IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-
The Hon'ble Justice Supratim Bhattacharya

SA 111 of 2022

Sk. Abdul Alim.
Vs.
Sri Tarak Das & Ors.

For the Appellant : Mr. Buddhadeb Ghosal
Md. Younush Mondal
For the Respondents : Mr. Saptangshu Basu
Mr. Shayak Chakraborty
Mr. Md. Siraj Munir
Mr. Abdul Zahid
Delivered On : 15.10.2026

Supratim Bhattacharya, J.:

1. Factual Matrix

Before the Trial Court

The factual matrix of the lis is that a Title Suit bearing No. 20 of 2017 seeking recovery of khas possession has been filed on behalf of the appellant namely Sk. Abdul Alim.

Through the plaint the appellant plaintiff has submitted that at the premises number 5/2 Rifle Range Road Police station Karaya there is 3 cottahs of land with structure which is mentioned in schedule A of the

plaint. In the schedule B of the plaint there is mention of one tile shed room having brick wall on the roof of the ground floor.

The appellant plaintiff through the plaint has sought for eviction of the respondents defendants on the ground of trespass and has also prayed for permanent injunction.

The respondents defendants No. 1, 2 and 3 namely Tarak Das, Kumari Mampi Das ad Smt. Bulbuli Das entered appearance and filed their written statement while the defendant No 4 before the Trial Court has not contested the case. Through the written statement the defendants respondents have controverted the pleadings mentioned in the plaint.

The Ld. Civil Judge (Sr. Divn.) 2nd Court, Alipore decreed the said suit on contest in part against the defendants No. 1 to 3 and *ex parte* against the defendant no. 4.

Before the Ld. First Appellate Court

Being aggrieved by and dissatisfied with the said judgment, the defendants/ respondents preferred Title Appeal before the Ld. District Judge at Alipore bearing Title Appeal No. 5 of 2020. The First Appellate court after hearing the parties has been pleased to pass the following order:

> *"Hence it is*
> ***ORDERED***
> *That the Appeal be and the same is allowed on contest against the Respondents. The Judgment and Decree of Title Suit No. 20 of 2017 of Civil Judge (Senior Division) 2nd Court ofAlipore made in suit property from the defendant as passed by the Ld. Trial Judge is hereby*

reversed and set aside. The suit filed by the Respondents-Plaintiffs are dismissed. No. Cost
Let a copy of judgment be sent to the Ld. Trial Judge"

Being aggrieved by and dissatisfied with the aforementioned impugned order the appellant has preferred the present appeal.

2. During the admission of the present second appeal the following substantial questions of law have been framed :

"1) Whether the Court of Appeal below was justified in reversing the judgment and Decree of the trial Court solely on the ground of res judicata without ascertaining whether in an earlier suit filed by the defendant/respondent for injunction, there was any service of or summons upon the appellant or they contested the said proceeding and suffered the Decree?

2) Whether the Court of appeal below was justified in applying the principle of res judicata solely on the ground that the proceeding as proforma defendant and, therefore, such judgment and decree is binding upon him.

3) Whether the principle of res judicata can be extended to a party against whom no relief was claimed in earlier suit?"

3. Ld. Senior counsel namely Mr. Buddhadeb Ghosal being assisted by Md. Younush Mondal, the learned Counsel representing the appellant during his exhaustive argument has submitted the following;

i) That the appellant is an absolute owner of the suit land including premises being 5/2 Rifle Rage Road PS Karaya Kolkata measuring about 2 cottahs 13 chitaks 40 sq. ft.

ii) He has further submitted that the name of the appellant is recorded in the Kolkata Municipal Corporation after the same being purchased on 07.01.2005 vide deed No. 05654/2017

iii) The Ld. Counsel has also submitted that one Anwar Jahan was the erstwhile owner who sold the property in favour of Fulbasia and Jogmaya in the year 1939 and after their demise Anandomohan got the property and thereafter the present appellant became the owner of the said land.

iv) It is therefore submitted that the respondents defendants have no right title and interest over the suit property as because they are the legal heirs of the caretaker namely Sagar Das. He has further submitted that Sagar Das was the caretaker in respect of the suit property and had no document regarding right, title and interest.

v) The Ld. Counsel has also submitted that earlier a suit has been disposed of *ex parte* against one Debasis Ghosh a promoter without deciding the matter on merit and no issue was framed in the said former suit.

