

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 22 of 2015**

1. Smt.Shardamani W/o Bhagat Ram Aged About 45 Years R/o Village Dabo, Tahsil Mungeli, Distt. Mungeli Chhattisgarh Through Their General Power Of Attorney Holder Gofelal, S/o Motilal Satnami, Aged About 75 Year R/o Village Kalmidih, Tahsil Lormi, Distt. Mungeli Chhattisgarh
2. Bhagat Ram S/o Salik Ram Aged About 50 Years R/o Village Kalpidih, Tahsil Lormi, Distt. Bilaspur New Distt Mungeli Chhattisgarh Through Their General Power Of Attorney Holder Gofelal, S/o Motilal Satnami, Aged About 75 Year R/o Village Kalmidih, Tahsil Lormi, Distt. Mungeli Chhattisgarh

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Versus

1. Lainu S/o Bakharia Aged About 75 Years R/o Village Gadapara, Tahsil Lormi, Distt. Bilaspur New Distt Mungeli Chhattisgarh
2. Malik Ram S/o Lainu Aged About 40 Years R/o Village Gadapara Tahsil Lormi, Distt. Bilaspur New Distt. Mungeli Chhattisgarh
3. Salik Ram S/o Lainu Aged About 45 Years R/o Village Gadapara Tahsil Lormi, Distt. Bilaspur New Distt. Mungeli Chhattisgarh
4. Fagua S/o Lainu Aged About 42 Years R/o Village Gadapara Tahsil Lormi, Distt. Bilaspur New Distt. Mungeli Chhattisgarh
5. Jawahar S/o Lainu Aged About 39 Years R/o Village Gadapara Tahsil Lormi, Distt. Bilaspur New Distt. Mungeli Chhattisgarh
6. Khelu S/o Lainu Aged About 32 Years R/o Village Gadapara Tahsil Lormi, Distt. Bilaspur New Distt. Mungeli Chhattisgarh
7. Smt. Jamuna Bai D/o Lainu Aged About 43 Years R/o Fokat Para, Tahsil Mungeli, Distt. Bilaspur New Distt. Mungeli Chhattisgarh
8. Smt. Jamun Bai W/o Kartik Ram Aged About 43 Years D/o Lainu R/o Village Pipar Tarai, Tahsil Kota, Distt. Bilaspur Chhattisgarh
9. Smt. Birit Bai W/o Ram Prasad Aged About 37 Years D/o Lainu R/o Fokat Para, Tahsil Mungeli, Distt. Bilaspur New Distt. Mungeli Chhattisgarh
- 10.State Of Chhattisgarh Through The Collector, Bilaspur New Distt. Mungeli
11. (a) Bhagwati Bai W/o Santu Aged About 28 Years R/o Village Barampur, Tahsil Lormi Distt. Mungeli Chhattisgarh

(b)Virendra Singh S/o Santu Aged About 12 Years Minor Through Mother Smt.

Bhagwati Bai W/o Santu R/o Village Barampur, Tahsil Lormi Distt. Mungeli Chhattisgarh

(c) Deepak Singh S/o Santu Aged About 4 Years Minor Through Mother Smt. Bhagwati Bai W/o Santu R/o Village Barampur, Tahsil Lormi Distt. Mungeli Chhattisgarh

(d) Gend Singh S/o Santu Aged About 3 Years Minor Through Mother Smt. Bhagwati Bai W/o Santu R/o Village Barampur, Tahsil Lormi Distt. Mungeli Chhattisgarh

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For Appellants	:	Shri Ravindra Agrawal, Advocate
For Respondent No.10	:	Smt. Shobha Kashyap, Dy. GA
None for respondents 1, 2, 4 & 6 though represented.		
None for respondents 3, 5, 7 to 11a to 11d though served as per office note.		

