

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Appeal against Order No.82 of 2015
(Atmaram s/o Bhagwan Chatarkar and another v. Devidas s/o Sakharam
Wankhede)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri V.B. Gawali, Advocate for Appellants.
Smt. R.S. Sirpurkar, Advocate for Respondent.

Coram : R.K. Deshpande, J.
Date : 13th April, 2016

The Trial Court dismissed the suit in exercise of its jurisdiction under Order VII, Rule 11(d) of the Code of Civil Procedure on the ground that the suit was barred by the principles of *res judicata*, as contained in Section 11 of the C Code. The lower Appellate Court has reversed the decision of the Trial Court, holding that the issue of *res judicata* is a mixed question of law and fact and it could not have been decided under Order VII, Rule 11(d) of the Code, unless the issue is framed and the parties are permitted to lead evidence. The lower Appellate Court has, therefore, remanded the matter back to the Trial Court for decision in accordance with law. Thus, this appeal challenges the order of remand.

It cannot be disputed that the lower Appellate Court has

exercised its jurisdiction under Order XLI, Rule 23 of the Code of Civil Procedure in remanding the matter back to the Trial Court after making out the case, as contemplated. The question as to whether the suit is barred by the principles of *res judicata* or by the law of limitation is a mixed question of law and fact, which can be gone into only after framing such issue, and this was the prayer made in the application under Order VII, Rule 11(d) of the Code by the present appellants. Hence, the remand of the matter back by the lower Appellate Court is in conformity with the prayer made in the said application and no substantial question of law arises for consideration by this Court.

At this stage, Shri Gawali, the learned counsel for the appellants, submits that the Trial Court may be directed to decide such issues as a preliminary issue. Such application can be moved after the Trial Court frames all the issues. If such application is made, the Trial Court shall decide the same in accordance with law.

The appellants are permitted to file the written statement within a period of thirty days from the date of first appearance of the parties before the Trial Court. The parties to appear before the Trial Court on 13-6-2016.

With these observations, the appeal is dismissed.

Judge.

Lanjewar