

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 65 of 2018****Reserved on 26.06.2019****Pronounced on 11.07.2019**

1. Girdhari S/o Rewaram Lodhi Aged About 44 Years Occupation- Cultivator, R/o Village- Parasbod, Tahsil- Saja, District- Bemetara, Chhattisgarh.
 2. Bhagwati Wd/o Meenaram Lodhi Aged About 44 Years Occupation- Cultivator, R/o Village- Parasbod, Tahsil- Saja, District- Bemetara, Chhattisgarh.
- Appellants**

Versus

Barati @ Bhondu S/o Late Rewaram Lodhi Aged About 55 Years Occupation-Cultivator, R/o Village- Parasbod, Tahsil- Saja, District- Bemetara, Chhattisgarh.

---- Respondent

For Appellants:	Ms. Sharmila Singhai along with Ms. G. K. Chawla, Advocate.
For Respondent:	Shri P. R. Patankar along with Shri Vedant Bhelonde Advocate.

Single Bench: Hon'ble Shri Sanjay Agrawal, J**CAV Order/Judgment**

1. This miscellaneous appeal has been preferred by the Defendants questioning the legality and propriety of the judgment dated 28.06.2018 passed by the Learned District Judge, Bemetara in Civil Appeal No.19A/2017, whereby the judgment and decree dated 03.07.2017 passed by the Civil Judge, Class-II, Saja, District Bemetara in Civil Suit No. 22-A/2015 has been reversed and the matter has been remanded in exercise of its power enumerated under Order 41 Rule 23 of Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') for its decision afresh in accordance with law.

2. Briefly stated the facts of the case are that a suit for declaration of title, partition, separate possession and also for injunction has been

instituted by the Plaintiff/Respondent claiming one-third share over the suit property described in Plaint Schedule-'A'. It is alleged in the plaint that the property in question is the ancestral property which was inherited by his father Rewaram Lodhi upon death of his grandfather Ganesh, erstwhile owner of it. It is pleaded further that his mother Bhangeen Bai after obtaining certain properties from father got separated herself from the joint family and after that rest of the property, i.e., the suit land remained in the joint family property. According to further averments made in the plaint, the suit property described in Plaint Schedule 'A' was got partitioned by the Defendants without his knowledge and succeeded to get the revenue papers mutated on 04.03.1998. It is pleaded further by the Plaintiff that when he demanded partition of the suit land in the month of January, 2015, it was refused by them, therefore, he has been constrained to institute the suit in the instant nature.

3. Upon receiving the summons of the suit, an application seeking rejection of the plaint has been made by the Defendants alleging *inter-alia* that prior to the institution of the suit, the Plaintiff and his sons had filed a suit, being Civil Suit No. 13-A/2011 claiming declaration of title, injunction, possession and also for damages with respect to the properties bearing Khasra No.941 and 1832 admeasuring 2.61 and 3.50 hectares respectively situated at Village Parasbod, Tahsil Saja, District-Bemetara. The said suit was dismissed by the trial court vide its judgment and decree dated 27.09.2014, therefore, the instant suit as framed is not maintainable and liable to be rejected on the principles of *res judicata* as provided under Section 11 of CPC.

4. In reply to the aforesaid application, it is stated by the Plaintiff that

the subject matter involved in an earlier instituted suit is quite different from that of the present suit and stated further that the issue of *res judicata* involves a mixed question of law and fact and in absence of any issues being framed, it cannot be held that the suit is barred by the principles of *res judicata*.

5. After considering the aforesaid submissions of the parties, the trial Court vide its judgment dated 03.07.2017 arrived at a conclusion that since partition has already been effected on 04.03.1998 and was decided in an earlier instituted suit being Civil Suit No.13-A/2011 on 27.09.2014, the suit as framed is, therefore, barred by doctrine of *res judicata* under Section 11 of CPC. As a consequence, the suit is held to be not maintainable and accordingly, it was dismissed.

6. The aforesaid finding of the trial Court has been reversed by the lower appellate Court in an appeal preferred by the Plaintiff. It has been observed by the lower appellate Court that the subject matter involved in an earlier instituted suit was with regard to the declaration of title, possession and for damages in relation to the properties bearing Khasra No.941 and 1832 and is, therefore, distinct from the nature of the present suit where the claim for partition along with other reliefs have been made by the Plaintiff. It held further that the question of *res judicata* is not a pure question of law and in fact, it involves a mixed question of law and fact and in absence of furnishing the pleadings of the earlier instituted suit by the Appellants/Defendants, it cannot be dismissed on the principles of *res judicata*. In consequence, the matter has been remanded in exercise of the powers enumerated under Order 41 Rule 23 of CPC. This is the judgment which has been impugned by way of this appeal.

