

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 402 OF 2008

Dhondu Vishram Gaidhani and anr. .. Applicants/Appellants

vs.

Baban Alias Chintaman Deoram Gaidhani
and anr. .. Respondents

None for the Applicants/Appellants.

None for the Respondents.

CORAM : M. S. SONAK, J.

DATE : 18 April, 2015.

P.C. :-

1] This Civil Revision Application challenges the order dated 15 January 2008 made by the Civil Judge, Junior Division, Nashik dismissing the applicants' application at Exhibit-18 holding that the issue of *res judicata*, being a '*question of procedure*' cannot be framed as a preliminary issue.

2] Section 11 of the Code of Civil Procedure, 1908 (CPC) provides 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 the parties under whom they or any of them claim, litigant 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 the Court.

3] In view of the aforesaid provisions, which virtually create a bar to the Court from trying a suit, or an issue which is *res judicata*, it cannot be said that the issue of *res judicata* is only '*question of procedure*' and therefore, the same cannot be tried as a preliminary issue.

4] The Hon'ble Apex Court, in case of ***Pandurang Dhondi Chougule and ors vs. Maruti Hari Jadhav and ors.***¹, has observed that a plea of *res judicata* is a plea of law, which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party which raises them would oust the jurisdiction of the Court.

5] In view of the aforesaid, the impugned order is liable to be set aside and is hereby set aside.

6] At this stage, it is not possible for this Court to actually go into the issue as to whether the suit, as filed, is actually barred by the principles of *res judicata* as contained in Section 11 of the CPC. Accordingly, it is directed that the learned Civil Judge frames the issue of *res judicata* as a preliminary issue and thereafter decides the same on its own merits and in accordance with law, after affording all the parties adequate opportunity in that regard.

7] Rule is accordingly, made absolute to the aforesaid extent. There shall be no order as to costs.

8] Since none of the parties appeared in the matter, the Registry of this Court is directed to forward an authenticated copy of this order to the Court of Civil Judge, Junior Division, Nashik Road in Regular Civil Suit No. 46 of 2006, as expeditiously as possible, and in any case within a period of fifteen days from today.

9] Parties to act upon an authenticated copy of this order.

(M. S. SONAK, J.)

1 AIR 1966 SC 153