

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

910 SECOND APPEAL NO.389 OF 2014

Vishwanath s/o Kedaru Javale
Age 71 years, Occupation Agriculture,
R/o Kharosa Tq. Dist. Latur.
Through his Power of Attorney Holder
Sunil s/o Vishwanath Javale,
Age 40 years, occupation Agriculture,
R/o R/o Kharosa Tq. Dist. Latur. ...Appellant.

VERSUS

Annarao s/o Nagorao Javale,
Age 48 years, Occupation Agriculture,
R/o Kharosa Tq. AUSA Dist. Latur. ...Respondent

...
Mr. C. V. Bodkhe, Advocate holding for Mr. R. V. Gore,
Advocate for appellant.

Mr. S. N. Patil, Advocate for respondent.

...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 07-03-2019.

ORAL ORDER :

1. Present appeal has been filed by the original plaintiff challenging the Judgment and decree passed in Regular Civil Appeal 139 of 2009 by learned District Judge - 3, Latur on 03-02-2011. It was the appeal filed by him challenging the Judgment and decree passed in Regular Civil Suit No.371 of 2005 by 2nd Joint Civil Judge, Junior Division, AUSA Dist. Latur dated 29-08-2008. The said suit was dismissed which was filed by the plaintiff for possession.

2. The present appellant - original plaintiff had come with a case that, he is the owner and possessor of land bearing Survey No.4/B/2 Gut No.7 to the extent of 1 Acre 1 Guntha out of 1 H 33 R situated at village Ramwadi Ta. Ausa Dist. Latur. It has been also contended that, his father had dug a well in the said suit land and he himself had increased depth of the said well. He has also got the said property measured by Taluka Inspector of Land Records, Ausa on 03-07-1998. Defendant was annoyed with the actions by plaintiff, and therefore, he started obstructing the plaintiff and defendant had filed Regular Civil Suit No.339 of 1998 for injunction against the plaintiff. Plaintiff had filed counter claim in that suit, however the said suit as well as counter claim was dismissed. The counter claim was challenged in appeal by the plaintiff and the appeal was also dismissed. Again by taking disadvantage of those decisions, the defendants started obstructing the possession of the plaintiff over the suit land. Therefore, he had filed Regular Civil Suit No.139 of 2004. The said suit was also dismissed. Again the defendant took disadvantage of the said fact and dispossessed the plaintiff from the suit land on 30th August 2005. It has been submitted by the plaintiff that, the suit land is a fertile and irrigated land. He used to get income @ of Rs.16,000/- per year. He had also taken sugarcane crop for the season of 2002-2003. Under such circumstance he has prayed for possession of the suit land from the defendant and also the mesne profits.

3. The defendant has resisted the claim of the plaintiff by saying that, the number of the suit land was earlier Survey No.4 which was

the ancestral property of the ancestors of the plaintiff and defendant, that land was partitioned. The western side 3 Acres 10 Gunthas land was given to the grandfather of defendant Ratna Javale. Since then he and his predecessors were cultivating the said land. It is also contended by him that, he has sold 2 Acres and 9 Gunthas land from 3 Acres 10 Gunthas to one Jaiprakash Birajdar and he is still possessing the Eastern side 1 Acre 1 Guntha. He had filed Regular Civil Suit No.339 of 1998 for declaring his ownership over 3 Acres 10 Gunthas. In the said suit defendant i.e. present plaintiff had filed counter claim. The suit as well as counter claim were dismissed. The appeal filed by the defendant challenging the dismissal of the counter claim was also dismissed. Thereafter, the another suit which was filed by the plaintiff was also dismissed. Under such circumstance the present suit is barred by principle of *res judicata*.

4. Taking into consideration the rival contentions, issues came to be framed, parties have led oral as well as documentary evidence on record. Taking into consideration the evidence on record, the learned trial Court has held that the suit was barred by the principles of *res judicata* and therefore the suit was dismissed.

5. The present appellant had preferred Regular Civil Appeal No.139 of 2009 as aforesaid which was decided by District Judge-3, Latur and it has been dismissed on 03-02-2011, hence present second appeal.

6. Heard Mr. C. V. Bodkhe, learned advocate holding for Mr. R. V.

Gore for appellant and Mr. S. N. Patil, learned advocate for respondent. Perused the record and proceedings.

7. It has been vehemently argued on behalf of the appellant that, the learned trial Court in fact though framed in all eight issues, decided only one i.e. in respect of *res judicata*. The other issues have been answered as not surviving. This approach was not proper. Those other issues also ought to have been answered. It was also tried to be submitted that in the earlier proceedings the claim of the plaintiff was different and therefore there was no question of bar under Section 11 of the Code of Civil Procedure to the present suit. Both the learned Courts below have not considered the point in proper perspective, and therefore, substantial question of law is arising in this matter.

8. Per contra, the learned advocate appearing for the respondent submitted that, in Regular Civil Suit No.339 of 1998 which was filed by the present respondent, the present appellant was one of the defendant and he had raised a counter claim. A specific issue in respect of his ownership and possession was framed and it was answered in the negative. The counter claim was dismissed. The appeal filed by the defendant challenging the dismissal of his counter claim was also dismissed but thereafter plaintiff had filed Regular Civil Suit No.139 of 2004, it was also for perpetual injunction against the present respondent. The said suit came to be dismissed on 05-08-2005. The said decree was not challenged by the plaintiff and then he has filed the present suit wherein again the issue was in respect of his ownership and possession. When that finding has

achieved finality, it could not have been gone into again in the present suit and therefore the both the Courts below have rightly held that the suit was barred by principles of *res judicata*. He also submitted that, no substantial question of law arise.

