

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 103 of 2014**

1. Biselal S/o Mehattar Gond Aged About 30 Years R/o Village Kasekera Presentaly R/o At Bharwamuda Tah. Chhura Distt. Raipur Cg (Now Distt. Gariyaband)
2. Bisani Bai S/o Mehattar Gond Aged About 40 Years R/o Village Kasekera Tah. Chhura Raipur Civil & Revenue Distt. Raipur Cg (Now Distt. Gariyaband)
3. Mati Bai S/o Mehattar Gond Aged About 32 Years R/o Village Kasekera Tah. Chhura Raipur Civil & Revenue Distt. Raipur Cg (Now Distt. Gariyaband)
4. Lalita Bai D/o Mehattar Gond Aged About 28 Years R/o Village Kasekera Tah. Chhura Raipur Civil & Revenue Distt. Raipur Cg (Now Distt. Gariyaband)
5. Uttara Bai D/o Mehattar Gond Aged About 25 Years R/o Village Kasekera Tah. Chhura Raipur Civil & Revenue Distt. Raipur Cg (Now Distt. Gariyaband)

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1. Khorbahra & Ors. S/o Shri Ghasuram Aged About 40 Years R/o Village Chingraud Ps & Teh. Mahasamund Civil & Revenue Distt. Mahasamund Cg
6. Daya Bai W/o Late Ghasuram Aged About 65 Years R/o Village Bharwamuda Phn. 4 Rnm And Ps Chhura Tah. Chhura Civil & Rvenue Distt. Raipur Cg (Now Distt. Gariyaband)
7. Naib Tahsildar Chhura Distt. Raipur Cg (Now Distt. Gariyaband Cg)
8. Sub Divisional Officer Gariyaband Tahsil Gariyaband Distt. Raipur Cg (Now Distt. Gariyaband Cg)
9. State Of Chhattisgarh Through The Distt. Collector Raipur Cg (Now Distt. Gariyand Cg)

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For appellants	:	Mr. Malay Bhaduri, Adv.
For Respondent No. 1	:	Mr. Kshitij Sharma, Adv.
For R-3, 4 and 5/State	:	Mr. Ramakant Pandey, PL
For R-2	:	None though served.

ORDER**16/3/2017**

1. Heard on admission.
2. Facts of the case in brief are that a Civil Suit No. 51A/2002 was disposed of vide judgment and decree dated 6-10-2006. Thereafter present respondents No. 1 and 2 filed a Civil Suit No.

35A/2006. While hearing the subsequent civil suit, present appellant/ defendant No. 1 filed an application under Section 11 of the Civil Procedure Code, 1908 (in brevity 'CPC') praying that the matter in issue was directly and substantially the same in a previously instituted civil suit by the parties hence the doctrine of res judicata operates, Section 11 of the CPC attracts hence the Civil Suit No. 35A/2006 may not be heard or tried and suit may be dismissed as per principles of res judicata. The Civil Judge Class II, Gariyaband vide order dated 17-6-2008 held that the parties are the same, matter in issue is the same, suit property is the same in the previously instituted civil suit No. 51A/2002 which is heard and disposed of finally hence the present suit is barred under Section 11 of the CPC, with this allowed the application, dismissed the suit as not maintainable. Against the said order, plaintiff preferred a civil appeal No. 32-A/2008. The appellate court vide judgment and decree dated 26-9-2014 held in para 21 that prima facie parties are not the same, matter in issue is not directly and substantially same, with this any appreciation in the civil suit No. 51A/2002 is not barred under Section 11 of the CPC for hearing of Civil Suit No. 35A/2006 hence set aside the order dated 17-6-2008 and remanded back the matter for trial with direction that the said civil suit be restored to its original number and heard and disposed of as per law after affording opportunity of hearing to the parties, afresh.

3. Against the said remand order dated 26-9-2014, the defendant No. 1, 1A, 1B, 1C and 1D have preferred instant MA under the provisions of Section 43 Rule 1(u) of the CPC taking the ground that the appellate court has utterly failed to appreciate the law in

regard to Section 11 of the CPC, the order of remand is bad in law, and praying for the relief that this court may set aside the impugned judgment and decree dated 26-9-2014 in the interest of justice.

4. Learned counsel for the appellants during argument submits that learned trial Court is a court of fact. It has held that the parties are same, issues to be tried are directly and substantially same and with this Section 11 is attracted and as parties are the same, issue in question are same, the judgment and decree passed by the appellate court is not correct. As per law the appellate court ought to have decided the appeal on its merit, rather to remand the same. With this it is prayed that the appeal may be allowed. The judgment and decree passed by the appellate court may be set aside.
5. Perused the documents annexed and the instant MA.
6. The order dated 17-6-2008 is not the judgment and decree passed by the trial Court instead this is an order generated on an application under Section 11 of the CPC. From perusal of the said order, it does not indicate whether the pleading of res judicata is taken in the written statement or not. There is no answer despite the pleading of res judicata in any written statement that the Court framed preliminary issue to decide the question of res judicata or not. It appears that an application under Section 11 of the CPC is filed and the same was disposed of.
7. On perusal of both the orders it appears that the defendants/ appellants are arrayed wrongly so far as numerical numbers are

concerned. This Court failed to understand that if the appellant No. 1 Biselal is alive and well represented why Bisani Bai, Malti Bai, Lalita Bai and Uttara Bai were arrayed as defendant No. 1A, 1B, 1C and 1D. On a very common understanding, they should have been numbered as D-2, 3, 4 and 5 etc.

8. After perusal of para 21 of the judgment and decree of the appellate court, it appears that prima facie parties are not the same in both the civil suits. Prima facie question in issue is not directly and substantially same. In para 20 of the judgment, it appears that in Civil Suit No. 35A/2006 relief sought is not same as per pleading, the relief sought in the suit is that orders passed by different revenue courts are not binding to the plaintiff whereas in the civil suit earlier disposed of bearing Civil Suit No. 51A/2002, the said issue was not framed and decided. With this the appellate court appreciated that the parties and the question in issue is not directly and substantially same.
9. By remanding of the hearing on CS No. 35-A/2006 parties are having opportunity of hearing as per law. If there is any pleading regarding applicability of Section 11 of the CPC, the said pleading has to be heard and disposed of in accordance with law. Order of remand of the appellate court does not bar the trial Court to frame any issue over Section 11 of the CPC as both the parties will get opportunity to be heard as per law and the appellate court does not take away the right of the appellant to place the facts and material for applicability of Section 11 of the CPC if so advised. On the appreciation as made in para 20 and 21, this Court is of the considered view that the appellate court has not

committed any mistake of law in remanding the matter to be tried afresh. As per settled law, it would not be appropriate to decide applicability of section 11 of the CPC for res judicata despite pleading of the parties without formulating preliminary issue in the matter.

10. Consequently, upon entire consideration, instant misc. appeal being sans substance is dismissed at motion stage.

Sd/-
(Chandra Bhushan Bajpai)
Judge