

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.48 of 2010**

Smt. Shanti Bai Agrawala, aged about 52 years, Widow of Late Shri Shiv Kumar Agrawal, Resident of Sargaon, Tahsil Mungeli, District Bilaspur (CG)

---- Appellant

Versus

Ram Awatar Agrawala, aged about 47 years, Son of Shri Bhagwan Das Agrawal, Resident of Sargaon, Tahsil Mungeli, District Bilaspur (CG)

---- Respondent

For Appellant	:	Mr.Ram Kumar Tiwari, Advocate
For Respondent	:	Mr.K.A.Ansari, Senior Advocate with Mr.Devesh G. Kela, Advodate

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

08/07/2016

1. This second appeal has been admitted and following substantial questions of law were formulated for determination of the appeal, which are as under:-

- (i) Whether the Courts below have committed an error of law in rejecting the plaint under Order 7 Rule 11(d) of the C.P.C. applying the rule of res-judicata as it could have been decided without filing the written statement, issues and claim?
- (ii) Whether the Courts below have committed an error of law in deciding the fact that Khasra No.1715/1, area

1350 square feet is the same land as decided in earlier suit No.215-A/1999, dated 24.02.2001, relating to the Khasra No.1928/1, area 30X30 square feet without trying the suit on merit?

[For the sake of convenience, the parties will be referred as their status shown in cause title of the plaint]

- 2.(i) The appellant / plaintiff filed a civil suit for recovery of possession and perpetual injunction against the defendant herein stating inter-alia that she is owner and title holder of the suit land bearing Khasra No.1715/1, area 1350 square feet and she is entitled for the reliefs claimed in the plaint.
- (ii) In the said civil suit, the respondent/defendant appeared and filed an application under Order 7 Rule 11 (d) of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") stating inter-alia that the defendant had filed Civil Suit No. 25-A/1999 (Ramavtar Agrawal vs. Smt.Shanti Bai Agrawal and others), which was finally decided on 24.2.2001 and suit property of subject-matter of the earlier suit and the instant suit are same and instant suit (now instituted) is barred by the principles of res-judicata, therefore, plaint is liable to be rejected in exercise of power conferred under Order 7 Rule 11(d) of the CPC.
- (iii) The said application was opposed by the appellant/plaintiff stating inter-alia that plea of res-judicata is not available to the

defendant as the suit property is different in previously instituted suit and the instant suit, therefore, the application deserves to be rejected.

(iv) The trial Court by its order dated 4.9.2008 allowed the application and rejected the plaint holding that the instant suit is barred by the principles of res-judicata.

(v) Feeling aggrieved against the order rejecting plaint, first appeal was preferred by the appellant/plaintiff questioning the order rejecting plaint.

(vi) The First Appellate by its impugned judgment dated 7.5.2009 held that the judgment and decree passed in previously instituted Civil Suit No. 25-A/1999 (Ramavtar Agrawal vs. Smt.Shanti Bai agrawal and others), decided on 24.2.2001 would operate as res-judicata in the instant suit and dismissed the appeal by affirming the judgment and decree of the trial Court.

(vii) Questioning the said judgment and decree, the present second appeal has been filed by the appellant/plaintiff under Section 100 of the CPC. Substantial questions of law framed have been mentioned in opening paragraph of this judgment.

2. Mr.Ram Kumar Tiwari, learned counsel appearing for the

appellant/plaintiff would submit that both the Courts below have committed legal error in holding that the instant suit is barred by principles of res-judicata. He would further submit that in order to attract Section 11 of the CPC i.e. res-judicata, the defendant has to establish the plea of res-judicata by adducing legal evidence, as such a plea of res-judicata being mixed question of law and fact and it cannot be considered while considering the application under Order 7 Rule 11 (d) of the CPC. He would also submit that the suit properties in both suits are different as in the earlier Civil Suit No.25-A/1999, decided on 24.2.2001 suit land was Khasra No.1928/1, area $30 \times 30 = 900$ square feet, whereas in the instant suit, the suit property is Khasra No.1715/1, area 1350 square feet, therefore, order of the trial Court as affirmed by the First Appellate Court deciding the question of res-judicata at the stage while deciding the application under Order 7 Rule 11(d) of the CPC deserves to be set aside.

3. Mr.K.A.Ansari, learned Senior Advocate with Mr.Devesh G. Kela, learned counsel appearing for the respondent, would submit that the plea of res-judicata is a pure question of law and plaint can be rejected under Order 7 Rule 11(d) of the CPC applying the principles of res-judicata and therefore, the second appeal deserves to be dismissed.

