

Before Anil Kshetarpal, J.

JASPAL SINGH—Appellant

versus

TEHAL SINGH AND OTHER—Respondents

RSA No. 2623 of 1989

Feb 07, 2018

Code of Civil Procedure, 1908—O.23, RI.1(4)—S.11 Defendant-appellant in appeal against concurrent findings of fact of both Courts below—Dispute qua estate of Teja Singh who died unmarried and issueless—Defendant-appellant claims to be legal heir of alleged widow of Teja Singh—In previous round of litigation First Appellate Court held, the lady is not widow of Teja Singh—Finding attained finality—Fact recorded in previous judgment of First Appellate Court operates as res judicata in subsequent suit—As per Section 11 CPC, decision on issue which is directly and substantially in issue in previous suit shall operate as res judicata—Appeal dismissed.

Held, that With regard to the first issue, it is significant to note that the plaintiffs also filed a suit for declaration previously but withdrew the suit on 15.05.1984. Learned counsel for the appellant submits that once a previous suit was withdrawn without any permission to file fresh one, hence, fresh suit would not be maintainable under Order 23 Rule 1 (4) of the Code of Civil Procedure.

(Para 6)

Further held, that a careful reading of the plaint would prove that the proceedings with regard to mutation were pending between the parties pursuant to judgment and decree dated 09.01.1960. Revenue Authorities sanctioned the mutation in favour of the plaintiffs and defendants No.22 to 24. Hence, the plaintiffs withdrew the earlier suit on 15.05.1984. Thereafter in an appeal, the order of mutation was reversed by the Appellate Authority vide order dated 28.01.1985. Plaintiffs have pleaded that cause of action accrued to them pursuant to the order passed by the Appellate Authority on 28.01.1985. Order 23 Rule 1(4) bars institution of any fresh suit in respect of such subject matter or such part of claim. The subsequent suit has been filed on a cause of action, which arose on 28.01.1985. Previous suit was instituted on 26.11.1981.

(Para 7)

Further held, that Hence, in the considered opinion of this Court, present suit is not barred under Order 23 Rule 1(4) of the Code of Civil Procedure.

(Para 8)

Further held, that It may be significant to note here that the finding of the learned trial Court that Pritam Kaur @ Prito is not widow of late Shri Teja Singh was not even challenged before the learned First Appellate Court in the year 1960. In absence of the judgment of the learned trial Court, it is not possible for this Court to record a finding that the fact recorded in the previous judgment of the learned First Appellate Court operates as *res judicata* in the subsequent suit. As per Section 11 of the Code of Civil Procedure, decision on a issue which is directly and substantially in issue in the previous suit shall operate as *res judicata*.

(Para 11)

Baldev Raj Mahajan, Senior Advocate with Saurabh Mago, Advocate, *for the appellant*.

Suvir Sehgal, Advocate with Akshay Sethi, Advocate, for respondent Nos.2, 3, 4, 8, 9, 12 and 14.

Kewal Krishan, Advocate for Paramjit Kalia, Advocate, for respondent Nos.2, 8, 9, 12 and 14.

ANIL KSHETARPAL, J.

(1) Defendant-appellant is in the regular second appeal against the concurrent findings of fact arrived at by the Courts below.

(2) Dispute in the present case is with regard to the estate of late Shri Teja Singh who alleged to have died unmarried and issueless. Appellant-Jaspal Singh before this Court claims to be legal heir of Pritam Kaur @ Prito. There was previous round of litigation, which resulted into a judgment and decree passed by the learned Additional District Judge, Amritsar dated 09.01.1960 wherein Pritam Kaur @ Prito was held to be not a widow of late Shri Teja Singh. The aforesaid finding has become final between the parties.

(3) Both the Courts below after appreciation of evidence available on the file, have decreed the suit filed by the plaintiffs.

(4) I have heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below as well as records.

(5) Learned Senior counsel for the appellant has raised two fold contentions:- (i) the present suit filed by the plaintiffs is barred under Order 23 Rule 1 of the Code of Civil Procedure; (ii) plaintiffs in the present suit are not the reversioner of late Shri Teja Singh and, therefore, they are not entitled to file the present suit and any declaration.

(6) With regard to the first issue, it is significant to note that the plaintiffs also filed a suit for declaration previously but withdrew the suit on 15.05.1984. Learned counsel for the appellant submits that once a previous suit was withdrawn without any permission to file fresh one, hence, fresh suit would not be maintainable under Order 23 Rule 1 (4) of the Code of Civil Procedure.