vi) The Ld. Counsel has further submitted that the Ld. Trial Judge was correct in passing the decree in favour of the appellant while the Ld. First Appellate Court has erroneously allowed the first appeal (title appeal) on the ground of res judicata as because the caretaker had no document to substantiate any

right, title and interest in respect of the suit land and Ananda Mohan from whom the present appellant purchased the property had nothing against him to defend.

vii) Ld. Counsel has again submitted that there was no prayer against the said Ananda Mohan.

viii) He has then submitted that the said Ananda Mohan was a proforma defendant in the said suit (Title Suit 24 of 1997).

ix) Ld. Counsel has submitted that the respondents No. 1,2 and 3 re the main contesting parties and particularly the Respondent No. 3 is the daughter in law of Sagar Das and mother of the respondent No. 2.

x) He has further submitted that Sagar Das never demanded the said land during his lifetime and even his son, daughter and the wife of said Sagar Das never claimed themselves to be the owner of the property, it is the third generation of Sagar Das who are claiming themselves to be owners of the said property on the basis of possession. They do not have any document to substantiate their right, title and interest except ration card voter card, Aadhar card and tax receipts and electricity bill.

xi) The Ld. Senior Counsel has also submitted that respondent nos. 1 2 and 3 had filed an earlier title suit being Title Suit No. 24 of 1997 before the Ld. Civil Judge (Jr. Divn.) 2nd Court Alipore praying for

a) A decree for permanent injunction restraining the defendant No.1 from having forceful possession of the suit property and from disturbing the peaceful possession of the plaintiffs in respect of the suit property

b) A decree for cost of the suit

c) A decree for any other relief/reliefs.

xii) He has submitted that in the aforementioned title suit the vendor of the appellant was made a proforma defendant and service was not effected upon him and there was no prayer against the said proforma defendant

xiii) He has then submitted that the respondents have admitted that Ananda Mohan the vendor of the appellant had 3/4th share over the suit property and in the record of the corporation the name of Ananda Mohan was recorded as absolute owner and presently the appellants are the absolute owner of the suit land.

xiv) Ld. Counsel has again submitted that the said suit being No. 24 of 1997 was disposed of *ex parte* by restraining the said promoter Debasis Ghosh

xv) He has further submitted that no issue was framed in the said earlier suit and the said suit was disposed of without going into the merit of the case.

xvi) Ld. Counsel stressed upon the point that the respondents fraudulently filed another title suit being title suit No.8 of 2005 (Tarak Das and Ors. Vs. Ananda Mohan and Ors.) seeking declaration, partition and permanent injunction before the Ld. Civil Judge (Sr. Divn.) 2nd Court at Alipore and in the said title suit Tarak Das Kumari Mampi Das, Smt. Bulbuli Dasi, Smt. Bishnu Dasi and Sonarani Dasi were plaintiffs and Ananda Mohan Das, Sk. Abdul Alim, Gopal Das , Smt. Sobha Das, Ghanashyam Das, Smt. Bina Das and Smt. Rama were made defendants. In the said suit the defendants No. 1 and 2 filed a counter claim seeking eviction of the plaintiff No.5 Sonarani Dasi who was the widow of Sagar Das, who was in possession of the room mentioned in schedule B..

xvii) He has further submitted that during the pendency of the said suit Sonarani Dasi expired and the said suit has been ultimately dismissed on 23.02.2016 on the ground that the plaintiffs therein /respondents herein had failed to establish the said suit in their favour and at the same time counter claim was also rejected.

xviii) Ld. Counsel then submitted that Ananda Mohan the vendor of the appellant and Sk. Abdul Alim the appellant had filed another suit being title suit No. 17 of 2009 seeking declaration of title and permanent injunction before the Ld. Civil Judge (Sr.