4. I have heard learned counsel for the parties, considered the rival submissions made therein and gone through the records of the Courts below with utmost circumspection.
5. A bare perusal of the plaint would show that earlier Civil Suit No. 25-A/1999 was filed by Ramavtar Agrawal against Smt.Shanti Bai Agrawal and others and the suit property was Khasra No.1928/1, area 30X30=900 square feet and that suit was for perpetual injunction and that suit was decreed on 24.2.2001. The instant suit was filed on 22.8.2007 by Smt.Shanti Bai Agrawal against Ramavtar Agrawal and the suit property is Khasra No.1715/1, area 1350 square feet for recovery of possession and for damages.
6. It is well settled law that the plea of res-judicata is a mixed question of law and fact and it has to be decided upon submission of proper pleadings i.e. copies of plaint, written statement and copy of the judgment of the earlier suit and the issue has to be framed in this regard and then such plea has to be established before competent Civil Court by adducing legal evidence.
7. The plea of res-judicata only bars investigation and decision on merits finally decided between parties earlier if the defendant omits to plead the plea of res-judicata and prove the same and the Court investigates and decides matters on

merits. Such a decision would not be bad for want of jurisdiction. Plea of res judicata is one which might and ought to have been raised as a defence and established in order to operate as a bar in exercise of jurisdiction to try and dispose of the matter subsequently otherwise the latter decision will prevail and plea of res judicata itself will be barred by constructive res judicata and latter decision overlooking the bar of res judicata alone will prevail.

8. In **Madhukar D. Shende Vs. Tarabai Aba Shedage**¹, the Supreme Court held that res judicata is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed, such a plea cannot be permitted to be raised for the first time. The Supreme Court held as under:

“14..... Res judicata is a mixed question of fact and law. We do not find the plea of res judicata having been raised in the plaint. Copies of pleadings and issues framed in the earlier suit have not been tendered in evidence and we do not find any issue on res judicata having been framed and tried between the parties in the present suit. No submission raising the plea of res judicata was made before any of the courts below or the High Court. We do not think such a plea can be permitted to be raised before this Court for the first time and at the hearing.....”

9. In **Sheodan Singh Vs. Darhyao Kunwar**², Their Lordships of the Supreme Court laid down the law relating to the

¹ (2002) 2 SCC 85

² AIR 1966 SC 1332

essential elements that need to be satisfied before a plea of res-judicata can be raised by party. It was held as under:-

“ (9) A plain reading of S. 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely-(I) the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit; (II) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (III) the parties must have litigated under the same title in the former suit; (IV) the court which decided the former suit must be suit or the suit in which such issue is subsequently raised; and (V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further Explanation I shows that it is not the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied.”

10. Principles of law laid down in **Sheodan Singh** (supra) has been followed and restated very recently by the Supreme Court in the matter of **City Municipal Council Bhalki by its Chief Officer Vs. Gurappa (dead) by legal representatives and another**³
11. In a very recently pronounced judgment in the matter of **Vaish Aggarwal Panchayat vs. Inder Kumar & others**⁴,

3 (2016) 2 SCC 200

4 AIR 2015 SC 3357

Their Lordships of the Supreme Court have held in no uncertain terms that plea of res-judicata involves mixed question of law and fact and it requires evidence to be recorded and it cannot be a ground to reject plaint under Order 7 Rule 11(d) of the CPC. Their Lordships relied upon the earlier decision of the Supreme Court rendered in the matter of V. Rajeshwari Vs. T.C. Saravanabava⁵, which held as under:-

“11. 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.

12. 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 of 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 [see (Raja) Jagadish Chandra Deo Dhabal Deb v. Gour Hari Mahato (AIR 1936 PC 258), Medapati Surayya v. Ton-dapu Bala Gangadhara Ramakrishna Reddi (AIR 1948 PC 3) and Katragadda China Anjaneyulu v. Katragadda China Ramayya (AIR 1965 AP 177)]. After so stating, the Court further observed that:-

'Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa (1976) 4 SCC 780 the

⁵ (2004) 1 SCC 551

basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata.'

12. Reverting back to the facts of the instant case following the law laid down by Their Lordships of the Supreme Court in above-stated judgments, the defendant has to establish the plea of res judicata by raising appropriate pleadings and if pleadings are so raised, issue has to be framed in this regard and upon leading evidence in such a issue, such plea has to be established before the competent civil Court; and plea of res judicata being mixed question of law and facts and it cannot be considered in the application under Order 7 Rule 11 (d) of the CPC and plaint cannot be rejected under Order 7 Rule 11 of the CPC on the principles of re-judicata. In view of the aforesaid analysis, the substantial question of law No.1 is decided in favour of the appellant/plaintiff and against the respondent/defendant and I deem it inappropriate to answer substantial question of law No.2 in view of the fact that matter is being remanded back to the trial Court to decide the issue of res-judicata at appropriate stage.

13. For the foregoing reasons, the second appeal is allowed and the impugned judgment passed by the First Appellate Court affirming the order of the trial Court rejecting the plaint is

hereby set aside. Civil Suit No.75-A/07 is restored in its original number to the board of trial Court for hearing and disposal in accordance with law. Parties are directed to appear before the trial Court on 22.8.2016. The defendant would be entitled to raise all possible and permissible pleas including the plea of res-judicata in written statement. The trial Court would decide the suit on its own merit within a period of six months from the date of appearance of the parties before it. No order as to cost(s). A decree be drawn accordingly.

Sd/-
(Sanjay K.Agrawal)
Judge

B/-