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HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No.197 of 2011

Judgment Reserved on : 14.7.2022

Judgment Delivered on : 2.9.2022

Santosh Kumar Sahu,

---- Appellant

versus

1. Smt. Basanti Bai,
2. Ku. Ishwari Sahu,
3. Ku. Pushpa Sahu,
4. Chabilal Sahu,
5. Smt. Revati Bai, W/o Patram Sahu,
6. Smt. Sevati Bai, W/o Firanta Sahu,
7. Smt. Motimbai, age ab. 44 years,

--- Respondents

For Appellant	:	Shri Raja Sharma, Advocate
For Respondents No.1 to 6	:	Shri Dhirendra Prasad Mishra, Advocate
For Respondent No.7	:	None

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. The instant appeal has been preferred by the plaintiff against the judgment and decree dated 5.10.2010 passed by 9th Additional District Judge (FTC), Raipur in Civil Suit No.41A of 2006.

2. Plaintiff/Appellant Santosh Kumar Sahu filed a suit, being Civil Suit

No.41A of 2006 before the Trial Court for vacant possession of the suit house and also for damages against the defendants/Respondents. Original defendant 1 Budhram Sahu died during pendency of the civil suit. Defendants 1-अ to 1-ई/Respondents 1 to 6 are legal representatives of deceased Budhram Sahu. Deceased defendant 1 Budhram Sahu and defendant 2 Smt. Motimbai are brother and sister of the father of the plaintiff, namely, Maujiram Sahu. The suit house bearing No.37/458/1 situated at Jawaharlal Nehru Ward No.37, Jorapara, Raipur was owned by Devantinbai, mother of original defendant 1 Budhram Sahu. It was pleaded by the plaintiff that on 21.2.1997 Devantinbai executed a will (Ex.P2) in favour of the plaintiff. On the basis of the said will, after the death of Devantinbai, the plaintiff became owner of the suit house. His name is also mutated in the records of Municipal Corporation, Raipur. It was further pleaded that deceased defendant 1 Budhram Sahu was residing in another house situated at Jorapara itself. In the lifetime of Devantinbai itself, deceased defendant 1 Budhram Sahu was residing in the suit house with the consent of Devantinbai. After the death of Devantinbai, the plaintiff became owner of the suit house on the basis of the will (Ex.P2). Thereafter, the plaintiff demanded vacant possession of the suit house from deceased defendant 1 Budhram Sahu. Deceased defendant 1 Budhram Sahu requested that the plaintiff should provide him the suit house on rent @ Rs.500 per month. Thereafter, with the consent of the plaintiff, deceased defendant 1 Budhram Sahu was residing in the suit house as a licensee. Earlier, a suit was filed by the present plaintiff himself

against deceased defendant 1 Budhram Sahu for eviction on the basis of relationship of landlord and tenant between him and Budhram Sahu. The suit was registered as Civil Suit No.542A of 2004, which was dismissed vide judgment and decree dated 10.2.2006 (Ex.P18 and P19). After disposal of the suit, the plaintiff sent a legal notice (Ex.P14) to Budhram Sahu. Reply was sent by Budhram Sahu vide Ex.P17. Since Budhram Sahu did not vacate the suit house nor did he give possession of the suit house to the plaintiff, the instant suit has been preferred by the plaintiff for vacant possession of the suit house and for damages.

3. Deceased defendant 1 Budhram Sahu filed his written statement in which he pleaded that the suit house was made by his father Pardeshi Ram Sahu. The suit house is his ancestral property. There was no partition made between Devantinbai and other legal representatives of Pardeshi Ram Sahu. It was further pleaded that the will dated 21.2.1997 (Ex.P2) is a forged document. Devantinbai had no right to execute the said will as she was not an absolute owner of the suit house. It was further pleaded that in the previous suit, i.e., Civil Suit No.542A of 2004, the competent Court did not find the will dated 21.2.1997 duly proved, therefore, the subsequent suit on the basis of the same filed by the plaintiff is barred under the provisions of Section 11 of the Code of Civil Procedure. It was further pleaded that the plaintiff has also not properly valued the suit and not affixed proper Court fee. Defendant 2 Smt. Motimbai also filed her written statement separately in which she supported the averments made by the plaintiff in his plaint.