7. Ms. Sharmila Singhai, learned counsel for the Appellants submits that the judgment impugned has been passed by the Court below while reversing the findings of the trial Court by holding that the subject matter of earlier instituted suit is distinct from the nature of the present suit and is not liable to be rejected under Section 11 of CPC is apparently contrary to law. According to her, since the factum of partition has already been decided in an earlier suit, therefore, the present suit is specifically suffers from the principles of *res judicata*. Without considering the said issue in its proper manner, the Court below has committed an illegality in remanding the matter as such. In support, she placed her reliance upon the decision rendered in the matter ***Mohhamed Khan (Dead) through Legal Representatives Vs. Ibrahim Khan and another*** reported in (2018) 14 SCC 495.

8. On the other hand, Shri P. R. Patankar, learned counsel for the Respondent while supporting the judgment impugned submits that the nature of an earlier suit and reliefs claimed therein for declaration of title, possession and for damages in respect of the properties bearing Khasra No. 941 and 1832 are apparently distinct from the present suit and, therefore, the Court below has not committed any illegality in rejecting the appellants' said application. He submits further that the question of *res judicata* is a mixed question of law and fact and cannot be decided without issues being framed. In any case, in absence of pleadings of an earlier instituted suit, it cannot be held that the instant suit suffers from the principles of *res judicata* as contended by learned counsel for the Appellants. In support, he placed his reliance upon the principles laid down in the matter of ***Madhukar D. Shende Vs. Tarabai Aba Shedage***,

Sajjadanashin Sayed Md. B.E. Edr.(D) by Lrs. Vs. Musa Dadabhai Ummer and others and ***Kamala and others Vs. K. T. Eshwara SA and others*** reported respectively in **(2002) 2 SCC 85**, **(2000) 3 SCC 350** and **(2008) 12 SCC 661**.

9. I have heard learned Counsel for the parties and perused the entire papers annexed with this appeal carefully.

10. A suit for declaration of title, partition, possession and injunction was made by the Plaintiff in respect of the property in question described in Plaint Schedule-'A' situated at Village Parasbod, Tahsil Saja, District-Bemetara. According to the Plaintiff, the property in question was inherited by his father Rewaram, however, the Defendants have obtained the revenue papers recorded in their names on 04.03.1998 without his knowledge and when he demanded for partition, it was refused by them. A suit in the instant nature was, therefore, filed by him. Upon receiving the summons of the suit, the Defendants instead of filing their written statements, moved an application questioning the maintainability of the suit based upon the principles of *res judicata*. According to them, a suit being Civil Suit No.13-A/2011 was earlier instituted by the Plaintiff and his sons against them claiming declaration of title, possession, injunction and damages with regard to the properties bearing Khasra No.941 and 1832. The said suit was dismissed by the trial Court vide its judgment and decree dated 27.09.2014. It was the contention of the Defendants while furnishing the copy of the judgment of the same that since factum of partition has already been decided by upholding the said order dated 04.03.1998, therefore, the instant suit claiming partition along with other reliefs is not maintainable as it is hit by the principles of *res judicata* as provided under

Section 11 of CPC.

11. The said application was contested by the Plaintiff on the ground that since the subject matter involved in an earlier suit was different from that of the present suit, therefore, principles of *res judicata* as contended are not attracted and the suit cannot be dismissed without recording the evidence of the parties as it involves a mixed question of law and fact.

12. From perusal of the record, it appears that while raising the said issue in their application, pleadings of an earlier instituted suit have not been furnished. It is the settled principles of law that in order to ascertain the fact as to whether the suit suffers from the doctrine of *res judicata*, the pleadings of an earlier suit is essential and was required to be furnished. In absence thereof, it is difficult to hold that suit as framed is hit by the principles of *res judicata*, as contended by the Appellants.

13. Here in the instant matter, the Appellants while filing the said application has furnished the copy of the judgment of an earlier suit alone. However, merely furnishing the copy of the judgment passed in an earlier instituted suit would not be sufficient by itself to ascertain this issue as the question of *res judicata* is to be determined by referring to the pleadings, issues and judgment and decree of entire suit alone would not be sufficient to decide the said issue. In such circumstances, and in absence of proof of pleadings of the previous suit, the question of *res judicata* as raised by the Appellants cannot be accepted.

