

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.438 of 2007****Judgment reserved on :15.11.2019****Judgment delivered on :25.11.2019****1. Smt. Tulsabai (died) through LR's**

I. Tularam S/o Late Bodhiram, aged about 60 years,
R/o Village & Post Dansara, Tah. Sarangarh, Distt.
Raigarh (CG)

II. Ramwati D/o Late Bodhiram, aged about 45 years,
R/o Village & Post Dansara, Tah. Sarangarh, Distt.
Raigarh (CG)

----- Appellants/LR's of Defendant No.6)**Versus**

**1. Savitri Bai, D/o Joginder, W/o Guno Pradhan, aged 38
years, R/o Khichdi, Tehsil – Saraipali, District –
Mahasamund**

**2. Photobai, D/o Joginder W/o Shyamlal Kolta, aged 35
years, R/o Dansara, Tehsil Sarangarh, District
Raigarh**

**3. Gouribai D/o Jogender W/o Devarchan Bhoi, aged 30
years, R/o Arjuna, Tehsil – Saraipali, Tehsil –
Saraipali, District Mahasamund**

----- Plaintiffs**4. Mst. Malamati (died and deleted)**

**5. Samaru S/o Nanhu Rawat, aged 52 years, R/o Dansara,
Tehsil Sarangarh**

**6. Gahiraram, S/o Nanhu Rawat, aged 40 years, R/o
Dansara, Tehsil Sarangarh**

**7. Bundaram, S/o Nanhu Rawat, aged 35 years, R/o
Dansara, Tehsil Sarangarh**

**8. Draupadi Bai, D/o Nanhu Rawat, aged 37 years, R/o
Devgaon, Tehsil Sarangarh**

**9. Ganesh Ram S/o Tihari Teli, aged 54 years, R/o
Khoksipali, Tehsil Sarangarh**

**10. State of Chhattisgarh, through the Collector,
Distt. Raigarh**

----- Respondents

For Appellant/LR's of : Ms Sharmila Shinghai, Advocate
Def. No.6

For Res.Nos.1to3 : Mr.Ratan Pusty, Advocate
/Plaintiffs

For Respondent No.10 : Mr.Anshuman Rabra,P.L.

For other respondents : None present

Hon'ble Shri Justice Sanjay K. Agrawal
C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by defendant No.6 is as under:-

“Whether both the court below were justified in not dismissing the suit by holding the suit to be barred by principle of res judicata as enumerated under Section 11 of the Code of Civil Procedure, 1908 by recording a finding which is perverse to the record ?

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and nomenclature in the suit before the trial Court].

2. Subject matter of the suit land bearing Khasra No.216/2 area 0.50 acre is situated at village Dansara, Tahsil-Sarangarh, District Raigarh.
3. Civil Suit NO.12A/81 (hereinafter called as “Suit NO.1”) filed by one Nanhu against daughters of Thanda Ram namely Sonae and Tulsaa-defendant No.6 and against one Joginder Singh, father of the plaintiffs herein seeking declaration of title in respect of the subject lands shown in Schedule 'A' to 'E' of

the plaint claiming himself to be adopted son of Thandaram, in that suit, present appellant Tulsa Bai, daughter of Thandaram filed written statement and denied the fact of sale by his father in favour of the plaintiff therein. That civil suit was decreed by the trial Court in favour of plaintiff-Nanhu on 25.3.85 (Ex.P-5) upholding his claim to the property of deceased Thandaram, but in appeal preferred by Sonae and Tulsa, daughters of Thandaram, questioning the judgment and decree of the trial Court of Suit No.1, the first appellate Court by the judgment and decree dated 2.1.86 allowed the appeal and set aside the judgment and decree of the trial Court with regard to the property shown in Schedule 'A' appended with the plaint and the suit filed by plaintiff-Nanhu was dismissed and the judgment and decree of the first appellate Court in Suit No.1 was affirmed by the High Court of Madhya Pradesh in Second Appeal No.13/1986 and ultimately, the SLP filed against the judgment of the second appellate Court was also not entertained by the Hon'ble Supreme Court.

