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HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 233 of 2014****Judgment reserved on : 16.09.2016****Judgment delivered on : 03.10.2016**

1. Dr. Somesh Pandeya, S/o. Late Parmanand Pandeya, Aged about 50 years,
2. Chetan Anand Pandeya, S/o Late Parmanand Pandeya, Aged about 48 years
3. Gurudatt Pandya, S/o. Late Parmanand Pandeya, Aged about 44 years,
4. Rakesh Pandeya, S/o Late Parmanand Pandeya, Aged about 39 years,
5. Smt. Shanti Devi, W/o. Late Parmanand Pandeya, Aged about 64 years,
6. All R/o. Subhash Ward, Jagdalpur, P.S. & Post. Jagdalpur, Civil & Revenue District – Jagdalpur (C.G.)

..... Plaintiffs

---- Appellants**Versus**

Viseshwar Prasad Pandeya, S/o. late Jaggannath Pandeya
(Died) through:-

1. Smt. Purnkanti Pandeya, W/o. Late Viseshwar Pandeya, aged about 69 years,
2. Devshankar Pandeya, S/o. Late Viseshwar Pandeya, aged about 48 years,
3. Tulsidas Pandeya, S/o late Viseshwar Pandeya, aged about 40 years,
4. Tularam Pandeya, S/o. Late Viseshwar Pandeya, aged about 37 years,
5. Jagjeevan Pandeya, S/o. Late Viseshwar Pandeya, aged about 34 years,

All R/o. Village Aasana, P.S. Post & Tahsil Jagdalpur, Civil & Revenue District Jagdalpur (C.G.)

6. Janki Pandeya, S/o. late Viseshwar Pandeya,
7. Sharda Pandeya, S/o late Viseshwar Pandeya
8. Nalini Pandeya, S/o. Late Viseshwar Pandeya,
9. Gayatri Pandeya, S/o late Viseshwar Pandeya,
10. Jaineshwari Pandeya, S/o. Late Viseshwar Pandeya,

All R/o. Village Aasana, P.S., Post & Tahsil Jagdalpur, Civil & Revenue District Jagdalpur (C.G.)

Shree Krishna Pandeya, S/o late Godawari Prasad Pandeya (Died) through LRs.

11. Smt. Shanti Pandeya, W/o. Late Shree Krishna Pandeya,
12. Manoj Pandeya, S/o. Late Shree Krishna Pandeya
13. Awdhesh Pandeya, S/o. Late Shree Krishna Pandeya
14. Lokesh Pandeya, S/o late Shree Krishna Pandeya
15. Bholeshankar Pandeya, S/o late Shree Krishna Pandeya,
16. Haripriya, D/o. Late Shree Krishna Pandeya

All R/o Vijay Ward, Jagdalpur, P.S. & Post Jagdalpur, Civil & Revenue District Jagdalpur (C.G.)

17. Jogeshwar Pandeya, S/o late Vidyadhar Pandeya, aged about 53 years,
18. Narendra, S/o late Laxminarayan Pandeya, aged about 39 years,
20. Kodang, S/o late Laxminarayan Pandeya, aged about 36 years,
21. Yudhisthir, S/o late Laxminarayan Pandeya, aged about 32 year All R/o. Village Chote Jeerakhal, P.S., Post & Tahsil Jagdalpur, Civil & Revenue District Jagdalpur (C.G.)
22. State of Chhattisgarh through Collector, Jagdalpur, Civil & Revenue District Jagdalpur (C.G.)

23. Must. Girija Bai, D/o late Vidyadhar Pandeya,
24. Must. Janki Bai, D/o. Late Vidyadhar Pandeya,
25. Must. Savitri Bai, D/o late Vidyadhar Pandey,
26. Mandiaya @ Bhaskar, S/o. Late Vidyadhar Pandeya,
27. Lesha, S/o. Late Vidyadhar Pandeya,
28. Dinesh, S/o late Vidyadhar Pandeya

All R/o Village Chote Jeerakhal, P.S. Post & Tahsil Jagdalpur,
Civil & Revenue District Jagdalpur (C.G.)

