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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 39 OF 2013
IN
SUIT NO.1165 OF 1996

M/s. Unique Integrated Transport & Management Consultancies Pvt. Ltd. … Appellant

Versus

Mahanagar Telephone Nigam Ltd. & Ors. … Respondents

Dr. K.K. Khanna for the Appellant.
Mr. Niranjan Shimpi for the Respondents.

CORAM : **M.S. Sonak & Jitendra Jain, JJ.**

DATED : **4 July 2025**

ORAL JUDGMENT (M.S. Sonak, J.) :-

1. Heard Dr. K. K. Khanna, learned counsel for the appellant and Mr. Niranjan Shimpi, learned counsel for the respondents.

2. The Appellant is the original Plaintiff, and the Respondent is the original Defendant in Suit No. 1165 of 1996.

3. This appeal is directed against the judgment and decree dated 26 September 2012 made by the learned Single Judge of this Court dismissing Suit No.1165 of 1996 with a cost of Rs. 1 lakh payable to the High Court Legal Services Authority.

4. Dr. Khanna submitted that the suit has primarily been dismissed by invoking the bar of *res judicata.* He points out that such a plea was never raised by the respondents (defendants) in their written statement, and consequently, no issue relating to the bar of *res judicata* was ever raised. He submitted that it was only in the impugned judgment that the suit was dismissed primarily by invoking the bar of *res judicata*. He submits that on this short ground, the impugned judgment and decree warrant interference.

5. Mr. Shimpi, learned counsel for the respondents, submits that the claim in the suit was raised by the appellant/plaintiff in at least four arbitration proceedings. The awards in these arbitration proceedings had fully determined such claims. Therefore, the very institution of this suit was an abuse of the legal process and, in any event, barred by the principles of *res judicata* or the principles analogous thereto.

6. Mr. Shimpi submitted that the learned Single Judge has, in detail, considered the above aspect and dismissed the suit with costs. He submitted that the impugned judgment and decree, therefore, warrant no interference.

7. The rival contentions now fall for our determination.

8. The appellant had instituted Suit No. 1165 of 1996, raising certain monetary claims against the respondents/ defendants. The plaint is on record.

9. The respondent/defendants submitted their written statement, which is also part of the record. A review of the

written statement filed on 24 January 1997 reveals that a preliminary objection regarding the maintainability of the suit has been raised, referencing the provisions of Order XXXVII of the Code of Civil Procedure, 1908 (CPC). The objection was that the claims cannot be processed in a summary manner under Order XXXVII of the CPC. Significantly, however, throughout the entire written statement, no plea of *res judicata* is raised by arguing that the awards issued by the arbitrators constitute *res judicata* concerning the claims raised in this suit.

10. Based on the rival pleadings and as per the draft issues tendered by the plaintiff's advocate on 14 January 2011, the learned Single Judge of this Court framed the following issues.

> *"1. Whether Defendants deliberately, maliciously and wrongfully denied appointment of arbitrator for disputes with Plaintiff under the terms and conditions of contract.*
>
> *2. Whether Defendants deliberately, maliciously, and wrongfully forced costly and time consuming litigation on the Plaintiff with regard to appointment of arbitrator as per terms of contract.*
>
> *3. Whether Defendants deliberately, maliciously and wrongfully denied/delayed payment of even award amounts to the Plaintiff.*
>
> *4. Whether eight bank guarantees totaling about 16,77,421.00 issued by bank Oriental Bank of Commerce already expired in 1994 since they had not been duly extended/renewed in 1994 were got l extended by Defendants from Oriental Bank of Commerce under pressure without the concurrence, consent, and knowledge of Plaintiff.*
>
> *5. Whether Defendants got the guarantees extended fraudulently when the guarantees had already expired even otherwise in terms of the conditions in the guarantee.*

6. Whether the extension letters of guarantees were got issued by Defendants actually in 1995 but they were back dated with various dates in October, December 1994.

7. Whether the extension letters issued by the bank falsely stated in the text of the extension letters that the extension letter was issued at the request of the constituent when actually there was no such request made by the plaintiff.

8. Whether the Defendants obtained the amount of guarantees without the concurrence, consent and knowledge of the plaintiff by concealing this fact of payment from the plaintiff.

9. Whether the extension of guarantees was obtained by Defendants without the concurrence, consent and knowledge of the plaintiff with the ulterior motive of causing deliberately wrongful loss to the plaintiff.

