

HIGH COURT OF CHHATTISGARH, BILASPUR

Civil Revision No.27 of 2016

1. Ramnath, S/o late Pitambar Singh Lodhi, aged about 63 years.
2. Vishnu Prasad, S/o late Pitambar Singh Lodhi, aged about 57 years.
3. Tirith Ram, S/o late Pitambar Singh Lodhi, aged about 55 years,

All are resident of village Tumakala, Post Tumakala, Tahsil Dhamdha, District Durg (CG).

---- Applicants

Versus

1. Makhanlal Lodhi, S/o late Pitambar Singh Lodhi, aged about 67 years.
2. Madansingh Lodhi, S/o late Pitambar Singh Lodhi, aged about 65 years.
3. Manharanlal Lodhi, S/o late Pitambar Singh Lodhi, aged about 60 years.

All are resident of Village Tumakala, Post Tumakala, Tahsil Dhamdha, District Durg (CG).

4. State of Chhattisgarh, through the Collector, Durg (CG).

---- Non-applicants

For Applicants	:	Shri Rudranath Mukherjee, Advocate
For Non-applicants No.1 to 3	:	Shri Anoop Majumdar, Advocate
For Non-applicant No.4/State	:	Ms. Astha Shukla, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal
Order On Board

02/11/2016

(1) Heard on I.A. No.1 i.e. application for condonation of delay in filing the revision.

(2) On due consideration, I.A. No.1 is allowed and delay in filing the revision is hereby condoned.

(3) By the impugned order dated 24.06.2015 passed in Civil Suit No.182-A/2014, the learned trial Court has rejected an application under Order 7 Rule 11 read with Section 11 of the CPC filed by the applicants/defendants finding no merit in the plea of *res judicata* raised by the applicants/defendants.

(4) It is well settled that the plea of *res judicata* is a mixed question of law and fact and it has to be decided by proper pleadings filed 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 decided by the competent Civil Court.

(5) 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.

(6) 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 and plea has not been raised, such a plea cannot be permitted to be raised for the first time. The Supreme

1 (2002) 2 SCC 85

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 tries 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.....”

(7) Thus, the applicants/defendants have to establish the plea of *res judicata* by raising appropriate pleadings and if pleadings are so raised, issues has to be framed in this regard and upon leading evidence, 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 of CPC.

(8) In view of aforesaid judgment of the Supreme Court in the above referred cases, I do not find any jurisdictional error in rejecting the applicants/defendants' application filed under Order 7 Rule 11 of the CPC and as such the revision is dismissed.

Sd/-

(Sanjay K. Agrawal)
Judge

L/-