29. Smt. Sonmati, W/o. Late Vidyadhar Pandeya, aged about 63 years, R/o. Village Chote Jeerakhal, P.S. Post & Tahsil Jagdalpur, Civil & Revenue District Jagdalpur (C.G.)
30. Smt. Yashoda, D/o. Late Laxminarayan Pandeya, aged about 38 years,

All R/o. Village Chote Jeerakhal, P.S. Post & Tahsil Jagdalpur, Civil and Revenue District Jagdalpur (C.G.)

---- Respondents

For Appellants	:	Mr. Manoj Paranjpe, Advocate.
For Respondents	:	Mr. Prafull N. Bharat, Advocate.
For Respondent No. 22:	:	Mr. Om P. Sahu, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

ORDER ON BOARD

(1) The substantial questions of law involved, formulated and to be answered in the second appeal preferred by plaintiffs is as under:-

“(1) Whether both the courts below were justified in dismissing the suit treating the issue of *res judicata* as preliminary issue contrary to the provisions

contained in Order 14 Rule 2(2) of the Code of Civil Procedure as the question of *res judicata* is neither affects jurisdiction of court nor it is a bar to the suit created by any law for the time being in force ?

(2) Whether both the courts below were justified in deciding the issue of *res judicata* as preliminary issue without recording evidence of the parties ?”

(2) The above stated substantial questions of law are required to be answered on the following factual backdrop:-

(i) The appellants/plaintiffs herein instituted a civil suit seeking relief of declaration of their title, confirmation of possession, partition and declaration of decree passed in Civil Suit No.4-A/79 and Appeal No.186/1981 to be null & void. In that Civil Suit, defendant No. 1 appeared before the trial Court seriously controverting the averments made in the plaint and averred that judgment & decree dated 26.03.1981 passed in Civil Suit No.4-A/79, which is duly affirmed the by first appellate Court in Civil Appeal No. 186/1981 would operate as *res judicata* and the present suit is hit by Section 11 of the Code of Civil Procedure.

(ii) The trial Court, upon pleadings of the parties, by order dated 22.03.1996 framed as many as 10 issues including issue of *res-judicata* as issue No. 5.

(3) The trial Court, by its order dated 6.11.2016 passed in Civil

Suit No.11-A/2004 treated the issue No. 5 as a preliminary issue under Order 14 Rule 2 sub-rule 2(b) of the CPC and dismissed the suit as barred by the provisions contained in Section 11 of the CPC deciding the preliminary issue in affirmative.

(4) The present plaintiffs preferred first appeal under Section 96 of the Code of Civil Procedure. The First appellate Court, by its impugned judgment & decree dated 17.04.2014, dismissed the first appeal affirming the order passed by the trial Court, dismissing the suit.

(5) Impugning the legal acceptability and sustainability of the order dated 17.04.2014 passed by the First Appellate Court, the second appeal under Section 100 of the CPC has been preferred by the plaintiffs (appellants herein), which has been admitted for final hearing on the substantial questions of law as incorporated in opening paragraph of this judgment.

(6) Mr. Manoj Paranjpe, learned counsel appearing for the appellants/plaintiffs would submit that the question of *res-judicata* does not strike to the root of the jurisdiction of the Court trying subsequent suit and, therefore, it could not have been taken as a preliminary issue by the trial Court under Order 14 Rule 2 (2)(b) of the CPC. He would further submit that the plea of *res judicata* is a mixed question of law and fact and it could not have been decided without recording evidence of the parties. He placed reliance upon

the judgment of the Supreme Court in the matters of **V. Rajeshwari (Smt.) Vs. T.C. Saravanabava¹, Vaish Aggarwal Panchayat v. Inder Kumar & others² and Foreshore Cooperative Housing Society Limited Vs. Praveen D. Desai (Dead) Through Legal Representative and others³** in support of his submission.

(7) On the other hand, Shri Prafull N. Bharat, learned counsel appearing for the respondents would submit that in judgment & decree passed by the trial Court in Civil Suit No.4-A/79 and affirmed by the First Appellate Court in Civil Appeal No. 186/1991 are not in dispute and, therefore, when the facts are admitted, plea of res judicata can be decided as preliminary issue as the same relates to jurisdiction of the Court. He placed reliance upon the judgment of the Supreme Court in the matters of **Pandurang Dhondi Chougule & others Vs. Maruti Hari Jadhav and others⁴, Abdul Rahman Vs. Prasony Bai and another⁵, Thirumala Tirupati Devasthanams and another Vs. Thallappaka Ananthacharyulu and others⁶ and Arun Agarwal Vs. Nagreeka Exports (P) Ltd. And another⁷** in support of his submission.