Divn) 4th Court at Alipore which has also been dismissed without any declaration.

xix) He has further submitted that Fulbasia and Jogmaya were the owners of the suit property in equal share by way of purchase. He has further submitted that after the death of Fulbasia and Jogmaya the vendor of the appellant namely Ananda Mohan became the absolute owner of the suit property and the said Ananda Mohan having sold the entire property in favour of the present appellant the appellant herein has become the absolute owner in respect of the suit property

xx) The Ld. Counsel representing the appellant has relied upon the following authorities which are published at

i) AIR 1968 Calcutta 550

ii) AIR 1975 Calcutta 200

iii) (2012) 6 SCC 430

Banking upon the aforementioned facts and circumstances and relying upon the authorities the Ld. Senior Counsel has prayed for setting aside the impugned judgment passed by the Ld. First Appellate court in Title Appeal No. 5 of 2020 and has further submitted that declaration in respect of the suit property has not been decided by any court of law prior to the present litigation as such the principle of *res judicata* will not apply. He has further submitted that the LD. First Appellate Court has

erred in law in allowing the first appeal and setting aside the decree passed by the trial court on the basis of *res judicata*.

4. *Per contra*, Ld. Senior Counsel Mr. Saptangshu Basu being assisted by Mr. Shayak Chakraborty and Mr. Abdul Zahid, Ld. Counsels representing the respondents has submitted the following:

i) He has submitted that the First Appellate Court in Title Appeal No. 5 of 2020 has reversed the judgment and decree dated 11.12.2019 passed by the Ld. Trial Judge in Title suit No. 20 of 2017 on the ground that the issue raised in the present lis that is title suit No. 20 of 2017 cannot be re-agitated in the present suit as the issue of title has been decided while passing an order of eviction which has been decided in the previously instituted titile suit No. 24 of 1997 filed by the respondents defendants herein wherein the predecessor of the plaintiff was a party. Thus, applying the principle of *res judicata* the Ld. First Appellate Court has allowed the title appeal.

ii) He has further submitted that through the title suit No. 24 of 1997 which was filed by the defendants there were prayers for

a) decree of permanent injunction restraining the defendant No. 1 from taking forcible possession of the suit property and from disturbing the peaceful possession of the plaintiffs.

b) decree for all costs of the suits.

c) decree for any other relief /reliefs.

He has further submitted that while deciding such a suit a court is required to decide the question of title.

iii) He has also submitted that through the judgment passed in title suit No 24 of 1997 the Ld. Court had expressly decided the title in respect of the suit property in favour of the plaintiffs therein who are the defendants respondents herein.

iv) He has then submitted that in view of the above findings in title suit no. 24 of 1997 the Ld. First Appellate Court has rightly held that the issues raised in the present suit are directly and substantially the issues which have been decided in the earlier suit being title suit No. 24 of 1997 as such the Ld. First appellate court has held that the present suit is not maintainable in the eye of law in view of the provisions of Section 11 of the Code of Civil Procedure.

v) The Ld. Senior Counsel has submitted that the Ld. First Appellate Court has rightly reached the conclusion which has given rise to the present second appeal.

vi) He has further submitted that the principle of *res judicata* laid down under Section 11 of the Code of Civil Procedure, 1908 has been rightly taken into consideration and the impugned judgment is correct in the eye of law and does not require interference.

vii) The Ld. Counsel has relied upon the following decision which have been published at

i) (2000) 3 SCC 350

ii) (2008) 4 SCC 594

Banking upon the aforestated facts and circumstances and relying upon the aforementioned authorities the Ld. Senior counsel has prayed for dismissal of the present second appeal.

5. From the aforementioned substantial questions of law framed it transpires that the moot point in issue is as to whether the principle of *res judicata* will apply or not in this round of lis, as because there has been several suits involving the suit property between the erstwhile owners, predecessors and even between these contending parties.

6.

Sl No.1	Name of the Suit	Parties to the Suit	Prayers in the suit	Reliefs granted
1	Title Suit No. 24 of 1997	Minor Tarak Das , Minor Mampi Das and Bulbuli Das. Vs. Debasis	The plaintiff prayed for permanent injunction.	Decree of injunction was passed against the defendant No. 1 but Ananda Mohan was one of the

		Ghosh, Ananda Mohan, Bishnu Das and Sonarani Das.		pro-defendant in that suit and that suit was decided in his presence.
2	Title Suit No. 8 of 2005	Tarak Das , Kumari Mampi Das, Smt. Bullbuli Das , Smt. Bishnu Das and Smt. Sonarani Das Vs. Ananda Mohan Das, Sk. Abdul Alim, Gopal Das,	This is a suit for declaration, partition and permanent injunction.	The plaintiffs failed to establish the suit in their favour as such the suit was not disposed of in favour of the plaintiffs. Counter claim of the defendants seeking eviction of plaintiff No.5 (Sonarani Das)

