

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

CIVIL REVN. APPLICATION NO. 166 OF 2009

1. Satappa Govind Hilage
2. Dattatraya Govind Hilage
3. Narayan Satappa Hilage
4. Anand Dattatraya Hilage
All residing at – Khanapur,
Tal. Bhudargad, Dist.Kolhapur.

... Applicants

v/s

1. Kamlesh Dhanaji Patel
2. Arjun Dhanaji Patel,
Both residing at Gargoti,
Tal. Bhudargad, Dist. Kolhapur.

... Respondents

Mr.Harshad Shingnapurkar i/by Amit Borkar for the applicants.

Mr.Swapnil Patil i/by S.V.Sadavarte for Resp. Nos.1 and 2.

Coram: N.M. Jamdar, J.

Dated: 1 SEPTEMBER 2016

ORAL JUDGMENT:

The Applicants challenge the order passed by the Civil Judge, Junior Division, Gadhinglaj, dated 2 March 2009, rejecting the application filed by the Applicants below Exh.No.25 and answering the issue of *res judicata* against the Applicants.

2 The Respondents had filed a suit bearing No.20 of 1988, for declaration and injunction in respect of the suit property to restrain the Applicants from disturbing the possession over the suit property. This suit was dismissed by the learned Civil Judge, Junior Division, Gargoti, on 11 March 1992. Thereafter, the Respondents filed Regular Civil Appeal No.135 of 1992 in the District Court, Kolhapur. The appeal was dismissed by the learned District Judge on 1 January 1998. Thereafter, the Respondents filed another Suit bearing No.77 of 2001 in respect of the suit property against the Applicants seeking an order of injunction restraining the Applicants from disturbing the construction of a compound wall stated to be in the land belonging to the Respondents. The suit was filed on 3 September 2001. The suit was dismissed by the learned Civil Judge on 12 November 2008. The Appeal No.409 of 2004 was dismissed on 4 April 2005. Thereafter the Respondents filed the present Regular Civil Suit No.94 of 2008, which was converted into Regular Civil Suit No.14 of 2009, seeking injunction in respect of the suit property against the Applicants. In this suit, the Applicants moved an application for framing a preliminary issue as regard the bar of *res judicata*. The learned Civil Judge, by an order dated 11 February 2009 framed an issue as regards the bar of *res judicata*. By the impugned order dated 2 March 2009, the learned Civil Judge dismissed the application taken out by the Applicants and held that the suit is not barred by principles of *res judicata*.

3 Heard learned counsel for the parties.

4 At the outset, it must be stated that the discussion and the reasons given by the learned Civil Judge in the impugned order are entirely unsatisfactory. Having framed the preliminary issue as to *res judicata*, it ought to have considered within the parameters governing the concept of *res judicata*. The learned Civil Judge reopened the proceedings which were concluded earlier against the Respondents. This is the third suit filed by the Respondents against the Applicants in respect of the very subject matter. Therefore, the issue of *res judicata* was framed. The learned Civil Judge ought to have examined the plaint filed in both suits, the decisions given in the earlier suits, the issues framed, and the grounds on which the earlier suit came to be decided. After the suit seeking injunction against the Applicants was dismissed, there was no question of the Applicants taking law in their own hands, as observed. The earlier suit was dismissed on the ground that the Respondents failed to demonstrate that they are entitled to a grant of an injunction. These are some of the points on which the learned Civil Judge has not applied his mind. To illustrate the area of adjudication, it is the contention of the Respondents that the basis of the second suit was certain subsequent developments. While it is the contention of the Applicants that there were no subsequent events and the Respondents had failed to secure grant of injunction earlier in respect of the very structure.

5 Since it is found that the learned Civil Judge has not exercised

his jurisdiction properly to arrive at a finding in a manner required to be followed, the order has to be set aside and the learned Civil Judge who is required to take the original decision in the matter need to be directed to take a decision concerning all parameters. Both the parties had cited various provisions concerning the principles of *res judicata* and the learned Civil Judge has simply brushed them aside stating that facts in those cases are different. Therefore, since the decision rendered by the learned Civil Judge is not in consonance with the various parameters governing the principles of *res judicata*, the impugned order dated 2 March 2009 cannot be sustained.

6 Accordingly, the order dated 2 March 2009 is quashed and set aside. The issue of *res judicata* is already been directed to be decided as a preliminary issue. The learned Civil Judge will examine the earlier litigation between the parties and decide the preliminary issue within the parameters governing the principles of *res judicata*.

7 The Civil Revision Application stands disposed of in above terms. No costs.

8 The contentions of the parties as regard the preliminary issue framed, are kept open to be considered by the learned Civil Judge.

(N. M. Jamdar, J.)