

2017 (5) ALT 236 (S.B.)

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
M. SATYANARAYANA MURTHY, J.
C.R.P.No 4707 of 2016
DECIDED ON : 14-07-2017

HEAD

Civil Procedure Code, 1908, Section 2(2) — *Res Judicata* when decree — The respondents preferred a CRP which resulted in dismissal — Thereafter the respondents preferred an appeal against the final order to the Apex Court and the same was rejected — Held, when the appeal lies against the decree and judgment, court cannot exercise inheriting jurisdiction under Article 227 of Constitution — Principal of *res judicata* is a decree as defined under Section 2(2) of C.P.C. and is appealable under Section 96 r/w Order XLI C.P.C. — Therefore revision petition not maintainable.

NOTE

HEAD

Constitution of India, 1950, Article 227 — Power of Court — Power under Article 227 also includes the power of judicial revision where no appeal or revision lies to the high court under the ordinary law — It is not subject to those technicalities of procedure or traditional fetters which are to be found in *certiorari* jurisdiction and such power can also be exercised *suo motu*.

NOTE

ADVOCATES

Mr. Mirza Nisar Ahmed Baig, Counsel for the Petitioner. Mr. MUDDU VIJAY and M/s. Aequitasjuris Law Firm, for Respondents 2 and 3.

CASES REFERRED

- 1 . 2005 11 SCC 251 - Amarendra Komalam and another Vs. Usha Sinha and another
- 2 . 2015 SCC 751 - Vaish Aggarwal Panchayat Vs. Inder Kumar and others
- 3 . 2016 (3) ALT(SC) 56 - Rishabh Chand Jain and another Vs. Ginesh Chandra Jain

ORDER

This petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.783 of 2010 in O.S.No.455 of 2009 dated 08.03.2016 passed by the Additional Junior Civil Judge-cum- XVII Metropolitan Magistrate Cyberabad at Rajendranagar, allowing the interlocutory application and also observing that O.S.No.455 of 2009 cannot be tried further, as it is hit by Principle of *Res judicata*.

2. For sake of convenience, the parties hereinafter will be referred to as arrayed in I.A.No.783 of 2010.

3. The petitioner/2nd respondent filed I.A.No.783 of 2010 under Section 11 r/w 151 C.P.C, alleging the rights of the parties were decided earlier in different suits and attained finality. But, the present civil revision petition is filed almost reiterating the same contentions in the suit. Therefore, the claim of the petitioners herein is hit by Principle of *Res judicata* and estopped to raise such contentions in a separate suit.

4. The respondents/plaintiffs filed counter denying material allegations, *inter alia* contending that O.S.No.39 of 1960 was filed for declaration of Sajjadda and Towliath of Dargha Hazrath

Mir Mehmood Aulia, which was decreed on 31.01.1963 to an extent of rights of Sajjadigei and his rights for towliah ended in dismissal. Later the second respondent in O.S.No.455 of 2009 filed A.S.No.119, which was allowed, setting aside the judgment and decree in O.S No.39 of 1960 and further, on 16.01.1976 remanded the said matter to Lower Court with a direction to dispose the matter afresh, after framing additional issue of relationship between the parties. Further, the respondents/plaintiffs preferred C.R.P.No.5889 of 2008 which ended in dismissal on 03.12.2008, to which the respondents/plaintiffs moved a C.R.M.P. No.7055 of 2008 and the same also ended in dismissal. Thereafter, the respondents/plaintiffs preferred an appeal against final order dated 03.12.2008 before the Supreme Court in S.L.P.C.C.No.17181-17182 of 2009 and the same was also dismissed by the Apex Court on 11.08.2010.

5. During enquiry, none were examined on behalf of the petitioner and respondents/plaintiffs. On behalf of the petitioner Exs.P-1 to P-11 were marked and on behalf of the respondents/plaintiffs, Exs.R-1 to 46 were marked.

6. Upon hearing argument of both the counsel, the Trial Court allowed I.A.No.783 of 2010 and held that O.S.No.455 of 2009 cannot be tried further, as is hit by Principle of *Res judicata*. Assailing the order in I.A.No.783 of 2010, the present civil revision petition is filed.

7. Learned counsel for the petitioners in the revision petition contended that the Principle of *Res judicata* is a mixed question of fact and law and thereby O.S.No.455 of 2009 cannot be dismissed by deciding interlocutory application, exercising power under Section 151 C.P.C.

8. In support of his contentions, learned counsel for the civil revision petitioners placed reliance on the judgment of the Apex Court in *Vaish Aggarwal Panchayat v. Inder Kumar and others* (1) (2015) SCC 751 and on the strength of the principles laid down in the above judgment, the learned counsel requested this Court to allow the civil revision petition, setting aside the impugned order of the Trial Court.

