

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal (M) No. 40 of 2017****Order Reserved on : 10.03.2017****Order passed on : 17.03.2017**

Smt. Neha Jain, aged 30 years, w/o Saurabh Jain,
Occupation -Dietician (Jindal Forties Hospital), Resident of
Hilview Colony, Quarter No. F-39, Patrapali, Post Office
J.S.P.L., District Raigarh (C.G.)

---- Appellant**Versus**

Saurabh Jain, aged about 31 years, S/o Shreyansh Jain,
Occupation Engineer, (Jindal Power Plant, Tamnar), resident
of Urja Bhavan, J.P.L., Tamnar, District Raigarh (C.G.)

---- Respondent

For Appellant : Mr. Vijay Kumar Mishra, Advocate.

Hon'ble Shri Pritinker Diwaker, Ag. Chief Justice
Hon'ble Shri Justice Sanjay K. Agrawal

Order [C.A.V.]**Sanjay K. Agrawal, J**

(1) In an application filed by the respondent/plaintiff for grant of divorce under Section 13 of the Hindu Marriage Act, 1955 (for short 'Act, 1955'), the appellant/wife filed an application under Order 7 Rule 11 of the Code of Civil Procedure (for short 'CPC') for rejection of plaint stating that suit is barred by Order 7 Rule 11(d) of the CPC. That was rejected by Family Court by the impugned order, against which this appeal under Section 19 (1) of the Family Court Act, 1981 (for short 'Act, 1981') has been preferred.

(2) Mr. Vijay Kumar Mishra, learned counsel appearing for the appellant would submit that order passed by the Family Court in favour of appellant granting decree for restitution of conjugal right under Section 9 of the Act, 1955 would operate as *res judicata* in this suit filed by the respondent seeking decree of divorce and, therefore, by virtue of provisions contained in Order 7 Rule 11 CPC, plaint is liable to be rejected.

(3) We have heard learned counsel appearing for the appellant and considered his submission made hereinabove and perused the order impugned with utmost circumspection.

(4) It is well settled law that the plea of res-judicata is a mixed question of law and fact and it has to be decided upon submission of proper pleadings 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 established before competent Civil Court by adducing legal evidence.

(5) The plea of *res-judicata* only bars investigation and decision on merits finally decided between parties earlier if the dependent 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, such a plea cannot be permitted to be raised for the first time. The Supreme 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 issue 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 tried 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) In **Sheodan Singh Vs. Darhyao Kunwar**², Their Lordships of the Supreme Court laid down the law relating to the essential elements that need to be satisfied before a plea of *res-judicata* can be raised by party. It was held as under :-

“(9) A plain reading of S. 11 shows that to constitute a matter *res judicata*, the following conditions must be satisfied, namely-(I) the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the

1 (2002) 2 SCC 85

2 AIR 1966 SC 1332

former suit; (II) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (III) the parties must have litigated under same title in the former suit; (IV) the court which decided the former suit must be suit or the suit in which such issue is subsequently raised; and (V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further Explanation I shows that it is not the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as *res judicata* it will have to be seen whether all the five conditions mentioned above have been satisfied.

(8) Principles of law laid down in **Sheodan Singh** (supra) has been followed and restated very recently by the Supreme Court in the matter of **City Municipal Council Bhalki by its Chief Officer Vs. Gurappa (dead) by legal representatives and another**³.

(9) In a very recently pronounced judgment in the matter of **Vaish Aggarwal Panchayat Vs. Inder Kumar & others**⁴, Their Lordships of the Supreme Court have held in no uncertain terms that plea of *res-judicata* involves mixed question of law and fact and it requires evidence to be recorded and it cannot be a ground to reject plaint under Order 7 Rule 11(d) of the CPC. Their Lordships relied upon the earlier decision of the Supreme Court rendered in the matter of **V. Rajeshwari Vs. T.C.**

³ (2016) 2 SCC 200

⁴ AIR 2015 SC 3357

Saravanabava⁵, held as under:-

“11. The rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

12. The plea of *res judicata* is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation of the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal [see (Raja) Jagadish Chandra Deo Dhabal Deb V. Gour Hari Matato (AIR 1936 PC 258), Medapati Surayya v. Tondapur Bala Gangadhara Ramakrishna Reddi (AIR 1948 PC 3) and Katragadda China Anjaneyulu v. Kattaragadda China Ramayya (AIR 1965 AP 177)]. After so stating, the Court further observed that:-

' Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be, in a given case only copy of judgment in previous suit is filed in proof of plea of *res judicata* and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa (1976) 4 SCC 780 the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to

5 (2004) 1 SCC 551

find out as to what had been decided by the judgment which operates as *res judicata*.”

(10) Reverting back to the facts of the instant case following the law laid down by Their Lordships of the Supreme Court in above-stated judgments, the defendant has to establish the plea of *res judicata* by raising appropriate pleadings and if pleadings are so raised, issue has to be framed in this regard and upon leading evidence in such an issue, 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(d) of the CPC and plaint cannot be rejected under Order 7 Rule 11 CPC on the principles of *res judicata*.

(11) Consequently, we do not find any merit in this appeal and deserves to be and is hereby dismissed at admission stage without notice to the other side.

Sd/-

(Pritinker Diwaker)
Acting Chief Justice

Sd/-

(Sanjay K. Agrawal)
Judge

Dubey/-