

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Civil Revision No. 98 of 2014

1. Thaneshwar S/o Late Shri Hiralal Yadav, Aged About 35 Years R/o Village Lafinkhurd, Tehsil and District Mahasamund, Chhattisgarh
2. Smt. Devki Bai W/o Khelaban, Aged About 37 Years D/o Late Shri Hiralal Yadav, R/o Village Madheva, Tehsil And District Mahasamund, Chhattisgarh
3. Smt. Pushpabai W/o Birsingh, Aged About 33 Years D/o Late Shri Hiralal Yadav, R/o Kumhari, Tehsil Kurud, District Dhamtari, Chhattisgarh
4. Smt. Lalita W/o Amrika, Aged About 24 Years D/o Late Shri Hiralal Yadav, R/o Kumhari, Tehsil Kurud, District Dhamtari, Chhattisgarh
5. Khomin Bai D/o Late Shri Hiralal Yadav, Aged About 22 Years
6. Topin Bai D/o Late Shri Hiralal Yadav, Aged About 21 Years
7. Smt. Anusuiya Bai Wd/o Late Shri Hiralal Yadav, Aged About 59 Years

Applicants No. 5, 6 and 7 R/o Village Lafinkhurd, Tehsil and District Mahasamund, Chhattisgarh

---- Applicants/defendants 1 to 7

Versus

1. a) Hemlal, S/o Shri Premlal Yadav, aged about 55 years, R/o Village Lafinkhurd, Tahsil and District Mahasamund, Chhattisgarh
b) Tulsiram Yadav, S/o Shri Premlal Yadav, aged about 46 years, R/o Village Lafinkhurd, Present Address- Behind Dr. Tiwari Building, Ward No.1, Shankar Nagar, Tahsil And District Mahasamund, Chhattisgarh

(Plaintiffs)

2. State Of Chhattisgarh Through Collector, Mahasamund, District- Mahasamund, Chhattisgarh

And

Civil Revision No. 41 of 2015

1. Thaneshwar S/o Late Shri Hiralal Yadav Aged About 35 Years R/o Village Lafinkhurd, Tehsil And District Mahasamund, Chhattisgarh

2. Smt. Devki Bai W/o Khelaban, Aged About 37 Years D/o Late Shri Hiralal Yadav, R/o Village Madheva, Tehsil And District Mahasamund, Chhattisgarh
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5. Khomin Bai D/o Late Shri Hiralal Yadav, Aged About 22 Years
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7. Smt. Anusuiya Bai Wd/o Late Shri Hiralal Yadav, Aged About 59 Years

Applicants 5 to 7 are R/o Village Lafinkhurd, Tehsil And District Mahasamund, Chhattisgarh

---- Applicants/defendants 1 to 7

Vs

1. a) Hemlal, S/o Shri Premlal Yadav, aged about 55 years, R/o Village Lafinkhurd, Tahsil and District Mahasamund, Chhattisgarh
- b) Tulsiram Yadav, S/o Shri Premlal Yadav, aged about 46 years, R/o Village Lafinkhurd, Present Address- Behind Dr. Tiwari Building, Ward No.1, Shankar Nagar, Tahsil And District Mahasamund, Chhattisgarh

(Plaintiffs)

2. State Of Chhattisgarh Through Collector, Mahasamund, District- Mahasamund, Chhattisgarh

For Applicants	:	Shri Sanjay S. Agrawal, Advocate
For respondents	:	Shri BP Sharma and Shri Hari Agrawal, Advocates
For the State	:	Shri Sameer Behar, PL for the State

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. ORDER

08.07.2016

- 1) The short question for consideration in these revisions is whether second suit for declaration of title and permanent injunction is barred under Order 9 Rule 9 of the CPC where an earlier suit for partition was dismissed in default under Order 9 Rule 8 of the CPC.
- 2) Original plaintiff-Isbati [mother of non-applicant No.1 (a) & (b) herein] filed a suit for declaration of title and permanent injunction restraining the defendant-Hiralal (father of applicants herein) from interfering with her peaceful possession. The said suit was filed against defendant-Hiralal, who also died during pendency of the suit and his legal heirs were brought on record (applicant herein). The original plaintiff claimed that she is title holder of the suit land and it was encroached by defendant Hiralal, therefore, he be restrained from interfering with possession by way of permanent injunction. Upon summons being served, the applicants herein/defendant therein filed an application under Order 7 Rule 11 Code of Civil Procedure (hereinafter referred to as "CPC") that the plaintiff-Smt.Isbati had previously instituted a suit for declaration of her 1/3rd share in suit property against defendant-Hiralal and his mother Ramhinbai on 28.09.1977, which was dismissed in