(8) I have heard learned counsel appearing for the parties; and also considered their rival submissions made therein with utmost

1 (2004) 1 SCC 551
 2 AIR 2015 SC 3357
 3 (2015) 6 SCC 412
 4 AIR 1966 SC 153
 5 (2003) 1 SCC 488
 6 (2003) 8 SCC 134
 7 (2002) 10 SCC 101

circumspection.

(9) In order to decide the plea raised at the bar, it would be appropriate to re-produce the provisions contained in Order 14 Rule 2 of the CPC.

“ORDER 14- Settlement of Issues and Determination of Suit on issues of Law or on Issues Agreed upon
2. Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.”

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

- (a) *the jurisdiction of the Court, or*
- (b) *a bar to the suit created by any law for the time being in force,*

(10) A careful reading of sub-Rule 2 (b) of Rule 14(2) of the Code of Civil Procedure would show that the issue relating to jurisdiction of the Court or the bar to the suit created by any law for the time being in force can be taken as a preliminary issue covered by Order 14 Rule 2(a) of the CPC.

(11) The issue raised herein is no-longer *res integra* and stand decided by Their Lordships of the Supreme Court; However, for sake of convenience some of judgments may be noticed gainfully

herein.

(11.1) In the matter of **Ramrameshwari Devi Vs. Nirmala Devi**⁸, while dealing with Order 14 Rule 2, Their Lordships of the Supreme Court have held as under:-

“**25.** Sub-rule (2) [or Order 14] refers to the discretion given to the court where the court may try an issue relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as a preliminary issue.”

(11.2) The controversy pertaining to the provisions contained in Order 14 Rule 2 had come up for consideration before Their Lordships of the Supreme Court in **Major S.S. Khanna Vs. Brig. F.J. Dillon**⁹, wherein it has been ruled thus:-

“**18.**.....Under Order 14 Rule 2 of the Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on

8 (2011) 8 SCC 249

9 AIR 1964 SC 497

the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lopsided trial of the suit.”

(11.3) In *Ramesh B. Desai V. Bipin Vadilal Mehta*¹⁰, while dealing with the issue of limitation, Their Lordships of the Supreme Court opined that:

“19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact.”

The Court further proceeded to state that a plea of limitation is a mixed question of fact and law. On a plain consideration of the language employed in sub-rule (2) of Order 14 it can be stated with certitude that when an issue requires an inquiry into facts it cannot be tried as a preliminary issue. In the said judgment the Supreme Court opined as follows:

“13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to

10 (2006) 5 SCC 638

(a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before the Supreme Court in **Major S.S. Khanna** (supra) and it was held as under:-

“18..... Under Order 14 Rule 2 of the Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issue. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit.’

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above-quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.”

(11.4) Very recently, their Lordships of the Supreme Court while

taking note of the judgments of the Supreme Court in the matters of **Ramrameshwari Devi (supra)**, **Major S.S. Khanna (supra)** & **Ramesh B. Desai (supra)** in the matter of **Satti Paradesi Samadhi and Pillayar Temple Vs. M. Sankuntala (Dead) through legal representatives and others**¹¹ have held that issue requiring into the facts cannot be tried as preliminary issue and further held issue of bar of limitation requiring inquiry into facts cannot be tried as a preliminary issue and observed in paragraph 16 as under:-

“16. We have not expressed any opinion with regard to the issue of limitation except saying that the present issue could not have been taken up as a preliminary issue. As the suit is pending since 1997 we would request the learned Single Judge of the High Court of Madras to dispose of the suit as expeditiously as possible.”

(12) Now, the question would be issue of *res judicata* is an issue relates to jurisdiction of the Court as enumerated in Order 14 Rule 2 (2) (b) of the CPC.

(13) The principle of *res judicata* has been codified in Section 11 of the CPC, which states as under:-

“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

¹¹ (2015) 5 SCC 674

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.