		Smt. Sova Das, Sri Ghanasyam Das, Smt. Bina Das, Smt. Kamala Lal, Bhola Lal, Munna Lal, Baby Das, Ruby Lal.		was not granted.
3	Title Suit No. 17 of 2009	Ananda Mohan and Sk. Abdul Alim Vs. Bulbuli Das, Minor Tarak Das, Minor Mampi Das, Smt. Bishnu	This is a suit for declaration and permanent injunction.	The suit has been dismissed on contest against the defendants No. 1 to 3 and ex parte against the defendants No. 4,5 and 6 without cost

		Das, Sonali Das and Debasis Ghosh		

From the chart/table above, the judgment of this Hon'ble Court can proceed to deduce which earlier suit /proceeding on the self-same issue by and between the same party or parties claiming under them will apply on the point of *res judicata* or even, *constructive res judicata,* i.e. the party could have taken the same point in the earlier /previous suit but did not and hence it is barred from taking the point now.

7. In respect of this suit property there has been several litigations those are laid down as follows:

i) First suit was Title Suit No. 24 of 1997. This suit was for permanent injunction wherein Tarak Das , Mampi Das and Bulbuli Das had filed the suit against one Debasis Ghosh, Ananda Mohan Das, Bishnu Das and Sonarani Das. Debasis Ghosh is said to be a promoter/developer and Anandamohan Das is the person from whom the present appellant namely Sk. Abdul Alim is said to have purchased the property. In the said suit issues had not been framed and an *ex parte* order of permanent restraint was passed dated 25.04.2001.

ii) The second suit being Title Suit No. 8 of 2005 had been filed seeking declaration, partition and permanent injunction. This suit was filed by Tarak Das , Kumari Mampi Das, Bulbuli Das, Smt. Bishnu Das and Smt. Sonarani Das against Ananda Mohan Das, Sk Abdul Alim, Gopal Das, Sova Das, Ghanashyam Das, Bina Das , Kamala Lal, Bhola Lal, Munna Lal, Baby Das and Ruby Lal.

The defendants in the said suit filed a counter claim for eviction. The said suit was dismissed on contest without cost and the counter claim was also dismissed. The Ld. Court had opined that the plaintiffs have failed to establish the suit in their favour and the defendants are also not entitled to get any relief.

iii) Thereafter another suit being Title Suit No. 17 of 2009 was filed seeking declaration and permanent injunction. The said suit was initially filed by Ananda Mohan against Bulbuli Das , minor Tarak Das, minor Mampi Das, Smt. Bishnu Das, Sonali Das , Debasis Ghosh being principal defendants and Sk. Abdul Alim being proforma defendant. Subsequently the proforma defendant namely Sk. Abdul Alim got transposed to plaintiff No.2. This suit has also been dismissed.

Thus from the aforementioned details furnished as regards to the suits involving the parties it transpires that several suits have been filed between the parties and among those suits the title suit No. 17 of 2009 was a suit for declaration and permanent injunction` and the said title suit has been dismissed.

Thus, from the above it transpires that Ananda Mohan and Sk. Abdul Alim, that is the person from whom the present appellant is said to have purchased the property and the present appellant, had preferred the title suit seeking declaration which has been dismissed on contest.

8. Now this Court intends to deal with the issue of *res judicata*.

Section 11 of the Code of Civil Procedure, 1908, deals with the issue of *res judicata*. The said Section is laid down :

> *"11. Res judicata .-*
> *No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.***"**

9. From the aforementioned Section it transpires that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties , or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

From the Title Suit 17 of 2009 it is evident that the issue of declaration in respect of the suit property has been in issue in the said suit, which is also the issue in the present lis being title Suit No 20 of 2017 wherein the suit has been filed for recovery of khas possession. Once declaration

in respect of the suit property has been dealt with and finally decided that cannot be reagitated through a subsequent suit and a subsequent suit through which recovery of khas possession has been sought for also involves the issue of title. If one has right, title and interest in respect of the property then and only then he can seek recovery of khas possession.