default for want of plaintiff's appearance on 12.08.87 and no application for setting aside the dismissal of suit was filed and that order has become final and therefore, the subsequently filed suit by the original plaintiff-Isbati is liable to be rejected being barred by law under Order 7 Rule 11 CPC.

- 3) Upon hearing the parties, the trial Court vide its impugned order dated 30.7.2014 rejected the said application by observing that since the Appellate Court has remanded the case for fresh trial, therefore, it is rejected at this stage.
- 4) Being aggrieved and dissatisfied with the aforesaid order, Civil Revision No.98 of 2014 (Thaneshwar and others vs. Hemlal and others) was filed. During pendency of this revision, the trial Court framed additional Issue No.5A by order dated 11.8.2014 whether the suit instituted is barred under Section 11(4) read with Section 9 of the CPC, if yes, then effect.
- 5) The trial Court by its order dated 3.3.2015 rejected the said application on the ground that cause of action in both the suits are different and upon death of Ramhin Bai, mother of plaintiff-Isbati, new cause of action arose for the plaintiff and came to the conclusion that the suit

subsequently instituted is neither barred by Order 9 Rule 9 of the CPC nor by principles of res-judicata.

- 6) Questioning the said order, Civil Revision No.41/2015 has been filed by the defendants (legal representatives of defendant-Hiralal Yadav). Since the question of law in both the revision petitions is common, they are being disposed of by this common order.
- 7) Shri Sanjay S. Agrawal, learned counsel appearing for defendants in both the revision petitions would submit that learned trial Court has acted illegally in holding that the suit subsequently instituted is not barred by Order 9 Rule 9 of the CPC. He would further submit that the trial Court ought to have seen that in previously instituted suit, the plaintiff has claimed the injunction and ownership of 1/3rd share in the suit property and the second suit is only for declaration of title and permanent injunction and as such, the cause of action in both the suits are one and the same. Therefore, Order 9 Rule 9 of the CPC is squarely attracted and by virtue of that, the instant suit is barred and the plaintiff is precluded for bringing the instant suit based on the same cause of action. He also submits that the trial Court has committed grave legal error in holding that suit is not barred by Order 9 Rule 9

and Section 11 of the CPC and the order impugned deserves to be set aside.

- 8) Vehemently opposing and countering the argument, Shri B.P. Sharma, learned counsel for the plaintiff/non-applicants herein, would submit that learned trial Court acted within its jurisdiction in holding that the cause of action is previously instituted suit and subsequently instituted suit are not one and same and it is altogether different cause of action. Adding further to his earlier submission, he would further submit that it is well settled law that suit for partition dismissed in default under Order 9 Rule 8 of the CPC does not bar second civil suit for partition. The right to partition is continuous right. Replying to submissions of Shri Agrawal that Section 11 of the CPC is attracted and the suit is barred by principle of res-judicata, would submit that since the earlier suit was dismissed on merits, therefore, it would not operate as res-judicata in the subsequent suit, as such, the order of the trial Court is within its jurisdiction and there being no jurisdictional error, both the revision petitions deserve to be dismissed with cost(s).
- 9) I have heard learned counsel appearing for the parties, also considered their rival submissions made therein and gone through the record with utmost circumspection.

10) The two questions that calls for consideration are:-

(A) Whether subsequently instituted suit for declaration of title and permanent injunction by the plaintiff is barred under Order 9 Rule 9 of the CPC ?

(B) Whether subsequently instituted suit is barred by principles of res-judicata ?