4. On the basis of the above pleadings, the Trial Court framed as many as seven issues. After recording evidence of both the parties and after hearing arguments on behalf of the parties, vide the impugned judgment dated 5.10.2010, the Trial Court dismissed the suit mainly on the ground that the suit preferred by the plaintiff is barred under the provisions of Section 11 CPC. Hence, the instant appeal has been preferred by the plaintiff.

5. Learned Counsel appearing for the Appellant/plaintiff submitted that the Court below illegally refused to exercise its jurisdiction to decree the suit on the ground of *res judicata*. The Court below failed to appreciate that the question of title incidentally considered in eviction proceedings could not be taken as bar in a subsequent suit based on title. In the previous suit, no issue pertaining to title of the plaintiff was framed or directly dealt with. The parties were either not at issue on the point of plaintiff's title or that the suit was not directly and subsequently involved for adjudication. If the parties were not at issue on this point then the Respondents/defendants would be stopped from agitating the point subsequently and if the issue was not involved directly and subsequently then it would not operate as *res judicata*. Reliance was placed on **(1993) 1 SCC 531 [Rameshwar Dayal v. Banda (Dead) through his LRs.]**. It was further argued that the Court below failed to appreciate that the issue in order to operate as *res judicata* must have been decided by the Court of exclusive jurisdiction and not merely by the Court of preferential jurisdiction and that the Court exercising jurisdiction under the Accommodation

Control Act has preferential jurisdiction and not the exclusive jurisdiction. Therefore also, the suit was not barred under the provisions of Section 11 CPC. It was further submitted by Learned Counsel that the case of original defendant 1 Budhram Sahu in the earlier suit was that the will (Ex.P2) was a forged document and any inference or conclusion drawn with respect to the will by a Court of preferential jurisdiction to try a landlord tenant dispute would not be binding on an issue directly and subsequently involved, but, would only be an incidental finding not decided by the Court of exclusive jurisdiction. Therefore, it was submitted by Learned Counsel that the judgment and decree passed by the Court below is not sustainable and liable to be set aside.

6. Learned Counsel appearing for Respondents 1 to 6 opposed the arguments advanced on behalf of the Appellant/plaintiff and supported the impugned judgment of the Court below.

7. I have heard the contentions raised on behalf of the parties and perused the entire record of the Court below and also gone through the evidence adduced by the parties before the Trial Court with due care.

8. From perusal of the impugned judgment passed by the Court below, it appears that the suit of the plaintiff has been dismissed mainly on the ground of *res judicata*.

9. Dealing with the issue in **(2021) 9 SCC 99 (Srihari Hanumandas**

Totala v. Hemant Vithal Kamat), it was observed by the Supreme Court thus:

> "25.3. To determine whether a suit is barred by res judicata, it is necessary that (i) the "previous suit" is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit."

10. Further, in **2021 SCC OnLine SC 792 [Jamia Masjid v. K.V. Rudrappa (Since Dead) by LRs.]**, it was observed by the Supreme Court as under:

> "17. Before analysing the three suits specifically, it is necessary that we visit the jurisprudence on *res judicata*. Section 11 CPC states as follows:
>
> > "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 such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
> >
> > […]
> >
> > *Explanation IV.*– Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
> >
> > *Explanation V.*– Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.
> >
> > *Explanation VI.*– Where persons litigate *bona fide* in respect of a public right or of a private right claimed

> in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
>
> […]
>
> *Explanation VIII.*– An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]"

18. In order to attract the principles of *res judicata*, the following ingredients must be fulfilled:

> (i) The matter must have been directly and substantially in issue in the former suit;
>
> (ii) the matter must be heard and finally decided by the Court in the former suit;
>
> (iii) The former suit must be between the same parties or between parties under whom they or any of them claim, litigating under the same title; and
>
> (iv) the Court in which the former suit was instituted is competent to try the subsequent suit or the suit in which such issue has been subsequently raised.