9. Whereas, learned counsel for the respondents herein contended that the Principle of *Res Judicata* is only to put an end to the litigation and it is based on Principle of Public Policy, thereby, the parties cannot be permitted to resort to litigation unnecessarily. In such case, the Court cannot allow such an application filed under Section 11 r/w 151 C.P.C, by exercising inherent power. Learned counsel for the respondents also contended that dismissal of a suit is decree within Section 2(2) of C.P.C and only an appeal lies against the order, but not a revision under Article 227 of the Constitution of India.

10. Learned counsel for the respondents placed reliance on the judgments of the Apex Court in *Amarendra Komalam and another v. Usha Sinha and another* (2) (2005) 11 SCC 251 and *Rishabh Chand Jain and another v. Ginesh Chandra Jain* (3) 2016 (3) ALT 56 (SC) = (2016) 6 SCC 675 and on the strength of the above judgments, submitted that the present civil revision petition is not maintainable and prayed for dismissal of the petition.

11. Instead of adverting to the legality of the findings, based on the principle laid down in *Amarendra Komalam 2* case, applicable to the Principle of *Res Judicata* and dismissal of the suit, it is appropriate to decide about maintainability of the revision under Article 227 of the Constitution of India.

12. Admittedly, O.S.No.455 of 2009 was dismissed by the Trial Court while allowing I.A.No.783 of 2010. Dismissal of suit is a decree within the definition of decree under Section 2(2) of C.P.C. When it is a decree, the remedy open to the plaintiff who lost his claim is to file an appeal under Section 96 r/w Order XLI Rule 1 C.P.C, but not a revision.

13. An identical question came up before the Apex Court in *Rishabh Chand Jain* case (3 supra), in paragraph 13 of the judgment, the Apex Court held that 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 that there is a judicial determination of the controversy after referring to the materials on record and after hearing both sides. Further, the Apex Court in paragraph 14 held that 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.

14. O.S.No.455 of 2009 was dismissed by a composite order in I.A.No.783 of 2010, on the ground that it is hit by Principle of *Res Judicata*. Therefore, only appeal lies against such composite order which would fall within Section 2(2) of C.P.C i.e. decree, which is appealable under Section 96 read with Order XLI of the Code. But, the present revision petition is filed under Article 227 of the Constitution of India, requesting this Court to exercise inherent jurisdiction, on the ground that the Trial Court did not exercise its jurisdiction and exceeded its jurisdictional limits.

15. In *Vaish Aggarwal Panchayat* case (1 supra), the Supreme Court held that Principle of *Res Judicata* is both mixed question of fact and law and issue is required to be framed and decided on merits. But, that does not mean that this Court can exercise such jurisdiction, circumventing the provisions of C.P.C. When an appeal lies against such a composite order by allowing I.A.No.783 of 2010 and dismissing O.S.No.455 of 2009, then appeal alone is maintainable, but not the review under Article 227 of the Constitution of India. This Court cannot interfere with the order under Article 227 of the Constitution of India, when a composite order or decree is passed by the Trial Court, allowing the interlocutory application and dismissing the suit. A composite order determines the rights of the parties, such question cannot be decided while exercising inherent jurisdiction under Article 227 of the Constitution of India, conferred on this Court.

16. The powers of this Court under Article 227 are limited, this Court cannot exercise such power and the duty of this Court is to see that the Courts shall not exceed its power that is conferred on it or exercise power based on extraneous material to pass any order and to keep the subordinate courts within its bounds of jurisdiction.

17. This Court while exercising power under Article 227 can exercise its discretion to interfere in the following circumstances:

- (a) When the inferior court assumes jurisdiction erroneously in excess of power.
- (b) When refused to exercise jurisdiction.
- (c) When found an error of law apparent on the face of record.
- (d) Violated principles of natural justice.
- (e) Arbitrary or capricious exercise of authority or discretion.
- (f) Arriving at a finding which is perverse or based on no material.
- (g) A patent or flagrant error in procedure.

- (h) Order resulting in manifest injustice.
(i) Error both on facts and law or even otherwise.

18. But, in the present facts of the case, there is absolutely no error warranting interference of the Court to interfere with the order by exercising power of supervision over the Subordinate Courts in the following situations:

19. Similarly, the Court cannot exercise its discretion under Article 227 of the Constitution of India:

- (a) Where the only question involved is one of interpretation of deed;
(b) On question of admission or rejection of particular piece of evidence, even though the question may be of everyday recurrence;
(c) To correct erroneous exercise of jurisdiction, as a Court of revision;
(d) To set aside an *intra vires* finding of the fact, except where it is founded on no material or is perverse;
(e) to correct an error of law, not being an error apparent on the face of the record;
(f) to interfere with the *intra vires* exercise of discretionary power, unless it is violative of principles of natural justice;
(g) The Court shall not interfere on a merely technical ground which would not advance substantial justice.