4. Thereafter, the present civil suit No.15-A/2002 (hereinafter called as "Suit No.2") filed by plaintiffs-Savitri Bai, Photobai and Gouribai,

daughters of Joginder Singh stating inter-alia that they are title-holders of the suit land bearing Khasra No.216/2 area 0.50 acre situated at village Dansara, Tahsil Sarangarh, Distt. Raigarh on the strength of sale deed dated 23.3.1976 (Ex.P-1) executed by Thandaram, father of defendant No.6 in favour of their father Joginder Singh as they have succeeded the suit property after death of their father and for declaration that the plaintiffs are not bound by sale deed dated 31.3.1995 executed by defendants No.1 to 5 in favour of defendant No.7- Ganesh Ram and same is void-ab-initio to the extent of suit land in present Suit No.2.

5. The defendants filed their written statement and denied the fact of sale deed by their father and claimed that Suit No.2 filed by the plaintiffs was barred by principle of res-judicata.
6. The trial Court after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 13.2.2003 decreed the suit holding that in Suit No.1 Nanhu had already relinquished his claim in that suit to the disputed suit land as there was no adjudication with regard to the suit land in earlier suit, hence, the principle of res-judicata would not be applicable

and since the suit land was earlier sold by Thandaram-father of defendant No.6 to the father of the plaintiffs namely Joginder Singh by sale deed dated 23.3.1976 (Ex.P-1) and the plaintiffs being successor-in-interest of Joginder Singh, therefore, they are entitled for decree of declaration of title and possession and sale deed dated 31.3.1995 is not binding on the plaintiffs, which was upheld by the first appellate Court holding that Suit No.2 is not barred by principle of res-judicata. Questioning the judgment and decree of the first appellate Court, defendant No.6-Tulsabai preferred this second appeal under Section 100 of the CPC, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.

7. Ms Sharmila Singhai, learned counsel for the appellants/legal representatives of defendant No.6, would submit that both the Courts below have concurrently erred in not holding Suit No.2 filed by the plaintiffs (daughter of Joginder Singh) to be barred by principle of res-judicata. In Suit No.1 Joginder Singh was arrayed as defendant No.4 and Nanhu's suit has been dismissed by the first appellate Court and affirmed up to the second

appellate Court and SLP having not been entertained, the principle of res-judicata would be squarely applicable in the present suit i.e. suit No.2, as such, the judgment and decree of both the Courts below deserve to be set aside on this ground alone by granting the appeal and the plaintiff's suit be dismissed by principle of res-judicata.

8. Mr. Ratan Pusty, learned counsel for respondents No.1 to 3/plaintiffs, would submit that in Suit No.1 title of Nanhu was adjudicated with regard to the property shown in Schedule 'A' appended with the plaint and he did not claim expressly with regard to the property shown in Schedule 'C' of the plaint, which was held by Joginder Singh, father of the plaintiffs. Since the suit property was expressly not claimed by Nanhu, therefore, title of Joginder Singh which he has acquired on the strength of sale deed dated 23.3.1976 (Ex.P-1) was never adjudicated in Suit No.1 and the plea of res-judicata would not be applicable, as such, both the Courts below have rightly held that the suit is not barred by principle of res-judicata.

9. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost

circumspection.

10. The question for consideration would be, whether the Suit No.2 from which this second appeal has arisen is barred by principle of res-judicata as enumerated under Section 11 of the CPC ?

11. In order to answer the plea raised at the Bar, it would be appropriate to consider first Section 11 of the CPC which states as under:-

"11. Res judicata- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto."

12. The object and purport of the principle of res judicata as contained in Section 11 of the CPC is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in

a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment. The doctrine of res judicata is conceived not only in larger public interest which requires that all litigation must, sooner than later, come to an end but is also founded on equity, justice and good conscience. (See Swamy Atmananda and others v. Sri Ramakrishna Tapovanam and others¹).

13. In the matter of Satyadhyan Ghosal v. Deorajin Devi² the Supreme Court has held that Section 11 CPC enacts the rule of conclusiveness of judgment as to the points decided, in every subsequent suit between the same parties.