Answer to question A

11) At this stage, it is apposite to notice Order 9 Rule 8 & 9 of the CPC which provides as under:-

“8. Procedure where defendant only appears.-Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit.-(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

- 12) Rule 8 of Order 9 of the CPC provides for the dismissal of the suit where the defendant appears and the plaintiff does not appear when the suit is called for hearing unless, of course, the defendant admits the claim, or part thereof, in which case the Court has to pass a decree against the defendant upon such admission.
- 13) Rule 9 of Order 9 of the CPC provides for restoration of the suit dismissed under Rule 8 for non-appearance. The Rule mandates that where a suit is dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.
- 14) From the above-stated provisions, it is quite vivid that once the suit has been dismissed under Order 9 Rule 8 of the CPC, then the plaintiff is debarred from bringing a fresh suit in respect of same cause of action. The provisions are mandatory in nature.
- 15) The Supreme Court in the matter of **Gaya Municipality vs. Ram Prasad Bhatt**¹ has held that if the cause of action in the second suit is the same as that on which the previous suit was based, the second suit is barred. A second suit on the same cause of action is not maintainable.

¹ (1967) 2 SCWR 823

16) Order 9 Rule 9 of the CPC is based on sound public policy that no defendant should be vexed twice on the same cause of action.

17) It is well settled law that right to enforce partition is a legal incident of a joint tenancy, and so long such tenancy subsists, a party has a continuous right for partition. Some of the judgements may gainfully be noticed herein:-

(i) Way back in the year 1926, the Madras High Court in the matter of **Madhura Gramani vs. Thumala Sesha Reddy and others**² it has been held that in a suit for partition, provisions contained in Order 9 Rule 9 would not be applicable. It was held as under:-

“In the present case, when the suit of the plaintiff's assignor was dismissed in 1917 she was relegated to her right of possession as joint owner and consequently to her right to partition, a right which accrues from time to time, for this right had not been taken away by the prior litigation. It was not contended for the appellant that the question is *res judicata* and consequently, the present suit, which is based on the plaintiff's assignor's right of partition, is not barred by Order IX, rule 9.”

(ii) In the matter of **Desraj & others vs. Bhagatram (Dead) by LR's & others**³, the Supreme Court on the issue observed pertinently as under:-

“It may be true, as has been contended on behalf of the appellants before the courts

² AIR 1926 Mad 1018

³ (2007) 9 SCC 641

below, that a co-owner can bring about successive suits for partition as the cause of action therefore would be continuous one.”

(iii) Later on, the Division Bench of Punjab & Haryana

High Court in the matter of **Manohar Lal vs. Onkar**

Das alias Omkar Dass and others⁴ struck a similar

note as under:-

“7..... It has, however, been repeatedly held that a suit for partition dismissed for default under Order IX rule 8, Civil Procedure Code, does not bar a subsequent suit for partition. The reason is that the right to enforce a partition is a continuous right which is a legal incident of a joint tenancy and which enures so long as the joint tenancy continues.”

(iv) In the matter of **Ranjit Singh vs. Gurnam Singh**⁵, it

was held by the Punjab & Haryana High Court that where

the cause of action was continuous the second suit would

not be barred under Order 9 Rule 9 of the Code of Civil

Procedure.

(v) In the matter of **Mukha Singh vs. Ramchariter**

Singh⁶ it was held by the Patna High Court that

subsequent suit for partition was not barred by provisions

of Order 9 Rule 9 as cause of action for partition is

recurring one and therefore the bar under Order 9 Rule 9

CPC will not operate in case of partition suits of the same

property.

⁴ AIR 1959 P&H 252

⁵ (1999) AIHC 989)

⁶ AIR 1956 Patna 143

(vi) Similarly, in the matter of **Asha Sharma vs. Amarnath**⁷, the Himachal Pradesh High Court has held that cause of action is continuous in partition cases which subsists, so long as the property is held jointly. In other words, the joint owner can file a suit for partition until partition is actually effected irrespective of fact whether earlier suit for such partition were dismissed in default or an earlier decree for partition was not acted upon.

(vii) In order to decide and determine for similarly cause of action in two suits, the Supreme Court has laid down the test in the matter of **Suraj Rattan vs. Azamabad Tea Co.Ltd**⁸ relying upon decision of **Mohd. Khalil Khan vs. Mahbub Ali Main**⁹ and held as under:-

“In considering whether the cause of action in subsequent suit is the same or not, as the cause of action in previous suit, the test to be applied is, are the cause of action in the two suits in substance, not technically identical.”

