

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

WRIT PETITION NO. 11345 OF 2017

Dagdoba Shankar Shelar (Since deceased) Through LRs. & Ors. V/s. Vilas Dnyanoba Shelar & Ors.	...	Petitioners Respondents
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- Mr. Shirish V. Pitre for the Petitioners.
- Mr. Girish R. Agrawal for Respondent No. 1.
- Mr. Sushil Inamdar i/b. Mr. R. S. Sawant for Respondent Nos. 3 to 6.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 26th FEBRUARY, 2018.

P.C. :

- 1] Heard learned counsels for the parties.

- 2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 28th July, 2017, passed by the 4th Additional Judge, Jt. Civil Judge Senior Division, Pune, below Exhibit-99.

- 3] The application at Exhibit-99 was preferred by the Respondents/Defendants under Order-14 Rule-5 of the Civil Procedure Code (*for short*, "C.P.C.") for recasting of the issues. The said application was partly allowed by the trial Court framing following additional issues :-

“2A. Whether the suit premises is properly described?

2B. Whether the suit is properly valued?

2C. Whether the suit is filed within limitation?

2D. Whether the suit is hit by principle of res-judicata?”

4] The main grievance of learned counsel for the Petitioners is in respect of the issue No.2D i.e. Whether the suit is hit by principle of *res-judicata*? According to learned counsel for the Petitioners, earlier also the Respondents herein had filed an application before the trial Court for staying of the suit under Section 10 of C.P.C. and that application was rejected. In the Writ Petition preferred by the Respondents against it, bearing Writ Petition No.9435 of 2016, the said order was confirmed holding the both the suits are different, as suit Civil Suit No.1978 of 2006 was filed for partition and separate possession; whereas the present suit is filed only for possession where the party's claim is based on the ground of gratuitous licensee. Hence, no case was made out under Section 10 of C.P.C. for staying the hearing of the suit.

5] In the light of the above, it is urged that, once it has categorically held that both the suits are different and there was no necessity of staying the hearing of the said suit, now the same issue cannot be agitated by framing the issue that the present suit is hit by

principles of *res-judicata*. Learned counsel for the Petitioners in this respect points out to the wording of Section 10 and Section 11 of C.P.C. to submit that the ingredients of both the Sections are same. The only difference being under Section 10 of C.P.C. earlier suit is pending, whereas under Section 11 of C.P.C. earlier suit is already decided.

6] Thus, according to learned counsel for the Petitioners, when this Court had held that earlier suit is not between the same parties and for the same relief, now there is no question of re-agitating the same issue under the ground of *res-judicata*. According to him, therefore, the trial Court has committed an error in framing this additional issue.

7] However, learned counsel for the Respondents points out to the order passed by the trial Court which shows that in paragraph No.(4), it was clearly observed that, the present Petitioners have stated that, if such issues relating to description of suit property, valuation of the suit, limitation, *res-judicata* are framed, then the burden to prove the same is on to the Defendants; thereby indicating that the framing of additional issues on this aspect was not seriously challenged. The only request made was of casting the burden of proving those issues on the defendant. Hence, now the Petitioner cannot challenge the impugned order.

8] Be that as it may, in my considered opinion, while deciding this Writ Petition, the Court has to consider whether the framing of this issue relating to suit being barred by *res-judicata* is totally illegal, so as to warrant interference therein and answer thereto is in negative. Needless to state that, the prayer for staying of the Suit under Section 10 of C.P.C. is different and the prayer for framing of issue of *res-judicata* under Section 11 of C.P.C. is different. Hence, whatever finding was given by this Court in the earlier Writ Petition which was also merely of an interim nature, cannot bar the framing of issue of *res-judicata*. The issue of *res-judicata* is ultimately to be decided after considering the pleadings of the parties, the evidence led in the earlier suit and the judgment passed in the earlier suit; whereas under Section 10 of C.P.C. neither the evidence nor the judgment in the earlier suit is available. Therefore, the scope of Section 10 and Section 11 of C.P.C. being different, it cannot be said that the trial Court has committed any illegality in framing the issue as to the whether the suit is barred by *res-judicata*?

9] Hence, no interference is warranted in the impugned order of the trial Court. Writ Petition being without merits, stands dismissed.