

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9336 OF 2014

Kantabai w/o Chandrakant Hariyal,
Age: 53 years, Occ: Service,
R/o. Sidharth Nagar, Laltaki,
Ahmednagar & anr.

...Petitioners

versus

Shrawan s/o Fakira Hariyal,
Age: 58 years, Occ: Riksha Driver,
R/o. House No. 118, Siddharth Nagar,
Laltaki, Ahmednagar & ors.

...Respondents

.....
Mrs. Charuta S. Deshmukh, Advocate for petitioners
Mr. Y.V. Kakade, Advocate for respondent Nos. 2 to 4
.....

CORAM : N.W. SAMBRE, J.

DATE : 1st DECEMBER, 2015

ORAL ORDER :

After trial in R.C.S. No. 625 of 2012 commenced i.e. at the stage when the cross examination of plaintiff was about to begun, the petitioners moved an application styling the same under Section 9A of the Code of Civil Procedure seeking framing of preliminary issue on the ground that the parties and issue raised in R.C.S. No. 625 of 2012 and in already decided suit bearing R.C.S. No. 470 of 1998 are similar and findings recorded in the earlier suit bearing R.C.S. No. 470 of 1998 on the aspect of ownership of property will

operate *res-judicata*. The said application Exhibit-35 seeking framing of preliminary issue came to be rejected by an order dated 17/06/2014 passed by 2nd Joint Civil Judge, Senior Division, Ahmednagar. As such, present writ petition.

2. Mrs. Deshmukh, learned Counsel for the petitioners, while inviting attention of this Court to clause-2 of Rule 2 of Order 14 of the Code of Civil Procedure and judgment of the Apex Court in the matter of ***Pandurang Dhondi Chougule & ors vs. Maruti Hari Jadhav & ors*** reported in AIR 1966 SC 153, would urge that the issue as regards bar in entertaining subsequent suit being hit by *res-judicata*, hence issue of law is required to be decided as preliminary issue. In addition to above, she would then urge that the issue is squarely covered by the judgment of Punjab and Haryana High Court in the matter of ***Jagdev Singh vs. Sardarni Prem Parkash Kaur & ors.*** reported in ***AIR 2002 Punjab and Haryana 330.***

3. While opposing the claim, learned Counsel for the respondents, would urge that whether an issue as regards *res-judicata* is to be tried as preliminary issue or not, discretion vests in concerned Court. According to him, the trial Court has rightly exercised discretion in favour of deciding all the issues at the time of final hearing, particularly in the background of stage at which the

application Exhibit-35 came to be moved. According to him, the petition is liable to be dismissed.

4. Having bestowed my considerations to the submissions of the respective parties, it is required to be noted that the application in the present case for framing of preliminary issue is moved after commencing of trial i.e. at the stage of cross examination of plaintiff. By that time, issues were already settled and trial has set into motion.

5. The discretion of the Court as regards framing of preliminary issue is well behind the mind of trial Court as is apparent from the law which was cited by respective parties and effect in the impugned order.

6. In the present case, what is noticed is learned trial Court exercised its discretion while deciding the application Exhibit-35 by directing that all the issues which are framed in the suit will be decided finally.

7. In my opinion, in view of above referred back ground and observations made therein, I do not see any reason to interfere in the order passed by learned trial Court in extraordinary writ jurisdiction,

particularly in the back ground of fact that trial Court has rightly exercised its discretion. The writ petition fails, stands dismissed.

[N.W. SAMBRE, J.]