

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4543 OF 2016
(Arising out of S.L.P.(C) No. 538 of 2014)

RISHABH CHAND JAIN & ANOTHER ... APPELLANT (S)

VERSUS

GINESH CHANDRA JAIN ... RESPONDENT (S)

J U D G M E N T

KURIAN, J.:

Leave granted.

2. An Interlocutory Application filed in a pending suit for dismissal of the suit on the ground that the same is barred by *Res Judicata* and that there is no cause of action, was allowed by the trial court before commencement of the trial. The plaintiff filed a revision before the High Court of Judicature at Patna taking the position that no appeal is maintainable as the suit has been dismissed without framing an issue.

3. The High Court, as per the impugned order dated 14.08.2013, took the view that the approach taken by the trial court was not proper; an issue should have been framed on maintainability and the same should have been tried, and thereafter only, the suit could have been dismissed, in case the court upheld the contentions of the defendant/applicant. In that view of the matter, the High Court held that the order passed by the trial court, dismissing the suit, was not appealable and the same was only revisable in exercise of the powers under Section 115 of The Civil Procedure Code, 1908 (hereinafter referred to as 'Code'). Thus, aggrieved, the defendants are before this Court.

4. Appellants are defendants in Title Suit No. 149 of 2008 before the 1st Sub Judge, Arrah, Bhojpur, in the State of Bihar. The suit was filed for a declaration that the Municipality survey Khatiyani entered in favour of defendant No.1 regarding the land mentioned in Schedule 'A' is absolutely wrong and untrue and is not binding the plaintiff.

5. The defendants, by application dated 20.08.2009, prayed for framing a preliminary issue as to "whether the suit is maintainable as barred by *Res Judicata* and constructive *Res*

Judicata". According to the appellants, the plaintiff having suffered an order in Title Suit No. 4 of 1971, the present Title Suit was not maintainable. It was also averred in the Application that:

"5. That the survey of Khatiyān has not become final by the Municipality, and the plaintiff has no right to institute any suit against any entry made in it, hence, the present suit is not maintainable."

6. The defendant/plaintiff filed his objections, and thereafter, the Application was taken up for consideration. After hearing both the sides, the trial court upheld the objection that the suit was barred by the principle of *Res Judicata*. On cause of action, it was held that:

"It is also clear from the perusal of the plaint that the plaintiff has instituted this suit for declaration of the Municipality Survey Khatiyān as null and void. The photo copy of the survey Khatiyān has been produced with the suit. It is clear from its perusal that this survey Khatiyān has not yet been finally published. Under these circumstances, no relief of declaration can be granted by the Civil Court for declaring the said survey as null and void. The suit can not be filed in the Civil Court prior to final publication of the survey Khatiyān. Thus, it is clear that the plaintiff has no cause of action to institute the present suit."

And thus, the trial court dismissed the suit ... *“being barred by the principle of Res Judicata and the lack of cause of action”* as per order dated 03.08.2010.

7. The plaintiff challenged the said order in Civil Revision No. 783 of 2010 before the High Court of Judicature at Patna.

8. The High Court, in the impugned order, has taken the view that for dismissal of a suit, framing of issues is necessary whereas for rejection of a plaint, it is not and it can be done at any stage. It was further held that the order rejecting the plaint is appealable but dismissal of a suit, without framing an issue and before trial as not maintainable, is not appealable. To quote:

“In absence of specific issue, the same does not come within the definition of decree and the impugned order finally disposed of the case, so only remedy left in the case is filing revision.”

9. Heard learned Counsel appearing on both sides.

10. Section 2 (2) of the Code defines ‘decree’ to mean:

“2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include

the rejection of a plaint and the determination of any question within section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;”

11. Section 96 of the Code provides for appeals from original decree:

“96. Appeal from original decree.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex pane.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees].”

12. Section 115 of the Code provides for revision;

“115. Revision.-(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the , Court except where such suit or other proceeding is stayed by the High Court.

Explanation.-In this section, the expression “any case which has been decided” includes any

order made, or any order deciding an issue in the course of a suit or other proceeding.”

13. Order XIV Rule 1 provides for framing of issues:

“1. Framing of issues.- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and ¹[after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.”

14. In terms of Section 2(2) of the Code, in case, the court adjudicating the case, conclusively determines the rights of the parties with regard to any one or more or all of the matters in controversy in the suit, the requirement of decree is satisfied. Such determination can be preliminary or final. Rejection of a plaint is deemed to be a decree under Section 2(2) of the Code. Only two orders are excluded-(i) any adjudication from which an appeal lies as an appeal from an order and (ii) any order of dismissal for default. Order XLIII of the Code has provided for appeals from orders. The impugned order does not come under Order XLIII. The order has conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, viz., *Res Judicata*. True, it is not an order passed on framing an issue. But at the same time, there is adjudication on the controversy as to whether the suit is barred by *Res Judicata* in the sense there is a judicial determination of the controversy after referring to the materials on record and after hearing both sides.

15. The impugned order dismissing the suit on the ground of *Res Judicata* does not cease to be a decree on account of a procedural irregularity of non-framing an issue. The court ought

to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. What is to be seen is the effect and not the process. Even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the Code in view of the specific bar under sub-Section (2) thereof. It is only appealable under Section 96 read with Order XLI of the Code.

16. The order passed by the trial court is a composite order on rejection of the plaint as there is no cause of action and dismissal of the suit as not maintainable on the ground of *Res Judicata*. Both aspects are covered by the definition of decree under Section 2(2) of the Code and, therefore, the remedy is only appeal and not revision even if there is any irregularity in passing the order.

17. The appeal is hence allowed. The impugned order is set aside. However, the respondent/plaintiff is granted liberty to file an appeal against the order dated 03.08.2010 passed by the High Court. In case such an appeal is filed within six weeks

from today, the same shall be treated to have been filed within time, in view of the facts and circumstances of this case.

18. The appeal is allowed as above. There shall be no order as to costs.

.....J.
(KURIAN JOSEPH)

.....J.
(ROHINTON FALI NARIMAN)

**New Delhi;
April 13, 2016.**



JUDGMENT