and 2, who are defendants in the said suit, appeared before the trial court, entered contest and after issues were framed moved an application under Order 7 Rule 11, Civil Procedure Code
B (CPC), for rejection of the plaint on the ground that the suit was barred by law. The trial Court, vide order dated 7.12.2005 allowed the application moved by the defendants therein.

4. Aggrieved by the above said order, the Society
C preferred an appeal and the learned Additional District Judge allowed the appeal and the suit CS no. 333/03 of 2001 was ordered to be restored and tried.

5. Being dissatisfied with the said order in appeal,
D respondent Nos. 1 and 2 approached the High Court of Punjab and Haryana in Civil Revision No. 3695 of 2006 and the High Court allowed the revision petition and set aside the order dated 15.6.2006 passed by the appellate court and accordingly restored the order of the trial court.

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6. Before the High Court the Society contended that it was not a party to the Civil Suit No. 806 of 1993 and hence, it was not bound by the judgment and decree dated 19.9.1998 and, therefore, it has a right to challenge the same through a suit;
F that mere filing of objections to the execution petition, and an application for setting aside the earlier judgment and decree will not bar the suit, which is based on a different cause of action; and that as the civil suit was fixed for evidence of parties after framing of issues by the Court and a specific issue
G regarding maintainability, which is a mixed question of fact and law, had been framed, the same could not have been summarily decided at that stage. The Society also contended that the judgment in the earlier suit was vitiated due to fraud and collusion.

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7. The High Court while rejecting the arguments of the Society came to observe that the learned Additional District Judge took an erroneous view that since the issues had been framed and the parties had been put to trial the question regarding maintainability of the suit on the principle of *res judicata* could not have been decided. Thereafter, the High Court referred to the factual scenario in chronology. The said facts need to be stated. As per the High Court, admittedly, the judgment and decree dated 19.09.1998 in Civil Suit No. 806 of 1993 filed by Yogesh Kumar and Inder Kumar against Krishan Chand and Ved Pal seeking for specific performance of agreement to sell dated 02.11.1992 was decreed and no appeal against the said decree was filed; that during the pendency of the execution petition seeking execution of the judgment and decree dated 19.09.1998, the respondent-Society had filed objections through Vishav Pal Goel where they had claimed to be the owners of the suit land by way of gift deeds dated 05.03.1997 and 06.03.1997 executed by Ved Pal and Banarsi Dass which were dismissed vide order dated 04.11.2000 and there was nothing on record to show that the said order was dislodged in appeal; that the respondent-Society filed an application for setting aside the judgment and decree dated 19.09.1998 and for stay of the execution, which was also dismissed vide order dated 18.04.2001 and appeal filed by the plaintiff was also dismissed vide judgment dated 01.10.2004; that all the pleas which had been raised by the plaintiff-respondent No. 1 before the High Court had already been agitated before the executing court and the appellate court, which were rejected and the order of the appellate court dated 01.10.2004 had become final hence, binding upon the parties; that the plaintiff-Society could not permitted to re-open the matter again by way of the present suit as they had availed the remedy of agitating their grievance before the executing court; and that the plaintiff in the present suit had raised a similar controversy, which was also raised before the executing

court and also in its application for setting aside the judgment and decree, that was finally decided on merits and, therefore, suit was barred by the principle of resjudicata.

8. On the aforesaid basis, the High Court finally held:

> "To my mind, Additional District Judge has committed an error by setting aside the order dated 7.12.2005 passed by additional Civil Judge (Senior Division), Kurukshetra by virtue of which a finding was recorded that the suit is clearly barred by principles of res judicata and by principle of lis pendens laid down in Section 52 of the Transfer of Property Act. I would also like to observe that it is settled principle of law that in consonance with the provisions of section 11 of the Code of Civil Procedure, principle of res judicata equally applies to the interlocutory stage of the suit as well. Plaintiff-respondent cannot be permitted to raise similar controversy repeatedly on the same facts and circumstances and in fact, the present suit is an abuse of the process of the court and the plaint has rightly been rejected by the learned Additional Civil Judge (Senior Division), Kurukshetra. The rule of conclusiveness also comes into play in the instant case. Once the matter, which was the subject matter of lis to determine by the competent authority, no party, thereafter, can be permitted to re-open in the subsequent litigation. Such a rule was brought into statute book with a view to bring the litigation to an end so that the other side may not be put to harassment."

