

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

{Arising out of judgment and decree dated 28-1-2005 passed by the 10th Additional District Judge (FTC), Bilaspur, in civil suit No.1-A/2004}

FA No. 254 of 2005

1. Jhumuk Lal, S/o Ramgeela Bhai Aged About 60 Years
2. Sewakram (Dead) Through LRs
- 2.a Smt. Pushpa Bhoi W/o Parmanand Bhoi Aged About 55 Years
R/o Near Mahamai Talab, Purani Basti, Mahasamund,
Chhattisgarh
- 2.b Smt. Savita Bhoi W/o Santosh Kumar Bhoi Aged About 40 Years
R/o Sendri, Tahsil And District Bilaspur, Chhattisgarh
- 2.c Smt. Manju Bhoi W/o Late Laxmi Prasad Aged About 30 Years
R/o Village Nirtu, Tahsil Takhatpur, District- Bilaspur,
Chhattisgarh
- 2.d Santosh Bhoi S/o Late Sewakram Aged About 25 Years R/o
Katiyapara, Tahsil And District Bilaspur, Chhattisgarh

---- Appellants**Versus**

1. Mahendra Bhargav, S/o Shri Radhelal Aged About 35 Years
2. Devendra Bhargav S/o Shri Radhelal Aged About 25 Years

Both R/o Juna Bilaspur, Katiyapara Bhoieepara, Tahsil And
District Bilaspur, Chhattisgarh
3. Khamhanlal S/o Bhulauram Bhai Aged About 43 Years Clerk,
Election Br. Office Of The Collector Korba, District - Korba,
Chhattisgarh

---- Respondent

For Appellants
For Respondents

Shri Somnath Verma, Advocate
Shri Malay Kumar Bhaduri, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Smt. Justice Vimla Singh Kapoor****Judgment on Board****By****Prashant Kumar Mishra, J.**

30/08/2018

1. Plaintiffs' suit has been dismissed as not maintainable by the trial Court on the principle of *res judicata*.
2. The uncontroverted facts, as emerging from the material available on record, are that by sale deed dated 10-7-1968 the plaintiffs sold the suit property to the defendants' father namely; Radhelal Bhargav for a sum of Rs.600/- and possession was also delivered on the date of execution of sale deed. The appellants preferred civil suit No.199-A/84 (*Jhumuklal & Another v Radhelal Bhargav*) for issuance of permanent injunction against Radhelal Bhargav. The said civil suit was allowed by the trial Court vide its judgment and decree dated 10-11-1987, however, the appellate Court vide its judgment and decree dated 8-4-1993 passed in civil appeal No.171-A/89 (*Radhelal v Jhumuklal & Another*), set aside the trial Court's judgment, *inter alia*, holding that the plaintiffs being not in possession over the suit land from the date of sale deed it was necessary for them to have prayed for relief of recovery of possession without which a simple prayer for issuance of permanent injunction would not be admissible to them and the suit is not maintainable.
3. In the previous suit the appellate Court specifically recorded a finding, after referring to the admission made by the plaintiffs that the suit has been preferred when Radhelal Bhargav did not vacate possession. In the previous suit relief for permanent injunction was sought on the ground that the sale deed was a sham transaction, as the plaintiffs had obtained loan of Rs.600/-

and the sale deed was executed as security for repayment of the loan amount. The present suit was instituted on 13-12-2000 i.e. after about 7 years of the judgment and decree rendered by the appellate Court in the previous suit, again seeking issuance of a permanent injunction as well as declaration that the plaintiffs are in possession as title holder to the suit property. Once again, no prayer has been made in the plaint for recovery of possession.

4. The trial Court framed preliminary issue No.6 as to whether the suit is barred by principles of *res judicata* and has answered the same against the plaintiffs and eventually the suit has been dismissed as not maintainable.
5. Shri Somnath Verma, learned counsel appearing for the appellants, would submit that in the previous suit the subject matter was the open plot whereas in the present suit house as well as the open plot are shown as suit property, therefore, the suit properties being different, principles of *res judicata* would not apply. Learned counsel would further submit that the plaint and written statement of the previous suit were not on record, therefore, the trial Court could not have decided the plea of *res judicata*.
6. Shri Malay Kumar Bhudhuri, learned counsel appearing for the respondents, *per contra*, would refer to the decision of the Supreme Court rendered in **Ramadhar Shrivastava v Bhagwandas**¹ to argue that even if the subject matter of two suits were

¹ (2005) 13 SCC 1

different, but part of the property was the same, the judgment in earlier suit would bind the plaintiffs and the present suit has rightly been dismissed as barred by principles of *res judicata*.

