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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1369 OF 2016

Sou.Surekha Y. Kanase

...Petitioner

V/s.

Arun S. Kanase

...Respondent

Mr.Dilip Bodake for the Petitioner.

Mr.Milind Deshmukh for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 4TH SEPTEMBER, 2018.

P.C. :-

1. By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 3rd December, 2015, thereby allowing the application (Exhibit 12) filed by the defendant *inter-alia* praying for framing a preliminary issue about the maintainability of the suit on the ground of *res-judicata*.

2. Mr.Bodake, learned counsel appearing for the petitioner invited my attention to the averments made in the previous suit i.e. RCS No.134 of 2004 and the decree passed therein and also the averments made in RCS No.18 of 2015 filed by his client and the prayers in the said suit. He submits that the parties in both the suits are not the same nor cause of action and the prayers therein.

3. Learned counsel placed reliance on the judgment of the

Supreme Court in case of **Vaish Aggarwal Panchayat vs. Inder Kumar & Ors., 2016 ALL SCR 8.**

4. Learned counsel appearing for the original defendant on the other hand placed reliance on an unreported judgment of this Court in case of **Dilipkumar B. Badlani vs. Maharashtra State Financial Corporation & Ors.** delivered on 5th September, 2006 in support of his submission that the issue of *res-judicata* can be tried as a preliminary issue.

5. A perusal of the plaint in both the suits and the prayers *prima-facie* indicates that the reliefs claimed in both the suits are substantially different. The plaintiff in the first suit was not the plaintiff in the second suit. The cause of action in both the suits also appears to be different. In my view, the learned 2nd Joint Civil Judge, Senior Division, Satara thus could not have allowed the application filed by the original defendant for framing the issue of *res-judicata* as a preliminary issue. The issue of *res-judicata* in the facts and circumstances of this case raised by the original defendant is mixed question of fact and law and thus could not have been ordered to be tried as a preliminary issue. The said issue could have been framed under Order XIV Rule 2 of the Code of Civil Procedure, 1908 and could have been tried with other issues at the time of trial.

6. In my view, the judgment of the Supreme Court in case of

Vaish Aggarwal Panchayat (supra) relied upon by Mr.Bodake, learned counsel appearing for the petitioner would assist the case of the petitioner. Insofar as the judgment of this Court in case of **Dilipkumar G. Badlani** (supra) is concerned, the facts of the said case are totally different. The said judgment is clearly distinguishable in the facts and circumstances of this case and the same would not assist the case of the respondent (original defendant).

7. I therefore, pass the following order :-

a). The impugned order dated 3rd December, 2015 passed by the learned 2nd Joint Civil Judge, Senior Division, Satara is quashed and set aside. The Application (Exhibit – 12) filed by the defendant for framing issue of *res-judicata* as a preliminary issue is rejected. It is made clear that the issue of *res-judicata* as raised by the original defendant be tried as one of the issue under Order XIV Rule 2 of the Code of Civil Procedure, 1908 along with other issues at the time of trial.

b). The writ petition is allowed in aforesaid terms. There shall be no order as to costs.

Vasant
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(R.D. DHANUKA, J.)