10. Decree for the claim of Rs.70,000/- personally due from Defendant 3 with further interest from the date of filing of suit till realization as employee of Defendant 1 and subordinate of Defendant 2.

11. Decree for the other items of claims in schedule Exhibit-X in the plaint with interest due from the date of the suit till realization.

12. What relief is due to the plaintiff and its directors to compensate for the various types of losses and damages to the plaintiff and pain and suffering caused to the directors by deliberate, malicious and fraudulent acts of Defendants to first deny legitimate dues on contract, encash bank guarantees as officials of a government organization, and deny/delay payments of award amounts, and force frivolous, groundless and vexatious litigation."

11. Notably, no issue of *res judicata* was framed because such an issue was never raised in the written statement or otherwise urged at the stage of settlement of issues. Therefore, the parties, including the Appellant, had no opportunity of knowing that such an issue was going to be invoked and that he was expected to deal with the same.

12. The impugned judgment and decree, at paragraph 11, notes that no issue relating to the bar of *res judicata* was

framed. Nonetheless, after noting that this was the most seminal issue in the present suit, the learned Single Judge proceeded to frame an additional issue, invoking the bar of *res judicata* under Section 11 of the CPC, in the final judgment and decree. For this, the Learned Single judge relied on the provisions of Order XIV Rule 3 of the CPC.

13. The discussion in the above regard is to be found in paragraphs 11 and 12 of the impugned judgment and decree, and the same is transcribed below for the convenience of reference: -

> *"11. The draft issues tendered by the Plaintiff's Counsel and accepted by the Court and framed on 14th January 2011 show the most important issue not having been framed. That is the issue with regard to the bar contained in Section 11 of the CPC which is the principle of res-judicata upon the seminal defence of the Defendants relating to the non-maintainability of the suit. Consequently, under the provisions of Order 14 Rule 5 of the CPC an additional issue is required to be framed upon the pleadings as also upon the contents of documents produced by the parties as per Order 14 Rule 3(c) of the CPC. It would be material to set out the aforesaid provisions:*
>
> > *"Order 14 Rule 3. Materials from which issues may be framed. The Court may frame the issues from all or any of the following materials: -*
> >
> > *(a) .....*
> >
> > *(b) .....*
> >
> > *(c) the contents of documents produced by either party.*
> >
> > *Order 14 Rule 5. Power to amend and strike out issues. - (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.*
> >
> > *(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced."*

> *12. Consequently, the additional issue is framed as follows:*
>
> *"Whether the claim in the suit is barred by res-judicata under the provisions of Section 11 of the CPC and whether the suit is, therefore, maintainable.*
>
> *This issue relates to the bar created by the law under Section 11 of the CPC and must be tried as a preliminary issue, the oral evidence having been led on all the above issues, notwithstanding.*
>
> *The additional issue with regard to the maintainability of the suit upon the bar by res judicata.*
>
> *The parties entered into 4 separate contracts. The parties had disputes. The Plaintiff applied for appointment of Arbitrator. The Defendants initially did not appoint any arbitrator. Thereafter Arbitrators have been appointed in respect of each of the 4 contracts. 4 awards have been passed. These are awards dated 18 July 1994, 12 May 1995, 22 February 2000 and 23 February 2000."*

14. While the Court unquestionably has the power to frame additional issues or modify or recast existing ones, it is equally imperative that the parties be provided with a sufficient opportunity to address these new or altered issues. Generally, such additional issues should not be included in the final judgment without providing the parties with proper notice and an adequate opportunity to present evidence, if they wish, or to address these issues in accordance with established legal procedures.

15. In this case, as noted earlier, no defence of *res judicata* was raised in the written statement. No issue of *res judicata* was initially framed on 14 January 2011. Therefore, if an additional issue relating to *res judicata* needed to be framed, the parties should have been given an opportunity to address this issue by leading relevant evidence or, if they chose to rely solely on documents, by referring to all relevant documents

for determining this issue. The framing of proper issues is not some empty formality. In the case of **Sita Ram v Radha Bai,**[1]**,** it was observed that issues of the backbone of a suit. The Gujarat High Court, in the case of **State of Gujarat Vs Jaipalsingh**[2] held that they are also lamp posts which enlighten the parties to the proceedings as to what the controversies are.