9. We have heard Mr. Mahabir Singh, learned senior counsel for the appellant and Mr. K.V. Vishwanathan, learned senior counsel for the respondents.

10. We have referred to the decision of the High Court in extenso as it has used the words "admittedly" and scrutinized

in detail the factual scenario. It is submitted by Mr. Mahabir Singh, learned senior counsel appearing for the appellant that the suit was filed seeking declaration of the judgment and decree dated 19.9.1998 in civil suit no. 806/92 as null and void being resultant of fraud and collusion. That apart, the appellant was not a party to the earlier suit. It is urged by him that a written statement was filed on 23.7.2003 and on the basis of the plaint and the written statement, the learned trial Judge has framed number of issues and the issue number 1 relates to maintainability of the suit and issue number 9 pertains to whether the suit of the plaintiff is barred by principles of resjudicata. As is evident, after the framing of the issues the defendant filed the application under Order VII Rule 11 C.P.C. stating that the suit is not maintainable as barred by resjudicata. The learned trial Judge, as is evident from the order passed by him, has taken note of the stand taken in the written statement which has been regarded as the incorrect approach by the learned appellate Judge. The High Court, as it appears, has been guided by the finding recorded by the learned trial Judge totally ignoring the factum that such a conclusion has been arrived at by taking into consideration the averments made in the plaint and the assertions put forth in the written statement. The crux of the matter is whether, in the obtaining factual matrix, the High Court should have applied the principle of resjudicata. The cause of action for filing the suit is different. The grounds urged in the suit, as we find, are also quite different. Even if the plaint is read keeping in mind the cleverness and deftness in drafting, yet it is not prima facie discernible from the plaint that it lacks any cause of action or is barred by any law. On a perusal of the plaint alone it cannot be said that the suit is barred by the principle of resjudicata.

11. In this context, we may profitably refer to the decision in ***V. Rajeshwari v. T.C. Saravanabava***[1]. In the said case, a

[1] (2004) 1 SCC 551

A two-Judge Bench while dealing with the concept of resjudicata has held:-

"11. The rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It B is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

12. The plea of *res judicata* is founded on proof of certain C facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not D be permitted to be raised for the first time at the stage of appeal [see *(Raja) Jagadish Chandra Deo Dhabal Deb* v. *Gour Hari Mahato*[2], *Medapati Surayya* v. *Tondapu Bala Gangadhara Ramakrishna Reddi*[3] and *Katragadda China Anjaneyulu* v. *Kattaragadda China* E *Ramayya*[4]]."

After so stating, the Court further observed that:-

"Not only the plea has to be taken, it has to be F substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of *res judicata* and the judgment contains exhaustive or in requisite details the statement of G pleadings and the issues which may be taken as enough proof. But as pointed out in *Syed Mohd. Salie Labbai* v.

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[2] AIR 1936 PC 258

[3] AIR 1948 PC 3

H [4] AIR 1965 AP 177

Mohd. Hanifa[5] the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as *res judicata*."

12. We are conscious that the observations reproduced above were made in a different context but we have reproduced the same to understand the impact of the plea of resjudicata regard being had to the principle enshrined under Order VII Rule 11(d) of the C.P.C.

13. In this regard the pronouncement in ***Kamala and others v. K.T. Eshwara SA and others***[6] would be seemly. In the said case while dealing with the principle engrafted under Order VII Rule 11(d) C.P.C., the Court has held thus:-

"21. Order 7 Rule 11(*d*) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (*d*) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

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[5] (1976) 4 SCC 780

[6] (2008) 12 SCC 661

A 22. For the purpose of invoking Order 7 Rule 11(*d*) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of
B an order under the said provision."

After so stating, while proceeding to deal with the concept of resjudicata, the Court opined:-

C "23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit
D may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the
E plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by
F various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be
G barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained."

14. In this regard a reference to a three-Judge Bench
H decision in ***Balasaria Construction (P) Ltd. v. Hanuman***

Seva Trust[7] and others would be frutiful. Be it noted the said case was referred to a larger Bench vide ***Balasaria Construction (P) Ltd. v. Hanuman Seva Trust***[8]. The order of reference reads as follows:-

