

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

WRIT PETITION NO. 1389 OF 2016

Jalindar Krishna Yadav	... Petitioner
V/s.	
Vasant Krishna Yadav	
Since deceased through L.R.	
Smt. Shalan Vasant Rao Yadav & Ors.	... Respondents

Mr. Uday Warunjikar for the Petitioner.
Mr. Mahindra B. Deshmukh for the Respondent Nos. 1I to 1VI, 2, 10, 11I, 12I, 12II, 12V, 13 to 15.

**CORAM : K. K. TATED, J.
DATED : 27/07/2016**

P.C.:

. Heard learned Counsel for the parties.

2 By this petition under Article 227 of Constitution of India, the Petitioner Plaintiff is challenging the order dated 04.12.2015 passed by Joint Civil Judge, Junior Division, Kadegaon below Exh.1 in Regular Civil Suit No. 85 of 2009 closing the plaintiff's evidence in respect of issue framed below Exh.41 i.e. preliminary issue of *res judicata*.

3 In the present proceeding, the plaintiff filed Regular Civil Suit No. 85 of 2009 for partition and separate possession of HUF properties. In that suit, the respondent defendant Nos. 1,10,11 and 13 filed application below Exh. 41 under Code of Civil Procedure, 1908 for summarily dismissal of suit on the ground of *res judicata*. In that application, the defendants submitted that the earlier Special Civil Suit

No. 38 of 1959 was filed for partition and separate possession. That suit was dismissed. Thereafter, the First Appeal preferred. That also decided. Therefore, there is no question of again reopening of partition on basis of plaintiff's Regular Civil Suit No. 85 of 2009. Considering application filed by respondent defendant Nos. 1,10, 11 & 13, the Trial Court by order dated 05.08.2015 framed the following preliminary issue i.e. "Whether suit is bad for principle of *res judicata*?"

4 Thereafter, the plaintiff filed application below Exh. 131 dated 02.12.2015 and Exh. 132 dated 04.12.2015 allowing plaintiff to lead evidence by reserving his right to give evidence on preliminary issue after defendant's evidence was over. Those applications were rejected by the Trial Court. Thereafter, the Trial Court passed the impugned order dated 04.12.2015 stating that as the plaintiff failed and neglected to lead the evidence on preliminary issue, the plaintiff's evidence stands closed in respect of preliminary issue framed below Exh.41. Hence, present Writ Petition.

5 The learned Counsel Mr. Uday Warunjikar appearing on behalf of petitioner plaintiff submits that the Trial Court failed to appreciate the fact that the preliminary issue about *res judicata* was framed on the basis of application filed by the respondents defendants below Exh. 41. He submits that when the preliminary issue about *res judicata* framed by Trial Court on the basis of applications filed by the defendants then defendants have to prove those facts by leading evidence first. Without considering those facts and deciding the said issue whether the plaintiffs/defendants have to lead the evidence first on the preliminary

issue, the Trial Court passed impugned order dated 04.12.2015 closing the plaintiff's evidence in respect of preliminary issue below Exh. 41. Hence, the same order is bad-in-law and same is required to be set aside.

6 On the other hand, the learned Counsel Mr. Mahendra Deshmukh appearing on behalf of the Respondents vehemently opposed the present Writ Petition. He submits that they preferred application below Exh. 41 for summarily dismissal of suit and not for framing preliminary issue. He submits that Trial Court on its own considered their application dated 01.10.2009 framed preliminary issue about the *res judicata*. He submits that as per Order 18(1) of Code of Civil Procedure, 1908 plaintiff has to start his evidence first. As plaintiff failed and neglected to lead the evidence on preliminary issue though time was granted, the impugned order passed by the Trial Court on 04.12.2015. Hence, there is no question of setting aside the said order. There is no substance in the Writ Petition and same to be dismissed with costs.

7 I heard both the sides at length. It is to be noted that in the present proceeding, Trial Court framed preliminary issue about *res judicata* on the basis of application below Exh. 41 filed by the defendants. Thereafter, twice the plaintiff filed applications/purshis. Those purshis were rejected by the Court without deciding the issue whether the plaintiff or defendants have to lead evidence first. Without deciding that issue, the Trial Court passed impugned order dated 04.12.2015. Therefore, that order is required to be set aside with directions to the Trial Court to decide the issue whether plaintiff or

defendants to lead the evidence first on preliminary issue below Exh.41.

8 Hence, following order is passed:

a) The impugned order dated 04.12.2015 passed by the Joint Civil Judge, Junior Division, Kadegaon below Exh. 1 in Regular Civil Suit No. 85 of 2009 is set aside.

b) Trial Court is directed to decide the issue whether plaintiff or defendants have to lead evidence first on preliminary issue of “*res judicata*” and thereafter, preliminary issue to be decided on its own merits with opportunity to lead evidence, if any, to both the sides.

c) Writ Petition stands disposed off accordingly.

(K.K.TATED, J.)