(7) A careful reading of the plaint would prove that the proceedings with regard to mutation were pending between the parties pursuant to judgment and decree dated 09.01.1960. Revenue Authorities sanctioned the mutation in favour of the plaintiffs and defendants No.22 to 24. Hence, the plaintiffs withdrew the earlier suit on 15.05.1984. Thereafter in an appeal, the order of mutation was reversed by the Appellate Authority vide order dated 28.01.1985. Plaintiffs have pleaded that cause of action accrued to them pursuant to the order passed by the Appellate Authority on 28.01.1985. Order 23 Rule 1(4) bars institution of any fresh suit in respect of such subject matter or such part of claim. The subsequent suit has been filed on a cause of action, which arose on 28.01.1985. Previous suit was instituted on 26.11.1981.

(8) Hence, in the considered opinion of this Court, present suit is not barred under Order 23 Rule 1(4) of the Code of Civil Procedure.

(9) Second argument of learned counsel for the appellant is that in the previous litigation, plaintiffs and defendants No.22 to 24 were held not to be reversioner of late Shri Teja Singh. Hence, the aforesaid finding has become res judicata.

(10) It is not in dispute that the judgment passed by the learned trial Court in the previous suit decided by Shri Hukam Chand Gupta, Sub Judge Ist Class, Amritsar on 27.04.1959 has not been filed. Only judgment passed by the learned First Appellate Court dated 09.01.1960 is available on the files as Ex.PX/1. Appeal filed by the plaintiffs in that case was accepted. No doubt, while narrating the facts, the learned First Appellate Court has noticed that the learned trial Court did not find defendants No.3 to 8 in the aforesaid suit to

be reversioners of Teja Singh. However, learned First Appellate Court did not decide this issue and abstained from it. Learned First Appellate Court only held that the plaintiffs are proved to be reversioners and, therefore, entitled to 1/3rd share.

(11) It may be significant to note here that the finding of the learned trial Court that Pritam Kaur @ Prito is not widow of late Shri Teja Singh was not even challenged before the learned First Appellate Court in the year 1960. In absence of the judgment of the learned trial Court, it is not possible for this Court to record a finding that the fact recorded in the previous judgment of the learned First Appellate Court operates as res judicata in the subsequent suit. As per Section 11 of the Code of Civil Procedure, decision on a issue which is directly and substantially in issue in the previous suit shall operate as res judicata.

(12) It is not proved on file the factum that defendants No.3 to 8 are reversioners of late Shri Teja Singh or not, was directly in issue between the parties in the previous suit has not been established.

(13) Still further, the plaintiffs had filed an earlier suit claiming that Pritam Kaur @ Prito was not married to late Shri Teja Singh. Defendants No.3 to 8 in the previous suit were in fact proforma defendants and the plaintiffs were also seeking declaration on their behalf. The suit filed by the plaintiffs was decreed. Such being the position, the previous decree cannot operate as res judicata.

(14) Still further, the plaintiffs in the present suit along with defendants No.22 to 24 had claimed themselves to be reversioners of late Shri Teja Singh. Tehal Singh-plaintiff No.1 appeared in the witness-box and stated that the plaintiffs and defendants No.22 to 24 are reversioners of late Shri Teja Singh.

(15) Counsel for the defendants did not cross-examine the plaintiffs on this issue. The statement of Tehal Singh has gone un-rebutted. It is well settled that if a particular part of the statement of a witness is not challenged in the cross-examination then courts are justified in inferring that the correctness of the statement of the witness is not being disputed.

(16) Still further, a reading of the judgment passed by the learned trial Court as well as learned First Appellate Court proves that this issue was never contested. Learned trial Court while deciding issue No.2 has recorded as under:-

“7. I have already hold in issue No.1 that defendant No.1

is not the legal wedded wife of Teja Singh deceased so she is not entitle to succeed the estate of Teja Singh. Admittedly the plaintiffs and defendants No.2 to 44 are reversioners of Teja Singh deceased. In Ex.PX/1 it has been specifically held. Moreover defendants have failed to prove that the plaintiffs and defendants No.22 to 44 are not the colleterals/reversioners of Teja Singh deceased. They being the reversioners are entitle to joint possession of the suit property. This issue is therefore decided in favour of the plaintiffs and against the defendants.”

(17) Before the learned First Appellate Court, no argument on this aspect was ever raised. As noticed earlier the appellant before this Court is legal heir of Pritam Kaur @ Prito. She has no right, title or interest in the property.

(18) In view thereof, there is no scope for interference with the concurrent findings of fact arrived at by the Courts below.

(19) Hence, this regular second appeal is dismissed.

Shubreet Kaur