> "4. This case was argued at length on 30-8-2005. Counsel appearing for the appellant had relied upon a judgment of this Court in *N.V. Srinivasa Murthy* v. *Mariyamma*[9] for the proposition that a plaint could be rejected if the suit is ex facie barred by limitation. As against this, counsel for the respondents relied upon a later judgment of this Court in *Popat and Kotecha Property* v. *State Bank of India Staff Assn.*[10] in respect of the proposition that Order 7 Rule 11(*d*) was not applicable in a case where a question has to be decided on the basis of fact that the suit was barred by limitation. The point as to whether the words "barred by law" occurring in Order 7 Rule 11(*d*) CPC would include the suit being "barred by limitation" was not specifically dealt with in either of these two judgments, cited above. But this point has been specifically dealt with by the different High Courts in *Mohan Lal Sukhadia University* v. *Priya Soloman*[11], *Khaja Quthubullah* v. *Govt. of A.P.*[12], *Vedapalli Suryanarayana* v. *Poosarla Venkata Sanker Suryanarayana*[13], *Arjan Singh* v. *Union of India*[14] wherein it has been held that the plaint under Order 7 Rule 11(*d*)

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[7] (2006) 5 SCC 658

[8] (2006) 5 SCC 662

[9] (2005) 5 SCC 548

[10] (2005) 7 SCC 510

[11] AIR 1999 Raj. 102

[12] AIR 1995 AP 43

[13] (1980) 1 An LT 488

[14] AIR 1987 Del 165

A cannot be rejected on the ground that it is barred by limitation. According to these judgments the suit has to be barred by a provision of law to come within the meaning of Order 7 Rule 11 CPC. A contrary view has been taken in *Jugolinija Rajia Jugoslavija* v. *Fab* B *Leathers Ltd.*[15], *National Insurance Co. Ltd.* v. *Navrom Constantza*[16], *J. Patel & Co.* v. *National Federation of Industrial Coop. Ltd.*[17] and *State Bank of India Staff Assn.* v. *Popat & Kotecha Property*. The last judgment was the subject-matter of challenge in *Popat and Kotecha* C *Property* v. *State Bank of India Staff Assn.* This Court set aside the judgment and held in para 25 as under:

"*25.* When the averments in the plaint are considered in the background of the principles set out in *Sopan* D *Sukhdeo case*[18] the inevitable conclusion is that the Division Bench was not right in holding that Order 7 Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non- E execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 F years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. This is not G so in the present case."

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[15] AIR 1985 Cal 193

[16] AIR 1988 Cal 155

[17] AIR 1996 Cal 253

H [18] (2004) 3 SCC 137

5. Noticing the conflict between the various High Courts and the apparent conflict of opinion expressed by this Court in *N.V. Srinivasa Murthy* v. *Mariyamma* and *Popat and Kotecha Property* v. *State Bank of India Staff Assn.* the Bench referred the following question of law for consideration to a larger Bench:

"Whether the words 'barred by law' under Order 7 Rule 11(*d*) would also include the ground that it is barred by the law of limitation.""

15. The three-Judge Bench opined that there was no conflict of opinion and thereafter the matter came back to the Division Bench for adjudication. The Division Bench reproduced what has been stated by the three-Judge Bench. It is as under:-

"Before the three-Judge Bench, counsel for both the parties stated as follows:

"...It is not the case of either side that as an absolute proposition an application under Order 7 and Rule 11(*d*) can never be based on the law of limitation. Both sides state that the impugned judgment is based on the facts of this particular case and the question whether or not an application under Order 7 Rule 11(*d*) could be based on law of limitation was not raised and has not been dealt with. Both sides further state that the decision in this case will depend upon the facts of this case."

16. After so stating, the Division Bench opined that in the facts of the said case, the suit could not be dismissed as barred by limitation without proper pleadings, framing of issue on limitation and taking evidence, for question of limitation is a mixed question of fact and law and on ex-facie reading of the plaint it could not be held that the suit was barred by time.

A 17. Coming to the case at hand we find that the allegations in the plaint are absolutely different. There is an asseveration of fraud and collusion. There is an assertion that in the earlier suit a decree came to be passed because of fraud and collusion. In such a fact situation, in our considered opinion, B the High Court has fallen into error by expressing the view that the plea of resjudicata was obvious from the plaint. In fact, a finding has been recorded by the High Court accepting the plea taken in the written statement. In our view, in the obtaining factual matrix there should have been a trial with regard to all C the issues framed.

18. Resultantly, the appeal is allowed and the order passed by the High Court is set aside and that of the appellate Judge is restored. The trial court is directed to proceed with the suit D and dispose of the same within a period of six months hence. There shall be no order as to costs.

Kalpana K. Tripathy Appeal allowed.