7. We have seen the certified copy of the judgment and decree of both the Courts in the previous suit, which are available in the record of the trial Court.
8. The appellate Court judgment and decree passed by the Additional District Judge, Bilaspur, has attained finality, as the same was not challenged by preferring second appeal by the plaintiffs. Para 2 of the previous decree passed by the trial Court clearly mentions the suit property being the land sold to the defendants' father Radhelal Bhargav whereas in the present suit the land as well as the adjoining house has been made the suit property.
9. In the written statement filed in the present suit the defendants have clearly stated, in reply to para 1 of the plaint, that they are not at all concerned with the house possessed by the plaintiffs because they have only purchased the open land by sale deed dated 10-7-1968. The plaintiffs have not prayed for any relief for recovery of possession, therefore, when the plaint allegations are read along with the findings recorded in the previous suit, it would appear that plaintiffs are not in possession since 10-7-1968, for about five decades from now.

10. It is settled that principles of *res judicata* would apply between the parties or their legal heirs even if part of the suit property was the same. If a judgment in between the parties has been rendered in a previous suit and the plaintiff's suit was dismissed which has attained finality, the present suit would be barred not only under Section 11 of the Code of Civil Procedure, 1908 but under Order 2 Rule 2 of the CPC also.
11. We say so for the reason that when the plaintiffs brought the first suit they should have included the whole claim which necessarily includes the claim for recovery of possession, therefore, if they have failed to seek relief for possession, they cannot include and make the suit property larger by including some other portion, which is in their possession and try to camouflage the defects in the previous suit to claim as if they are in possession of the entire suit land. In the teeth of finding in the previous suit that the plaintiffs are not in possession of the open land, which was the property sold under the sale deed dated 10-7-1968, the plaintiffs mistake of not claiming relief for possession cannot be ignored merely for the reason that in the present suit some other property on whom the plaintiffs have possession, is also included.
12. It appears, realising the plaintiffs ingenuity the defendants have stated in para 1 of the written statement that they are not concerned with the house as they have purchased only a plot under the subject sale deed.

13. Under Order 2 Rule 2 sub-rule (1) of the CPC, it is provided that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (3) provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

14. Framing of the present suit has been so made by including the additional portion, to avoid the rigor of Section 11 and sub-rule (3) of Rule 2 of Order 2 of the CPC, however, that may not benefit the plaintiffs because the defendants have stated that they are not at all concerned with the other part of the suit property, which has been added in the present suit, over and above the land which was included in the previous suit.

15. In this regard it will profitable to refer to the observation made by the Supreme Court in **Ramadhar Shrivastava** (supra) wherein it has observed thus in para 22 :

22. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the same suit. (Vide *Nirmal Enam Horo v Johan Ara Jaipal Singh*, SCC at p.192 : AIR at p. 1409, *Jaswant Singh v Custodian of Evacuee Property*, *Forward Construction Co.*

v Prabhat Mandal (Regd.), Direct Recruit Class II Engg. Officers' Assn. v State of Maharashtra and Vijayan v Kamalakshi.

16. Further the Supreme Court in **K. Ethirajan (Dead) by LRs v**

Lakshmi and Others², observed thus in para 20 :

20. The argument that principle of *res judicata* cannot apply because in the previous suit only a part of the property was involved when in the subsequent suit the whole property is the subject matter cannot be accepted. The principle of *res judicata* under Section 11 of the Code of Civil Procedure is attracted where issues directly and substantially involved between the same parties in the previous and subsequent suit are the same, may be, in the previous suit only a part of the property was involved when in the subsequent suit, the whole property is the subject matter.

17. In view of the law laid down by the Supreme Court in the aforesaid decisions, it is well settled that even if the part of the suit property was involved in the previous suit, it will still operate as *res judicata* in any subsequent suit between the same parties or their legal heirs, therefore, in our considered opinion, the trial Court has rightly dismissed the plaintiffs' suit, as being barred by *res judicata*.

18. In the result, the instant appeal, *sans substratum*, deserves to be and is hereby dismissed.

Sd/-

Sd/-

Judge

Judge

Prashant Kumar Mishra

Vimla Singh Kapoor

Gowri