The title suit No. 17 of 2009 was filed by the self-same appellant plaintiff who along with another plaintiff is said to be the person from whom the present appellant plaintiff has purchased the property. The present appellant plaintiff is now seeking recovery of possession and through the earlier suit being Title Suit 17 of 2009 this appellant plaintiff along with the person from whom he is said to have purchased the property had sought for declaration and the said declaration been not granted on the contrary has been dismissed cannot seek recovery of possession by instituting a separate suit thereafter. The issue of title has already been decided in the Title suit No. 17 of 2009 and that having been not challenged has attained finality. It should have been agitated before the higher forum and that not being done or preferred, by a subsequent suit the appellant plaintiff cannot seek recovery of possession as such the principle of *res judicata* applies in the present suit.

10. Section 34 of the Specific Relief Act and Order II Rule 2 of the code of Civil Procedure also comes into play.

In this context Order II Rule 2 of the Code of Civil Procedure is laid down as follows:

> *"II. Suit to include the whole claim.*
> *(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
> *(2) Relinquishment of part of claim – Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
> *(3) Omission to sue for one of several reliefs – A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.***"**

Section 34 of the Specific Relief Act is also laid down which staters that **:**

"34. Discretion of court as to declaration of status or right.—

> *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.***"**

Thus from Order II Rule 2 of the Civil Procedure Code and Section 34 of the Specific Relief Act it is evident that a suit is to include the whole

claim where further relief is to be sought for then in that case a mere declaration of title cannot be granted. Thus, in addition to the applicability of the principle of res judicata that is Section 11 of the CPC the Order II rule 2 of the said Code and Section 34 of the Specific Relief Act also comes into play. The present appellant/plaintiff is not entitled to prefer/institute the present lis seeking recovery of possession once the issue of title in respect of the self-same suit property been decided against him.

11. As regards to the substantial questions of law those are being dealt herein.

As regards to substantial question of law No.1

As no issue was framed in Title Suit No 24 of 1997 so issues have not been dealt with. Through the said Title Suit No. 24 of 1997 only permanent injunction was sought for and there was no prayer for declaration as such there being no issues framed and not dealt with and there being no declaration sought for and only permanent injunction been prayed for, the principle of *res judicata* will not apply.

As regards to substantial questions of law No.2 and 3

The Title Suit No. 17 of 2009 being an earlier suit and through the said suit declaration along with permanent injunction been sought for by Sk. Abdul Alim, appellant/plaintiff in the present suit and in the earlier suit being transposed to plaintiff No.2 from proforma defendant No.7, having been filed against the self-same defendants and the issue of

declaration been dealt with and dismissed on contest, so the principle of *res judicata* will apply in the present suit.

12. The appellant relied upon by the following authorities which are as follows:

i) AIR 1975 Cal 200, in the said case both declaration of title and recovery of possession was sought for so the issue of *res judicata* did not arise in the said suit as such the said authority is not applicable in the present case.

ii) AIR 1968 Cal 550, in this case there had been admission in previous suit which has binding effect on subsequent suit. This is not the issue herein as such this authority is of no help to the appellant.

iii) (2012) 6 SCC 430, in the said case it was the caretaker whose status had been decided earlier, who had preferred the suit whereas in the lis in hand it is the other way round. The appellant has instituted the suit against the alleged caretaker and herein the status of the appellant /plaintiff has not been decided as the owner, so this judgment is also not applicable in the present case.

On the contrary, the judgment passed by the Hon'ble Apex court in the case between ***Sajjadanashin Saiyed MD. B.E. EDR (D) by LRs Vs. Musa Dadavai Ummer and Ors*** is applicable Paragraph 12, 13, 14 , 18 and 19 of the said judgment states as follows:

> *" ... 12. It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a*

prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

13. As pointed out in Halsbury's Laws of England (Vol. 16, para 1538, 4th Edn.), the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question.

14. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression "collaterally or incidentally" in issue implies that there is another matter which is "directly and substantially" in issue.

... 18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh [AIR 1965 SC 948] and Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780 : AIR 1976 SC 1569]). We are

> *of the view that the above summary in Mulla is a correct statement of the law..*
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> *19. We have here to advert to another principle of caution referred to by Mulla (p. 105):*
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> *"It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision."……..*

13. From the aforementioned discussion this Court is of the view that the judgment of the First Appellate Court is not required to be interfered with as such the present second appeal being No. **SA 111 of 2022** is **dismissed**.

14. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

15. Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)