

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 46 OF 2017

1] Anteshwar Vyankat Devangre,
Age : 34 years, Occu.: Agri.,
R/o. Shirur Anantpal,
Tal : Shirur Anantpal, Dist. : Latur

2] Sangmeshwar Vyankat Devangre,
Age : 36 years, Occu.: Agri.,
R/o. Shirur Anantpal,
Tal : Shirur Anantpal, Dist. : Latur

.. Petitioners
(Orig. Defendants)

Vs.

Ramesh Madhavrao Manthale,
Age : 45 years, Occu.: Agri.,
R/o. Shirur Anantpal,
Tal : Shirur Anantpal, Dist. : Latur

.. Respondent
(Orig. Plaintiff)

Mr. A.V. Indrale Patil, Advocate for the petitioners
Mr. C.R. Deshpande, Advocate for the respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 10-04-2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith.
2. Heard learned counsel for the parties finally, by consent.
3. The revision has been moved against order dated 04-02-2017 on application exhibit – 78, in regular civil suit no. 374 of 2016 whereunder learned civil judge, senior division, Nilanga has rejected the application of defendants.

4. Exhibit – 78 had been moved by the defendants / petitioners, requesting the suit be dismissed, by applying section 11 of code of civil procedure. It has been contended that suit property had been subject matter of regular civil suit no. 131 of 1982. Regular civil suit no. 131 of 1982 had been instituted by mother of present plaintiff, alleging encroachment against father of present petitioners/defendants. The suit was dismissed. Thereafter, the property was transferred by mother to the son – present plaintiff. In the circumstances, it appears to be a case of the petitioners, that subject matter of the suit is the same. The parties since are deriving title to the property from earlier defendants and plaintiff, respectively.

5. Learned counsel for the petitioners submits that regular civil suit no. 131 of 1982 was dismissed. Appeal against the same bearing regular civil appeal no. 269 of 1984 was dismissed. Present suit is between the same parties as stated above. Learned counsel further submits that the issues in the earlier suit and the present suit are practically similar and same. The court has also found that suit property is one and the same. Having regard to aforesaid, according to him, consideration that parties are different, is not a proper consideration and exhibit – 78, under the circumstances, ought to have been allowed.

6. Learned counsel Mr. Deshpande appearing for the respondent – plaintiff, however, contends that *doctrine of res judicata*, sought to be invoked in the present matter is wholly misconceived. According to learned counsel, the issue in respect of *res judicata*, is a mixed question of law and fact, and, could not be decided without affording opportunity to the parties to lead evidence. He further points that the issue in this respect is already framed in the present matter, and, it will have to be decided on its own merits with reference to the evidence. He further points out that while the earlier suit had been in respect of 27 Aar of land, whereas present suit is for 23 Aar of land. Whether 27 Aar of land in the earlier suit and 23 Aar of land in the present matter comprise the same land, will have to be adjudged on merits and on evidence. Learned counsel submits that the causes of action in the two suits are entirely different. In the circumstances, order passed by the learned judge is not liable to be faulted with. He therefore submits that the revision application does not deserve any consideration.

7. After hearing learned counsel for the parties, the submissions on behalf of the plaintiff – respondent appear to carry lot of weight. By now, it is well settled proposition that issue of question of *res judicata* is a mixed issue of fact and law and will have to be decided by granting opportunity to the parties in respect of the

same. The observations of trial court having regard to the submissions advanced on behalf of the respondent about subject matter are interlocutory in nature, and, do not have preempting efficacy. However, ultimately, order passed, for the reasons as submitted on behalf of the respondent, is not liable to be faulted with.

8. The revision application, as such, is dismissed with no order as to costs.

9. Observations in this order or for that matter, by the learned judge in the impugned order, shall not influence the decision making by the court, on merits.

10. Rule stands discharged.

[SUNIL P. DESHMUKH]
JUDGE

arp/