43. The *locus classicus* on the point of determining if an issue was 'directly and substantially' decided in the previous suit is the decision of Justice M Jagannadha Rao (writing for a two judge bench) in *Sajjadanashin Syed MD B.E. Edr. (D) by LRs.* v. *Musa Dadabhai Ummer.* During the course of the judgment, the Court analysed the expression "directly and substantially in issue" in Section 11 and laid down the twin test of *essentiality* and *necessity*:

> "12. 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."

[…]

18. In India, Mulla has referred to similar tests (*Mulla*, 15th Edn., p. 104). The learned author says : 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** (Mulla, p. 104). 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* [(1976) 4 SCC 780 : AIR 1976 SC 1569]). We are of the view that the above summary in *Mulla* is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105):

> "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.*"*
(emphasis supplied)

44. Adverting to the decision in *Mahant Pragdasji Guru Bhagwandasji* (supra) and two earlier decisions, the Court held that these were instances where in spite of adverse findings in an earlier suit, the finding on that specific issue was not treated as *res judicata* as it was purely incidental, auxiliary or collateral to the main issue in each of these cases and not necessary in the earlier case.

47. In view of the authorities cited above, the twin test that is used for the identification of whether an issue has been conclusively decided in the previous suit is:

A. Whether the adjudication of the issue was 'necessary' for deciding on the principle issue ('the necessity test')' and

B. Whether the judgment in the suit is based upon the decision on that issue ('the essentiality test').

On applying the necessity test to the case at hand, we will have to identify if the decision on the principle issue of framing a scheme for the administration of the Mosque could not have been arrived at without adjudication of the title of the suit. The plaint contains two distinct allegations against the defendant, Abdul Khuddus: (i) that he was misappropriating the funds of the mosque; and (ii) that he was setting up his own title to the suit property. The defendant contested that the suit property belonged to him. Therefore, since the title was contested, it was necessary that the court in the first suit determine if the suit property belonged to the mosque to adjudicate on the scheme of administration of the mosque. The contention that the trial court could not have adjudicated on the title of the suit property in a representative suit has already been addressed in the preceding section relying on the case of **Bhagwandasji** (supra). On applying the essentiality test to the judgment in the first suit, it has to be identified if the final decision rendered by the court in that case would be altered if the issue on title was determined otherwise. Whether the scheme for the administration of the mosque would also cover the suit property was necessary for adjudication in the former suit. In the next section we shall explore what precisely was the nature and import of the adjudication in the former suit."

11. In (1995) 6 SCC 733 (Deva Ram v. Ishwar Chand), it was observed

by the Supreme Court thus:

> "24. In the previous suit, which was instituted by the respondents, an issue, namely, Issue 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 appellants 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."

12. In **AIR 2004 SC 2186 (Escorts Farms Ltd. v. Commissioner, Kumanon Division, Nainital)**, it was observed by the Supreme Court as under:

> "51. Res judicata is a plea available in civil proceedings in accordance with Section 11 of the Code of Civil Procedure. It is a doctrine applied to give finality to 'lis' in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice over. The literal meaning of res is 'everything that may form an object of rights and includes an object, subject-matter or status' and res judicata literally means : 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment.' Section 11 of CPC engrafts this doctrine with a purpose that 'a final

judgment rendered by a Court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.' (See : Black's Law Dictionary at pages 1304-1305)."

13. In **Rameshwar Dayal** case (supra), it was observed by the Supreme Court as follows:

"15. We are, therefore, more than satisfied that the bar of res judicata is not applicable to the determination of the issue with regard to the title to the property in the present suit. It is for these reasons that we do not think it necessary to discuss in detail the decisions cited on both sides. However, we may refer to a decision of this Court – *Gangabai* v. *Chhabubai*, (1982) 1 SCC 4 which has a direct bearing on the question as to when a finding on the question of title to immovable property rendered by a Small Cause Court would operate as res judicata. After discussion, various decisions on the point, this court has held there as follows:

> "When a finding as to title to immovable property is rendered by a Court of Small Causes res judicata cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should 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 the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. A question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as res judicata in a subsequent suit in which the question of title is directly raised."

