

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8694 OF 2014

Nandkumar Hari Ghodke Petitioner
Vs.
Chandrakant Raghu Ghodke & Ors. Respondents

Mr. Surel Shah i/by Mr. Sachin K. Hande for the Petitioner
Mr. Govind R. Pawar for Respondent nos. 1 and 2.

Coram : Smt. Sadhana S. Jadhav, J.
Date : 14th November, 2017

P.C.:

1 Heard respective Counsel. Rule. Rule made returnable
forthwith with the consent of the parties.

2 The present petitioner herein is the defendant in Suit No.
147 of 2010, which is filed before the Civil Judge, Junior Division,
Miraj seeking a declaration that the plaintiff is entitled to half of the
share of the estate of Bhau. Learned counsel for the petitioner has
drawn the attention of this Court to the plaint in Regular Civil Suit
No. 241 of 1993, which was filed by one Bayakka alias Anusaya

Ghodke against the present respondent i.e. against Chandrakant Raghu Ghodke who was defendant no.2 in Regular Civil Suit No. 241 of 1993. The suit properties mentioned in Civil Suit No. 241 of 1993 have the same description as in Civil Suit No. 147 of 2010. The parties to the plaint are the same. The suit was dismissed.

3 Being aggrieved by the dismissal of the suit, the original defendant had filed Regular Civil Appeal No. 104 of 2001. The learned appellate court, by its order dated 19th November 2003 had allowed the appeal and set aside the judgment and decree passed by the trial Court. The cause title of the judgment would clearly indicate that the appeal had proceeded *ex parte* against the respondents. The Second Appeal was filed before this Court, which was registered as Second Appeal (Stamp) No. 30863 of 2006. This Court (Coram : D.B. Bhosale, J.) had dismissed the Second Appeal at the stage of admission. Being aggrieved by the same, the appellants had approached the Hon'ble Apex court by filing Special Leave to Appeal (Civil) Nos.13442-13443 of 2007, which were dismissed by an order dated 15th January, 2010.

4 Soon after the dismissal of the appeals before the Honb'le Apex Court, the respondent herein had filed the suit on 25th June, 2010 seeking a declaration that he is entitled to half of the share of deceased-Bhau. In the given circumstances, the petitioner who happens to be the defendant had filed an application under Section 9A Code of Civil Procedure before the Civil Judge, Junior Division at Miraj requesting the Court to frame an issue contending therein that the subsequent suit i.e. 147 of 2010 would be barred by principles of res-judicata. The learned Court, by an order dated 16th March, 2013 was pleased to reject the application on the ground that the issues can be decided after considering evidence of the parties and it was contended that the suit would stand abated against defendant no.1 and that the suit is barred by principles of res-judicata. The Court was of the opinion that the whole suit cannot be decided on the said grounds and therefore had observed that there is no need to frame the preliminary issue.

5 The learned counsel for the respondents submits that the statutory First Appeal was not contested by the respondents therein

and the judgment was exparte and therefore adjudication is necessary and there were several issues such as that one Anusaya had posed as “Bayakka” although she was not “Bayakka”. In the previous suit, the defendants had contended that Bayakka was absconding since last 40 years and the plaintiff- Anusaya is not wife of Hari Ghodke. The said issue was decided against Bayakka. However, in the Second Appeal, this Court has once again considered that issue and there is a specific finding that the manner in which Bayakka had deposed and given the pedigree of the family and faced the cross-examination itself shows that the appellate Court has rightly held that Bayakka and Anusaya are one and the same person and clearly establishes that she was the wife of Hari Ghodke. Merely because her age is wrongly mentioned at one place in the evidence or on the document, such as voters list, which does not match with the year of her marriage and the year of the death of Hari Ghodake does not mean that she was not the wife of Hari. Hence, the petitioner has rightly submitted that the said issue was also decided in the Second Appeal, which was confirmed by the Apex

Court. As on today, the fact that the respondent had specifically demonstrated that the issues involved in Regular Civil Suit No.147 of 2010 have been adjudicated by the Courts of law. The same would be barred by the principles of res-judicata. Upon perusal of both the complaints and the judgment delivered therein, this Court is of the opinion that it would be necessary to frame preliminary issue as to whether the suit is barred by the principles of res-judicata. Hence, the valuable judicial time would not be wasted in adjudicating the suit which has attained finality by the judgment in Second appeal, which was confirmed by the Hon'ble Apex Court. In view of this, the order dated 16th March, 2013 deserves to be quashed and set aside. The learned Civil Judge, Junior Division, Miraj is hereby directed to frame the preliminary issue as to whether the suit is barred by principles of res-judicata and decide the same on its own merits within eight weeks of framing the preliminary issues. Rule is made absolute in above terms. The Petition stands disposed of.

(Smt. Sadhana S. Jadhav, J)