Hon'ble Shri Justice Chandra Bhushan Bajpai
Order On Board

09/01/2017

1. The instant Misc. Appeal has been preferred after 10 days of its limitation.
2. Heard on I.A.No.1/2015 under Section 5 of the Limitation Act.
3. Learned counsel would submit that as the appellants are residing at remote village and on a misconception that father of appellant 1 who was holding general power of attorney to take care of the litigation had taken necessary steps to file the Misc. Appeal, the appellants could not file the appeal within time and on account of non-communication this fact was also not brought to the notice of the appellants by her father. Thereafter, as soon as they were informed for the fact that Misc. Appeal has not been preferred they immediately preferred the instant Misc. Appeal, hence, delay of 10 days is bonafide and unintentional, the same may be condoned and the appeal may be admitted for consideration.
4. On due consideration of the reasons mentioned in I.A.No.1/2015, same is allowed. Delay of 10 days in filing the appeal is condoned.

5. Also heard on admission.

6. The present appeal has been preferred under Order 43 Rule 1 u of the Code of Civil Procedure, 1908 (for short the CPC) being aggrieved by the first appellate Court whereby and whereunder the learned appellate court has set aside the judgment and decree passed in C.S. No.14-A/2009 dated 12.8.2011 wherein the trial court after hearing the matter on a preliminary issue under the provisions of Order 14 Rule 2 (2)(b) CPC dismissed the said suit on the basis of doctrine of res judicata. The plaintiff/appellants had preferred the First Appeal No.108A/11 and the appellate court vide judgment dated 27.11.2014 held that as this Court in Second Appeal No.635/2003 dated 28.2.2007, allowed the prayer of the appellants, which was a connected matter with the question in issue and permitted the appellants to withdraw the Second Appeal with liberty to file a fresh suit for declaration that the sale deed executed by one Lainu in favour of the defendants was in fact a mortgage. This court granted liberty to the appellants to take recourse to such remedy as is available to them under the law and the appeal was dismissed as withdrawn. After the said order, the plaintiffs had filed C.S.No.14A/2009. The appellate court held that as the appreciation in that litigation is not effective hence, the court below was not required to dispose of the plaint only on the basis of preliminary issue and as the Second Appeal was not disposed of on its merits, doctrine of res judicata is not applicable hence, the court below was required to appreciate the merits of the case and dispose of the matter finally. With this, the appellate court has set aside the judgment and decree passed by the trial court and remanded the matter back and directed the trial court to take evidence on the issues framed and after affording opportunity of hearing to the parties decide the matter afresh on its merits. Against the said order, the appellants had preferred this Misc. Appeal and in brief submitted that as the earlier judgment and decree passed by the trial court and the first appellate court was not set aside with this, fresh

suit is bar under the doctrine of res judicata, hence, the judgment and decree passed by the first appellate court may be set aside and the appellate court be directed to dispose of the said First Appeal after affirming the judgment and decree passed by the trial court.

7. Perused the documents annexed and the memo of appeal.

8. After minute examination of the material it appears that Second Appeal No.635/2003 was not disposed of on its merits and liberty was granted to the appellants to file a fresh suit. With this, as the liberty was granted to file a fresh suit, the appellants are granted liberty to file a fresh civil suit and the court where the said civil suit is filed was required to hear the matter whether the said civil suit is hit by doctrine of res judicata or not. The trial court on the basis of earlier litigation appreciated the entire matter and held that doctrine of res judicata is applicable and dismissed the suit.

9. On the other hand, learned appellate court held that as the Second Appeal was not disposed of on its merits, with this, question was open and the matter could not be disposed of only after hearing the arguments and to consider the fate of the earlier litigation. The then appellants were well within the authority of law to hear them in the said civil suit on its merits whether the subsequent civil suit would operate as res judicata or not. But the trial court without affording an opportunity to the then appellants, straightway on the basis of the earlier litigation, held that res judicata is applicable.

10. In the considered view of this court, the appellants have failed to demonstrate any reason for hearing the matter. Consequently, I do not see any reason to interfere with the findings and the conclusion arrived by the appellate court while hearing the First Appeal No.108-A/2011 and also both the parties are granted opportunity to adduce evidence. The trial court has to appreciate the entire matter including the res judicata. The opportunity is open to the

parties to demonstrate the matter in their favour including the res judicata.

11. After due consideration, I do not see any reason to interfere with the impugned judgment and decree dated 27.11.2014 with this, the instant Misc. Appeal is dismissed at the motion stage itself.

Sd/

(Chandra Bhushan Bajpai)
Judge