14. Sir William B. Hale made remarkable observations on the applicability of principle of res judicata in the following words in the matter of Duchess of Kingstone's case [2 Smith Leading Cases, 13th Ed. Pages 644-645:

“From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first that the judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of

1 (2005) 10 SCC 51

2 AIR 1960 SC 941

exclusive jurisdiction, directly on the point, is in like manner, conclusive upon the same matter, between the same parties, coming, incidentally in question in another Court, for a different purpose. But neither the judgment of a Court of concurrent or exclusive jurisdiction, is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

15. The aforesaid dictum has been approved by the Supreme Court in the matter of Daryao Singh v. State of U.P.³.

16. The Supreme Court in the matter of Syed Mohd. Salie Labbai v. Mohd. Hanifa⁴ laid down the conditions for giving effect to the plea of res-judicata and it was held that the following conditions must be proved:-

- (i) That the litigating parties must be the same,
- (ii) that the subject-matter of the suit also must be identical,
- (iii) that the matter must be finally decided between the parties and
- (iv) that the suit must be decided by a Court of competent jurisdiction.

17. The Supreme Court has the opportunity to explain the principle of res judicata in the matter of Lal Chand v. Radha Krishna⁵ wherein it has been held that the principle of res judicata is conceived in the larger public interest which requires that all

3 AIR 1961 SC 1457

4 AIR 1976 SC 1569

5 AIR 1977 SC 789

litigation must, sooner than later, come to an end. The principle is also found on equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

18. The above-stated proposition has been followed by the Supreme Court in the matter of Sarguja Transport Service v. S.T.A. Tribunal Gwalior⁶.

19. Thus, in order to constitute a plea of res-judicata, the following conditions must be existed:

- (i) There must be two suits one former suit and the other subsequent suit;
- (ii) The Court which decided the former suit must be competent to try the subsequent suit;
- (iii) The matter directly and substantially in issue must be the same either actually or constructively in both the suits;
- (iv) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit;
- (v) The parties to the suits or the parties under whom they or any of them claim must be the same in both the suits;
- (vi) The parties in both the suits must have litigated under the same title.

20. In the matter of Jaswant Singh and Anr. v. Custodian of Evacuee Property, New Delhi⁷ it has been held by the Supreme Court that in order that a defence of res judicata may succeed, it is necessary

6 AIR 1987 SC 88
7 AIR 1985 SC 1096

to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings.

21. In the matter of Madhvi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai⁸ it has been held by the Supreme Court that there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision. So if no such issue is raised and if on any other issue, if incidentally any finding is recorded, it would not come within the periphery of the principle of res judicata.

22. In the matter of Kewal Singh v. Smt.Lajwanti⁹ it has been held by the Supreme Court that at the time when the plaintiff relinquished her first cause of action the defendant was nowhere in the picture, and there being no adjudication between the parties the doctrine of res judicata does not apply.

23. Reverting to the facts of the present case in the light of principle of res-judicata as enumerated

8 AIR 2000 SC 2301

9 (1980) 1 SCC 290

in Section 11 of the CPC and applying the principle of law laid down by the Supreme Court in the above-stated judgments (supra) to the facts of the present case, it would appear that in Suit No.1 filed by Nanhu the land bearing Khasra No.216/2 area 0.50 acre, which was held by Joginder Singh, father of the plaintiffs herein, was subject-matter of Suit No.1 and Joginder Singh was also impleaded as defendant No.4 in Suit No.1. Copy of earlier suit i.e. Suit No.1 was filed in the instant suit as Ex.P-4, wherein in para-5 the following averment was made:-

“5. यह कि फेरहिस्त स बाली जमीन को मृत ठंडाराम तारीख 3/3/1976 मु 2000/- रूपया में जोगीन्द्र पिता के पास बयनामा रजिस्ट्री कर देकर दखल कब्जा दे दिया तथा वह काबिज है। वादी को प्रतिवादी नं० 4 से कोई दावा पाना नहीं है केवल जमीन खरीदा है इसलिए बयनामा के फरीक बनाया है।”

24. A careful perusal of the aforesid averment would show that plaintiff-Nanhu in Suit No.1 has though included this suit lands bearing Khasra No.216/2, area 0.20 hectare (0.50 acre) held by Joginder Singh, but in para-5 he has clearly averred that he has nothing to do with the land held by defendant No.4-Joginder Singh and he was made formal party to Joginder in that suit for sake of convenience as defendant No.4 therein as he has purchased the suit property. Not only this, Suit NO.1 being Civil Suit

