

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10145 OF 2018

Jogesh Anil Rachh

...Petitioner

vs.

Bhadra Jogesh Rachh

...Respondent

Ms. Purnima Bhatia, for the Petitioner.

CORAM : M. S. SONAK, J.

DATE : DECEMBER 11, 2018

P.C.:

. Heard Ms. Purnima Bhatia, learned counsel for the
Petitioner.

2. The challenge in this Petition is to the order dated 18th
July, 2018 by which the Family Court has in fact re-cast the issue
and held that the issue of *res judicata*, in the facts and
circumstances of the present case is not required to be decided as
a preliminary issue.

3. Ms. Bhatia, the learned counsel for the petitioner,
however, submits that the Respondent had earlier filed a suit for
divorce on the ground of desertion. Such suit was dismissed. She
therefore, submit that the subsequent suit seeking maintenance is

barred by principles of *res-judicata*. She relies on the decision of this Court in ***Yogesh Baburao Patil vs. Rupali Yogesh Patil, Second Appeal No. 617 of 2012***. She points out that the S.L.P. against this decision was dismissed by the Hon'ble Apex Court.

4. By the impugned order, it is not as if the Family Court has rejected the petitioner's contentions that the subsequent suit is barred by principle of *res judicata*. The Family Court has merely held that such suit is not required to be decided as a preliminary issue and that too on basis of oral arguments, since, it was the case of the petitioner that there is no necessity of even leading any evidence on this issue. There is no jurisdictional error in the impugned order or in the view taken by the Family Court. This was certainly not a case where the matter before the Family Court warranted disposal on the alleged ground that the same was barred by the principle of *res judicata*.

5. In ***Sayed Mohd. Salie Labbai (dead) by. L.Rs. and ors. vs. Mohd. Hanifa (dead) by L.Rs. and ors. - (1976) 4 SCC 780***, the Apex Court has not only referred to the conditions which must be proved before a plea of *res judicata* can be upheld, but has further

held that the best method to decide the question of *res judicata* is to first determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operate as *res judicata*. The Apex Court however added that pleadings cannot be proved merely recitals of the allegations mentioned in the judgment. It appears that the petitioner in the present case precisely wanted to prove the pleadings in the earlier suit merely on the basis of certain observations in the judgments made in the previous suit. The Family Court was quite right in not permitting this.

6] Admittedly, the previous suit, was not a suit seeking maintenance. Therefore, the effect, if any, of the judgment in the previous suit in which the respondent had applied for a decree of divorce on the ground of desertion, will have to be examined in some detail after necessary evidence is let in by the parties. This was certainly not a case where the suit warranted dismissal or the plaint warranted rejection at the threshold. In ***Sajjadanashin Sayed Md. B.E. EDR (D) By. L.Rs. vs. Musa Dadabhai Ummer and ors. - (2000) 3 SCC 350***, the Apex Court has held that for the

principle of *res judicata* to apply, matters should have been “*directly and substantially*” in issue in the previous suit. The Apex Court has held that matter collaterally or incidentally in issue in the previous proceedings would not ordinarily operate as *res judicata* in subsequent proceedings. All this examination could not have been undertaken at the threshold as the petitioner insists. Accordingly, there is no error in the impugned order.

7] The decision in the case of *Yogesh Patil (supra)* was rendered in a second appeal and on the basis of evidence let in by the parties in the course of trial court. That was not a case where the issue of *res judicata* was decided at the threshold and that too on basis of only oral arguments. The decision in *Yogesh Patil* is therefore, clearly distinguishable.

8] Accordingly, there is no merit in this petition. This petition is therefore, dismissed. However, taking into consideration that the petitioner is a senior citizen, no costs are imposed.

9] All concerned to act upon an authenticated copy of this order.

(M. S. SONAK, J.)