

workman insofar as the issue of reinstatement is concerned. However, for back wages, the petitioner would be at liberty to avail the remedy under Section 33-C(2) of the Industrial Disputes Act, 1947, in view of the judgment of the Supreme Court in the *Managing Director, U.P. Warehousing Corporation and others v. Vijay Narayan Vajpayee* (33). It is also made clear that as and when the petitioner makes an application for back wages, the respondents shall be free to plead and prove that she was gainfully employed during the intervening period and as such she is not entitled to whole or part of the back wages.

S.C.K

Before Sat Pal, J

MEHARBAN AND ANOTHER,—*Petitioners*

versus

PUNJAB WAKF BOARD AND ANOTHER,—*Respondents*

C.R. No. 2372 of 1997

30th March, 1998

Code of Civil Procedure, 1908—Order 14, Rl.2—Issue of resjudicata—Such issue requiring evidence—Whether can be treated as preliminary issue.

Held, that a persual of order 14 Rule 2 makes it clear that if the Court is of the opinion that the case or part thereof may be disposed of on an issue of law only it may try that issue first if that issue relates to either jurisdiction of the Court or a bar to the suit created by any law for the time being in force. The issue with regard to *resjudicata* can be treated as a preliminary issue even if it involves production of evidence by the parties.

(Para 5)

R.K. Battas, Sr. Advocate with Mr. Munish Jolly, *for the Petitioners*

Harkesh Manuja, Advocate, S.C. Kapoor, Sr. Advocate with Ashish Kapoor, *Advocate for the Respondents.*

JUDGMENT.

Sat Pal J.

(1) This petition has been directed against the order dated 20th March, 1997 passed by Additional Civil Judge (SD), Panipat. By this order the learned trial court has dismissed the application filed by the defendants for treating issue No. 2 as a preliminary issue. Issue No. 2 is to the effect that "the suit is barred by principle of *resjudicate*". Notice of this petition was issued to the respondents.

(2) Mr. Battas, the learned counsel appearing on behalf of the petitioners submitted that the respondent Wakf Board had earlier filed a suit for possession on 21st March, 1972 and the said suit was dismissed,—*vide* judgement and decree dated 13th November, 1972. He further submitted that the appeal filed by the Wakf Board was, however, allowed by the lower appellate court,—*vide* judgment dated 28th February, 1974 but Regular Second Appeal filed by the petitioners and others was allowed by the High Court,—*vide* judgement dated 25th January, 1983. It was held by the High Court that the Wakf Board had no *locus standi* to file the suit. He further submitted that Special Leave Petition filed by the Wakf Board was dismissed by the Supreme Court,—*vide* judgment dated 9th December, 1985. The learned counsel submitted that the present suit has again been filed for the recovery of possession against the petitioners on 25th August, 1989. He submitted that in the written statement filed on behalf of the petitioners-defendants, *inter alia*, it has been stated that the present suit was barred by the principle of *res judicate*, and issue No. 2 has been framed on this point. The learned counsel submitted that since the plea of *resjudicate* in a plea of law, an application was filed before the learned trial court for treating this issue as a preliminary issue, but the request has been rejected by the learned trial court by the order dated 20th March, 1997 which has been impugned in this petition. The learned counsel submitted that the said order was contrary to the provisions of order 14 Rule 2 and the law laid down by various High Courts. In support of his submissions, the learned counsel placed reliance on two judgments of this Court in *Punjab State Co-operative Milk Producers Federation Limited (MILKFED) vs. MM Munjal* (1) *Uggar Sen and another vs. Massu and another* decided on 22nd April, 1997 and a judgment of Calcutta High Court in *Smt. Lakshmi Maini Davi vs. Manik Chander Dass* (2).

(1) 1996 (1) P.L.R. 181

(2) A.I.R. 1991 Calcutta 231

(3) Mr. Kapoor, the learned senior counsel appearing on behalf of the respondents, however, submitted that in the earlier litigation it was held by this court that till appointment of trustees, the property in dispute vested in custodian and as such *Wakf* board had no *locus standi* to file the suit. He, however, submitted that after the law has been amended in the year 1995, the *Wakf* Board is competent to file the suit. The learned counsel further submitted that in para 5 of the grounds of revision the petitioners themselves have admitted that the proof of *res-judicata* requires some evidence and since the said issue could not be decided without the evidence of the parties, the same could not be decided as a preliminary issue. In support of his submission the learned counsel placed reliance on two judgements of this Court in *Hardwari Lal vs. Pokhar Mal and others* (3) and *Ram Kali and others vs. Sohan Lal* (4).

(4) The learned counsel further submitted that in the present case the learned trial court keeping in view the facts of the case has held that the issue No. 2 pertaining to the point of *res-judicate* cannot be decided without receiving the evidence and once the learned trial court had exercised the jurisdiction in accordance with law, this court should not interfere in its jurisdiction under section 115 CPC. In support of this submission, the learned counsel has placed reliance on two judgments of this Court in *Surinder Pal Singh and another vs. Pawanveer Kaur and others* (5) and *Bharat Petroleum Corporation Limited vs M/s Sat Parkash Amar Singh* (6).

(5) I have given my thoughtful consideration to the submissions made by the learned counsel of the parties and have perused the impugned order. Before dealing with the rival contentions urged by the learned counsel of the parties, it will be relevant to refer to Order 14 Rule 2 CPC which reads as under :—

Order 14 Rule 2

“(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2) pronounce judgment on all issues.

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- (3) A.I.R. 1978 Pb. & Hr. 230
(4) 1984 P.L.J. 600
(5) 1989 P.L.J. 512
(6) 1992 P.L.J. 220

(2) where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

- (a) the jurisdiction of the Court, or
- (b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

From Order 14 Rule 2 it is clear that if the Court is of opinion that the case or part thereof may be disposed of on an issue of law only it may try that issue first if that issue relates to either jurisdiction of the Court or a bar to the suit created by any law for the time being in force. Issue No. 2 framed in the present suit will fall under sub-rule (2) (b) as it is to the effect “whether the suit is barred by principle of *res-judicata* ?” In *Pandurang Dhordi Chougule and others vs. Maruti Hari Jaghav and others* (7), a Constitution Bench of the Supreme Court held that a plea or *res judicata* was a plea of law which concerns the jurisdiction of the court which tries the proceedings. In this view of the matter it becomes clear that the issue with regard to *resjudicata* can be treated as a preliminary issue under Order 14 Rule 2(2) even if it involves production of evidence by the parties. The view I have taken finds full support from a decision of this Court in the case of *Uggar Sen* (supra).

(6) For the reasons recorded herein above, the petition is allowed and the impugned order dated 20th March, 1997 passed by the learned trial court is set aside. Consequently, the application filed by the petitioner-defendants before the learned trial court for treating issue No. 2 as preliminary issue stands allowed. The parties are left to bear their own costs.

S.C.K.

(7) A.I.R. 1966 S.C. 153