No.12A/81 was ultimately decreed on 25.3.85 (Ex.P-5) only with regard to the property shown in Schedule 'A' of the plaint though the issue was framed with regard to the property shown in Schedule 'C' of the plaint, but it was never adjudicated as plaintiff-Nanhu in that Suit No.1 had not claimed any title over other land including the suit land bearing Khasra No.216/2 area 0.50 acre and ultimately, the judgment and decree of the trial Court was set aside by the first appellate Court in Civil Appeal No.143A/83 on 2.1.86 (Ex.P-6) and the suit of Nanhu was dismissed and Second Appeal No.13 of 1986 filed by Nanhu was also dismissed by the High Court of Madhya Pradesh on 21.2.1994 (Ex.P-7) and SLP against the judgment of the Madhya Pradesh High Court was not entertained by the Hon'ble Supreme Court, as such, in Suit No.1 title of Nanhu was adjudicated only with respect to the property shown in Schedule 'A' of the plaint and it was not adjudicated with regard to the property shown in Schedule 'C' of the plaint (Khasra No.216/2 area 0.50 acre) held by Joginder Singh and the instant suit filed by legal representatives of Joginder Singh is with regard to the land bearing Khasra No.216/2 area 0.202 hectare (0.50 acre), as such, though there are two suits

i.e. earlier Civil Suit No.12A/81 (Suit No.1) and present Civil Suit No.15A/2002 (Suit NO.2) and Suit No.1 was decided by the court of competent jurisdiction and subject-matter in the former suit, adjudication was confined to only with regard to the property shown in Schedule 'A' of the plaint and the property of subsequent suit i.e. Suit No.2 was though included in Suit No.1, but it was only formal, it was mentioned in the suit, but title was not adjudicated as per plaint averments (para-5) of Suit No.1 noticed hereinabove and the judgment (Ex.P-5) in that suit, as such, it cannot be held that the matter directly and substantially in issue in the subsequent suit have been heard and finally decided by the Court in the former suit, as such, subject-matter of former suit No.1 was different than a subsequent suit No.2 and title of Joginder Singh, which is subject-matter of Suit No.2 which the plaintiffs are claiming being daughters was never an issue, considered and finally adjudicated in Suit No.1.

- 25.** In Suit No.1, Nanhu has claimed title with respect to the property shown in Schedule 'A' of the plaint of that suit and the suit property in Suit No.2 shown in Schedule 'C' was included in that

suit, but that was never adjudicated as plaintiff-Nanhu did not seek any adjudication claiming the relief against Joginder Singh, father of the plaintiffs claiming the including of suit land bearing Khasra No.216/2 and defendant No.4 as formal and only for sake of convenience. (See Isher Singh v. Sarwan Singh and others¹⁰ and Sajjadanashin Sayed Md. B.E. Edr.(D) by L.Rs. v. Musa Dadabhai Ummer and others¹¹.)

26. In the matter of Asrar Ahmed v. Duryah Committee, Ajmer¹² it has been held by the Privy Council that decisions on matters not alleged and denied or admitted within the meaning of Explanation III are decisions on matters incidental and collateral to the main issue in the case and will not operate as res judicata.

27. The Supreme Court in the matter of Ferro Alloys Corpn. Ltd. and another v. Union of India and others¹³ has held that before any issue is said to be heard and finally decided, the Court considering it has to be shown to have expressly considered such an issue and to have decided it one way or other and such decision should have obtained finality in hierarchy of proceedings. Then only such an issue

10 AIR 1965 SC 948

11 AIR 2000 SC 1238

12 AIR 1947 PC 1

13 (1999) 4 SCC 149

can be said to be heard and finally decided between the parties.

28. In view of the aforesaid analysis, I am of the considered opinion that title of Joginder Singh, father of the plaintiffs in Suit No.2 was never questioned in Suit No.1 filed by Nanhu, though Joginder Singh (father of the plaintiffs) was impleaded as defendant No.4 as per copy of plaint Ex.P-4 and in the judgment (Ex.P-5) an issue of Joginder Singh *qua* Nanhu was never adjudicated in Suit No.1, as such, plea of res judicata as already been held by the trial Court would not be attracted and rightly been affirmed by the first appellate Court, which is hereby re-affirmed.

29. As a fallout and consequence of the above-stated discussion, I do not find any merit in this second appeal. The appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

30. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-