18) In the light of above-mentioned enunciation of law, I would proceed to examine the facts of the case, it would be evident that the plaintiff Ishbati's previous suit was for partition claiming 1/3rd share of the suit property against Ramhin Bai, who was her mother and Hiralal, which was dismissed in default on 12.8.1987 under Order 9 Rule 8

⁷ AIR 2003 HP 32

⁸ AIR 1965 SC 215

⁹ AIR 1948 PC 78

of the CPC, whereas the subsequent and instant civil suit was filed only for declaration of title and permanent injunction after death of her mother Ramhinbai. She has claimed declaration of title over the entire suit property against sole defendant Hiraral, plaintiff's half brother.

- 19) Thus it appears the cause of action in previously instituted suit for partition which was dismissed in default under Order 9 Rule 8 of the CPC and subsequently instituted suit for declaration of title and permanent injunction are different, yet assuming that the cause of action in previously instituted and subsequently instituted suit are similar, but even after dismissal of previously instituted suit for partition, the plaintiff continued to be joint owner of the suit property as according to her no partition was effected till the instant suit was filed and subsequent suit for declaration of title was brought after death of her mother, therefore, it cannot be concluded that the suit is barred by Order 9 Rule 9 of the CPC and the plaintiff is precluded from instituting the instant suit for the reliefs claimed in the suit and therefore, learned trial Court is absolutely justified in answering the issue against the defendant and in favour of the plaintiff holding that the subsequent suit is not hit by Order 9 Rule 9 of the CPC.

- 20) The judgement relied upon by learned counsel for the applicants herein in the matter of **Karuna Chaturvedi vs. Sarojini Agrawal**¹⁰ rendered by the Madhya Pradesh High Court is clearly distinguishable in the light of finding arrived herein by this Court holding that the cause of action in both the suits are different and in suit for partition, cause of action is continuous & recurring cause of action and successive suit for partition is maintainable till partition by metes and bounds is effected and in the matter of **Karnua** (supra), the Madhya Pradesh High Court clearly recorded a finding as under:-

“The present suit was based on same cause of action which earlier suit was dismissed.”

This is not the position in the present case and as such, facts of **Karuna** (supra) are distinguishable and not applicable to the facts of the present case.

Answer to question B

- 21) This brings me to the next plea whether the subsequently instituted suit is barred by principles embodied in Section 11 of the CPC. The provisions contained in Section 11 of the CPC to operate to the subsequent suit proceedings, decision in the former suit must be decided on merits on the same. Substantial questions both on facts and in

¹⁰ 2010 (1) CGLJ 17

law that would arise in the subsequent original suit. Thus order of dismissal made for non-appearance of the plaintiff under Order 9 Rule 8 of the CPC in the earlier suit would not operate as res-judicata under Section 11 of the CPC to the subsequently instituted suit. The Constitution Bench Judgement of the Supreme Court may be noticed herein profitably:-

In the matter of **Sheodan Singh vs. Darhyao Kunwar**¹¹ the Constitution Bench of the Supreme Court has held that where the former suit was dismissed by the trial Court either for want of jurisdiction, or for default of plaintiff's appearance, the decision in the former suit not being on the merits would not be res-judicata in subsequent suit. Para 13 of the report states as under:-

“13..... Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff 's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint

¹¹ AIR 1966 SC 1332

which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit...”

- 22) In **Sheodan Singh** (supra), Their Lordships laid down the law relating to the essential elements that need to be satisfied before a plea of res-judicata can be raised by party 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.”

- 23) Principles of law laid down in **Sheodan Singh** (supra) has been followed and restated in **City Municipal**

**Council Bhalki by its Chief Officer Vs. Gurappa
(dead) by legal representatives and another¹²**

- 24) In view of the aforesaid discussion, the subsequently instituted suit is neither barred under Order 9 Rule 9 nor barred by principles of res-judicata under Section 11 of the CPC and as such, learned trial Court is absolutely justified in answering the issue in favour of the plaintiff/non-applicants and against the applicants/defendant, in which I do not find any jurisdictional error.
- 25) Consequently, both the revisions being without substance are liable to be and are hereby dismissed leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K Agrawal)
Judge

B/-

¹² (2016) 2 SCC 200