14. At this juncture, the observation made by the Supreme Court in the matter of ***Madhukar D. Shende Vs. Tarabai Aba Shedage*** (supra) is to be noted where it has been observed that the point of *res judicata* is a mixed question of law and fact and in absence of pleadings of an earlier

instituted suit, it cannot be held that the suit is barred by doctrine of *res judicata*. Yet in the matter of ***Sajjadanashin Sayed Md. B.E. Edr.(D) by Lrs. Vs. Musa Dadabhai Ummer and others*** (supra) wherein the same principle has been laid down at paragraph 18 as under:

“18. In India, Mulla has referred to similar tests (*Mulla*, 15th Edn., p. 104). The learned author says: a matter in respect of which *relief* is claimed in an earlier suit can be said to be generally a matter “directly and substantially” in issue but it does not mean that if the matter is one in respect of which no *relief* is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was “directly and substantially” in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon *the facts of the case*. The question arises as to what is the *test* for deciding into which category a case falls? One test is that if the issue was “*necessary*” to be decided for adjudicating on the principal issue and was decided, it would have to be treated as “directly and substantially” in issue *and* if it is clear that the judgment was in fact *based* upon that decision, then it would be *res judicata* in a latter case (*Mulla*, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (*Ishwer Singh v. Sarwan Singh* (AIR 1965 SC 948) and *Syed Mohd. Salie Labbai v. Mohd. Hanifa* {(1976) 4 SCC 780}). We are of the view that the above summary in *Mulla* is a correct statement of the law.”

15. In the matter of ***Kamala and others Vs. K. T. Eshwara SA and others*** (supra) wherein the trial judge allowed an application for rejection of the Plaint in a suit for partition of family properties and the same was affirmed by the High Court as well. An appeal against the order of the High Court was filed before the Supreme Court and after examining the scope, ambit and exercise of powers under Order 7 Rule 11 of CPC it has been

observed therein at paragraphs 21, 22 and 23 as under:-

21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.

23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

16. It is, thus, settled by the Supreme Court that one has to look only into the plaint averments for the purpose of deciding the application under Order 7 Rule 11 of CPC. It is evident from the plaint that while instituting a suit in the instant nature, the Plaintiff/Respondent has not given the details about the earlier suit, as was disclosed by the Appellants/Defendants by way of moving their application. In that sense, the Plaintiff/Respondent

may be guilty of suppression and concealment, if the disclosure made by the Appellants/Defendants is ultimately found to be proved. However, as per the established principles of law, such a plea as projected by the Appellants/Defendants cannot be looked into while deciding the said application for rejection of plaint on the principles of *res judicata*.

17. Now, in so far as the contention of Ms. Singhai based upon the principles laid down in the matter of ***Mohhamed Khan (Dead) through Legal Representatives Vs. Ibrahim Khan and another*** (supra) is, however, noted to be rejected. True it is that the pleadings of the previous suit in that matter were not produced, but it reveals in the said matter that the Plaintiff had filed a suit for possession based upon a sale deed dated 24.05.1972 by alleging, *inter alia*, that he was forcibly dispossessed by the Defendant in September, 1983 after the dismissal of his earlier suit by the trial Court on 21.02.1981, affirmed by the appellate Court on 16.07.1985. The said earlier suit was for declaration of title, possession and for injunction based upon the said sale deed. The Plaintiff was, therefore, claiming his right to title to the property and right of possession as well and during the pendency of the said suit (earlier suit) he was dispossessed in September, 1983. It was, therefore, observed that merely by giving different dates of dispossession would not be sufficient to hold that the principles of *res judicata* would not be attracted as the issue in the matter was directly and substantially the same. However, that is not the position here and, therefore, the said case law is distinguishable and would not come as a rescue for the Appellants.

18. In view of the foregoing discussions of the case and based upon the aforesaid observations of the Supreme Court, the dismissal of the suit by

the trial Court holding to be barred by *res judicata* is, therefore, rightly turned down by the lower appellate Court in an appeal preferred by the Plaintiff and I do not find any infirmity in the same. The judgment impugned, thus, deserves to be and is hereby affirmed.

19. Consequently, the appeal being devoid of merits is hereby dismissed. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE

Nikita