16. The plea of *res judicata* must be pleaded and proved in a specific manner. This may even require the production of the two plaints on which the plea of *res judicata* is based. There are several defences available to a party when faced with a plea of *res judicata.*

17. In ***V Rajeshwari Vs. T.C. Saravanabava***[2]***,*** the Hon'ble Supreme Court has held that the plea of *res judicata* is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings, and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial would not be permitted to be raised for the first time at the stage of appeal. Furthermore, not only must the plea be taken, but it must also be substantiated by producing copies of the pleadings, issues, and judgment from the previous case.

18. May be in a given case only a copy of the judgment in the previous suit is filed in proof of the plea of *res judicata,*

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1 AIR 1968 SC 534

2 2004 (1) SCC 551

and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. The basic method for determining the question of *res judicata* is first to determine the case as presented by the parties in their respective pleadings of the previous suit, and then to ascertain what was decided by the judgment that operates as *res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment.*

19. The Court held that the plea of *res judicata,* depending on the facts of a given case, can be waived if not properly raised at an appropriate stage and in an appropriate manner. The party adversely affected by the plea of *res judicata* may proceed on the assumption that his opponent had waived the plea by his failure to raise the same.

20. In ***Prem Kishore and others Vs. Brahm Prakash and others***[3], the Hon'ble Supreme Court explained that the rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause. The basic method for determining the question of *res judicata* is first to determine the case as presented by the parties in their respective pleadings of the previous suit, and then to ascertain what was decided by the judgment that operates as *res judicata.* The plea of *res judicata* is basically

[3] 2023 (19) SCC 244

founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. *Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings.*

21. The Court finally held that since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decision in the previous suit, such a plea will be beyond the scope of Order VII Rule 11 (d) of the CPC, where only the statements in the plaint have to be perused.

22. In ***Alka Gupta Vs. Narender Gupta***[4], the Hon'ble Supreme Court has held that the plea of *res judicata* must be clearly established, more particularly where the bar sought is on the basis of constructive *res judicata. Further, the plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice of the plea and should be provided with an opportunity to put forth his contentions against the same.*

23. In the present case, by including this additional issue of *res judicata* in the impugned judgment and decree itself, the appellant/plaintiff was caught by surprise, as argued by Dr. K.K. Khanna, learned counsel for the appellant. No opportunity was given to the appellant to address this issue or to produce any evidence to demonstrate that this plea was not applicable in the facts and circumstances of the present case.

[4] 2010 (10) SCC 141

Upon reviewing the impugned judgment and decree, we find that the entire discussion revolves around this additional plea of *res judicata*, and ultimately, the suit has been dismissed with a cost of Rs. 1 lakh by invoking the bar of *res judicata.*

24. The operative part of the order dated 26 September 2012 in the suit is in paragraph 9 and the same reads as follows: -

> *"9. Hence, the following order:-*
>
> *1. The suit is dismissed with costs of Rs.1 lakh.*
>
> *2. The Plaintiffs suit is frivolous. The Defendants did not take up the material issue of the bar under the principles of Res judicata to have the plaint itself rejected and needlessly defended the suit in the trial.*
>
> *3. Hence the Plaintiff shall pay costs of this suit in a sum of Rs. 1 lakh to the High Court Legal Services Authority."*

25. Since we are satisfied that the procedure adopted was not entirely consistent with the principles of natural justice, the impugned judgment and decree are liable to be set aside and are hereby set aside. The matter is remanded to the learned Single Judge for deciding the Suit No. 1165 of 1996 afresh in accordance with law and on its own merits.

26. The learned Single Judge may, if deemed suitable, formulate an issue relating to *res judicata* as outlined in paragraph 12 of the impugned judgment and decree. However, even after framing such an issue, both parties must be afforded adequate opportunity to address it. The learned Single Judge may then decide whether further evidence should be confined to the *res judicata* issue because, at least

prima facie, we see no reason to prolong the trial by leading evidence on the other issues. Still, we leave this matter to the discretion of the learned Single Judge. All contentions of all parties on the merits are left open.

27. The impugned judgment and decree are set aside, and the matter is remanded for the decision of the learned Single Judge.

28. This appeal is allowed in the above terms without any costs for the order.

(Jitendra Jain, J) **(M.S. Sonak, J)**