This is a sufficient answer to the contention that when Small Cause Court incidentally determines the question of title, it operates as res judicata. The contention ignores that to operate as res judicata the first finding must be on an issue which has been directly and substantially in issue in the former suit. If the finding is given incidentally while determining another issue which was directly and substantially in issue, such

> finding cannot be said to be on an issue which was directly and substantially inn issue in the former suit. However, it is not necessary for us to discuss this point at length since we have come to the conclusion that not only the Small Cause Court has not given any finding on the issue even incidentally, it has not even referred to the said issue in its so-called decision."

14. In the light of the above observations made by the Supreme Court, now, I shall examine the instant case.

15. It is not in dispute that the previous suit, i.e., Civil Suit No.542A of 2004 moved by the present Appellant/plaintiff against original defendant 1 Budhram Sahu, which was decided by 1st Additional Civil Judge Class-I of the Court of 1st Civil Judge Class-I, Raipur, was preferred by the plaintiff for eviction of Budhram Sahu from the suit house. The suit was dismissed vide judgment dated 10.2.2006 (Ex.P18). Thereafter, the plaintiff preferred the present suit, i.e., Civil Suit No.41A of 2006 for getting vacant possession of the suit house and damages.

16. The previous suit was filed by the Appellant/plaintiff on the basis of relationship between the parties as landlord tenant. From perusal of paragraph 9 of the plaint of the previous suit (Ex.P20), it appears that the plaintiff preferred the suit under Section 12(1)(d) of the Accommodation Control Act for eviction of the tenant from the suit house on the ground of *bona fide* need of the suit house for himself. The present suit has been filed by the plaintiff for vacant possession of the suit house claiming himself as a title holder over the suit house. In the previous suit, the plaintiff claimed himself as

a landlord of the suit house on the basis of the will dated 21.2.1997 (Ex.P2) executed by Devantinbai. Incidentally, it was observed by the Court in the previous suit that the plaintiff has not duly proved the execution of the will. In the previous suit, the plaintiff never claimed his title over the suit house. He only claimed himself as the landlord of the suit house on the basis of the will (Ex.P2). In the previous suit, directly or indirectly, no question was involved that the plaintiff got title over the suit house on the basis of the will as there was no issue framed by the Court on this point. Therefore, the finding of the Court in the previous suit regarding execution of the will is incidental.

17. On a close scrutiny of the pleadings made in the present suit as well as in the previous suit, the issues framed in the present suit as well as in the previous suit and the findings given by the Court in the previous suit, it is clear that in the previous suit the question whether the plaintiff was title holder of the suit house or not was not involved directly or indirectly. On this point, no issue was framed in the previous suit. The previous suit was filed under the provisions of Section 12(1)(d) of the Accommodation Control Act for eviction of the tenant from the suit house on the basis of *bona fide* need of the landlord. The Court deciding the previous suit was not competent to decide the title of the plaintiff over the suit house directly or indirectly as the suit was preferred by the plaintiff on the basis of relationship between the parties as landlord and tenant only. The present suit has been preferred by the plaintiff for getting vacant possession of the suit house and damages claiming himself as a

title holder of the suit house. Therefore, the finding of the Court below that the present suit preferred by the plaintiff is barred under the provisions of Section 11 CPC is not in accordance with law. Hence, it is held that the present suit preferred by the plaintiff is not barred under the provisions of Section 11 CPC. The Court below dismissed the suit only on the ground of *res judicata* and did not decide the other issues on merit.

18. As an outcome of the above discussion, the impugned judgment passed by the Court below is set aside. The matter is remanded back to the Trial Court to decide the other issues as also the civil suit on their merits in accordance with law and pass a fresh judgment. Resultantly, the instant appeal is allowed.

Sd/-

(**Arvind Singh Chandel**)
JUDGE

Gopal