20. Article 227 deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in *certiorari* jurisdiction and such power can also be exercised *suo motu*.

21. The circumstances where the Court can exercise jurisdiction under Article 227 of the Constitution of India are only elliptic. In the present case, when the appeal lies against the decree and judgment, this Court cannot exercise inherent jurisdiction under Article 227 of the Constitution of India. Therefore, the contention of the learned counsel for the petitioners that this Court can exercise inherent jurisdiction is without any substance and on this ground, the petition cannot be allowed and decree and judgment cannot be specified circumventing the provisions of C.P.C.

22. Learned counsel for the civil revision petitioners contended that when a revision is not maintainable, the Court has to remand the matter to the Appellate Court for converting a revision into appeal and cannot dismiss the petition filed under Article 227 of the Constitution of India and placed reliance on an unreported judgment of this Court in C.C.C.A.No.37 of 2014 dated 10.07.2014. In the facts of the above judgment, an appeal was preferred before this Court as there was a dispute with regard to valuation of the appeal. This Court observed that the subject matter of the appeal being only decree for eviction, in the absence of any decree for mesne profits, the appeal ought to have been valued only to the extent of decree for eviction. This Court further observed that if such valuation is made, the District Court will have pecuniary jurisdiction for entertaining the appeal and directed the Registry to forthwith return the appeal to the learned counsel for the appellant in that case for presentation before appropriate Court. This Court also granted two weeks time for filing the appeal before the appropriate Court, as the appellant has pursued the appeal before wrong forum having no pecuniary jurisdiction.

23. But, the principle laid down in the above judgment has no application to the present facts, for the reason that the Court exercised jurisdiction under Section 151 C.P.C, since the appeal was filed before this Court under Section 96 r/w Order XLI C.P.C. But, in the present case, a revision is filed under Article 227 of the constitution of India and this Court cannot

invoke Order XLIII Rule 23 or Rule 23-A C.P.C to remand the matter and cannot return for presentation before the Competent Court for the reason, jurisdiction under Article 227 of the Constitution of India cannot be exercised by the District Court. Therefore, the request of the learned counsel for the petitioners cannot be acceded to, for the reason that Order XLI C.P.C has no application to the revisions filed under Article 227 of the Constitution of India and the principle laid down in the above judgment has no application, either directly or indirectly and it is for the petitioners herein to file appeal before the Appellate Court depending upon both pecuniary and territorial jurisdiction.

24. It is also contended that, if the learned counsel for the respondents had drawn attention of this Court to the judgment of Apex Court in *Rishabh Chand Jain* case (3 supra) about an year ago, the petitioners herein would have filed an appropriate petition immediately. But, the learned counsel for the respondents, for the first time, brought to the notice of this Court, the principle laid down after one year of his appearance in this matter.

25. But, this is not a ground to invoke jurisdiction, for the simple reason that the Advocate did not bring to the notice of this Court about the principle. It is for the counsel to rely on any judgment of his choice at appropriate time and this Court cannot insist the counsel to rely on the legal position at a particular time. The revision came up for hearing finally before this Court at the stage of admission. Therefore, the learned counsel for the respondents placed reliance on *Rishabh Chand Jain* case (3 supra) and on that ground, this Court cannot jurisdiction under Order XLIII Rule 23 or 23-A C.P.C or under Section 151 of C.P.C. The petitioners may take advantage of Section 14 of Limitation Act and if, such application is filed, the Court has to decide the application in accordance with law. But, the delay in submission is not at all a ground. Hence, I find no ground to remand or return the matter to the Trial Court or presentation before competent Court, exercising power under Order XLI Rule 23 or 23-A C.P.C or Section 151 of C.P.C.

26. In view of my foregoing discussion in the earlier paragraphs, the composite order, allowing I.A.No.783 of 2010 and dismissing O.S.No.455 of 2009 by applying the Principle of *Res Judicata* is a decree, as defined under Section 2(2)of C.P.C. and it is appealable under Section 96 r/w Order XLI C.P.C. Therefore, the revision under Article 227 of the Constitution of India is not maintainable.

27. As I have recorded a finding about maintainability of the revision and I need not advert to the other aspects regarding applicability of Principle of *Res Judicata*. It is left open to the Trial Court having jurisdiction to decide the appeal, if any, filed. Hence, the civil revision petition is liable to be dismissed, on the sole ground that the revision is not maintainable.

28. In the result, the civil revision petition is dismissed, leaving it open to the petitioner to file an appeal, if advised, before appropriate Court.

29. Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

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