Explanation I.-The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI. Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and

others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.- An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

(14) The Supreme Court in the matter of **Sheodan Singh Vs. Daryao Kunwar**¹² has laid down the law relating to the essential elements that need to be satisfied before a plea of *res judicata* can be raised by a party. Paragraph 9 of the report states as under:-

“9. A plain reading of Section 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

12 AIR 1996 SC 1332

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 a court competent to try the subsequent 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.”

(15) The above legal principles laid down by the Supreme Court has been followed in the matter of **Syed Mohd. Salie Labbai v. Mohd. Hanifa**¹³ and held as under:-

“7..... it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved:

'(1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction.”

13 (1976) 4 SCC 780

(16) Following the above referred judgments, very recently the Supreme Court in the matter of **City Municipal Council Bhalki, by its Chief Officer Vs. Gurappa (dead) by legal representatives and another**¹⁴ has held as under:-

“21. Thus, for the bar of res judicata to operate in the subsequent original suit proceedings, the litigating parties must be the same, and the subject-matter of the suit must also be identical. Further, it has also been held by this Court in **Ram Gobinda Dawan v. Bhaktabala**¹⁵ that for the bar of res judicata to operate in the subsequent original suit proceedings, the decision in the former suit must have been decided on merits on the same substantial questions both on facts and in law that would arise in the subsequent original suit.”

(17) Thus, in order to press the plea of res judicate in service, the contesting party must be the same and identical and the subject matter must be decided finally between the parties and that too by the court of competent jurisdiction and, therefore, in order to establish the essential elements of *res judicata*, it is required to be established by filing pleadings and leading evidence.

(18) Way back in the matter of **Ram Harakh (DEAD) BY LRS. Vs. Hamid Ahmed Khan (DEAD) BY LRS. and others**¹⁶, their

14 (2016) 2 SCC 200

15 (1971) 1 SCC 387

16 (1998) 7 SCC 484

Lordships of the Supreme Court has clearly held that issue of *res judicata* is a mixed question of law and facts and held as under:-

“7.Therefore, the moot question arises for consideration whether there was really a decree of a competent court in the first suit rendered by the civil court and whether it had become final. All these aspects would be required to be considered before the plea of *res judicata* could be entertained. Such a contention of *res judicata* based on mixed questions of law and facts, therefore, cannot be entertained by us for the first time at this stage.”

(19) Likewise, similar proposition has been laid down by the Supreme Court in the matter of **Madhukar D. Shende V. Tarabai Aba Shedage**¹⁷, in which, again their Lordships held that plea of *res judicata* is a question of fact and law as it requires recording of evidence. Paragraph 14 of the report states as under:-

“ 14.We are not inclined, in the facts and circumstances of this case, to weight the admissibility and binding efficacy of the decision rendered in the earlier suit on the doctrine of *res judicata* and holding the earlier decisions as conclusive between the parties. *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*

17 AIR 2002 SC 637

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.”

(20) On the basis of above-stated analysis, it is held that issue of *res judicata* though relates to jurisdiction of the court but as it is a mixed question of law & fact and, as such, Order 14 Rule 2(2)(b) of Code is not attracted as it is not a pure question of jurisdiction and, therefore, the trial Court is absolutely unjustified in taking the issue of *res judicata* as a preliminary issue and first appellate court also failed to notice the said fact and committed illegality in affirming the order of trial Court dismissing the suit.

(21) In view of the aforesaid analysis, this Court is opinion that the judgment of the trial Court taking the issue of *res judicata* as a preliminary issue and thereby dismissing the suit is hereby set aside and as a consequence judgment & decree of the first appellate Court is also set aside and the Civil Suit No. 11-A/2004 is restored to the file of 2nd Civil Judge, class II, Jagdalpur, District Bastar for hearing and disposal in accordance with law with a direction that trial Court would do well to decide the issue of *res judicata* along with other issues at the time of final hearing. Since the Civil Suit No.11-A/2004 was filed on 2.4.1993, the trial Court would do well to

conclude hearing of the suit within six months from date of receipt of original record from the Registry of this Court .

(22) The parties are directed to appear before the trial Court on 15th November, 2016.

(23) Accordingly, the second appeal is allowed to the extent indicated above.

(24) Decree be drawn accordingly.

(25) No order as to costs.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-