9. The first and the foremost fact that is required to be seen as to whether the present appellant is able to point out any substantial question of law or not. If the substantial question of law are shown then only they are required to be framed and the matter deserves admission. The facts as regards the previous litigation are concerned, they are admitted. They are reiterated here for the sake of convenience with chronology. Regular Civil Suit No.339 of 1998 was filed by the present respondent on 09-07-1998. In that suit present appellant and other two persons were the defendants. The said suit was for declaration of ownership as well as perpetual injunction. The plaintiff therein i.e. present respondent had come with a case that, land Survey No.4/B/2 situated at village Ramwadi admeasuring 3 Acres 10 Gunthas was given in partition to his grandfather. It was tried to be contended that, the property was belonging to the family, that is 'Bhavki', of plaintiff and defendants. That means, the suit property involved in that suit was also the same as it is in the present case. In that suit the defendant No.1 therein i.e. present appellant had filed counter claim. It was prayed in that counter claim that, defendants No.1 to 3 are the owners and possessors of Gut No.4 i.e. the Survey No.4 admeasuring 1 H 33 R to the extent of western side 41 R. Consequential prayer of injunction was also prayed. The said suit as well as counter claim came to be dismissed on 04-11-2003. Perusal of the Judgment in

that matter would show that, a specific issue was framed regarding whether the defendants are the owners and possessors of land admeasuring 41 R towards the western side out of Gut No.7 admeasuring 1 H 33 R situated at village Ramwadi Tq.Ausa Dist. Latur. The finding was given in the negative. Further as aforesaid the appeal which was preferred by the defendants therein was also dismissed.

10. The second event in the chronology is that, the present appellant original plaintiff had filed Regular Civil Suit No.139 of 2004 on 19-04-2004 contending that, he is the owner and occupier of 1 H 33 R land from Survey No.4/3 situated at village Ramwadi and the defendant therein i.e. the present respondent is obstructing his possession, and therefore, he should be perpetually enjoined. Specific issues were framed taking into consideration the rival contention of the defendant that, whether the plaintiff has proved that he possessed 1 H 33 R land out of Gut No.7. The finding was given in negative. The said suit was also dismissed on 05-08-2005 and the admitted fact is that, no appeal was filed challenging the said Judgment and decree by the present appellant.

11. Now the third and the last event is that, the filing of the present suit in which the plaintiff has come with a case that, taking disadvantage of the dismissal of Regular Civil Suit No.139 of 2004, he has been dispossessed by the defendant. The factual aspect is to be noted is that, when he had come with a case that, he still possessed the suit land when that suit was filed on 19-04-2004 and then the competent Court come to the conclusion that he has failed

to prove his legal possession as on the date of the suit also. There was nothing on record to prove that, plaintiff was dispossessed after the decision in Regular Civil Suit No.139 of 2004 on 05-08-2005. In fact as per the decision in that suit, even on the date of that suit he was not in possession, therefore no cause of action was there for the present plaintiff to file the present suit. It appears that, he had come with a imaginary cause of action.

12. Now turning towards the point of *res judicata*, it appears that the learned trial Court had only considered the said point taking into consideration the documents on record. However, the learned first Appellate Court has gone into the other points also. In fact as per Order XIV Rule 2 of Code of Civil Procedure it was necessary for the Courts below to pronounce Judgment on all the issues. Sub-rule (2) of Rule 2 of Order XIV provides that,

“Although a suit can be disposed of on preliminary issue, the Court shall ordinarily pronounce Judgment on all issues; but where any issue relates to the jurisdiction of the Court or a bar created by any law for the time being in force, the Court may postpone settlement of the other issues until the preliminary issue with regard to the jurisdiction of the Court or such bar has been determined and the Court may deal with the suit in accordance with the determination of such preliminary issue.”

Thus Court would be justified in not answering the other issues if it decides to try one of the issues as preliminary issue. Here in this case it is not the situation. When all the issues were framed then as

per Sub-rule (1) Rule 2 of Order 14 it was incumbent upon the Court to pronounce Judgment on all the issues. However that does not give a right to the present appellant to get the appeal admitted for the simple reason that, the Appellate Court has pronounced finding in respect of all the points involved. The Judgment of the Appellate Court may be cryptic but taking into consideration base of the earlier case it has come to the conclusion that the plaintiff has failed to prove the ownership as well as possession over the suit property. No prejudice can be said to have been caused to the present appellant when the other issues were not answered.

13. Now turning to the point of *res judicata* it has been tried to be contended that, the prayer of the plaintiff in earlier suits was different and the nature of the suit was also different. Those suits were for injunction and the present is for possession and therefore there is no question of bar under Section 11 of the Code of Civil procedure. The main object of Section 11 of Code of Civil Procedure or the doctrine that has been laid down in the same is that, once a matter has been determined in a former proceeding, it should not be open to the parties to reagitate the matter again and again. The principle of *res judicata* is based on public policy and giving finality to a judicial decision. Once a *res judicata*, it shall not be adjudged again. Where a question whether of fact or of law has been decided between the parties in one suit or proceeding and the decision has attained finality (whether because no appeal was taken to a higher Court or because the appeal was dismissed, or because no appeal lay), neither party is allowed in a future suit or proceeding between the same parties to canvass the matter again [*Narayana Chettiar*

v/s. Annamalai Chettiar AIR 1959 SC 275; Satyadhan Ghosal v/s. Smt. Deoranjini Debi AIR 1960 SC 941]. It puts a bar on the Court to 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, was substantially raised and has been heard and finally decided by such Court.

14. In *Swamy Atmananda and Ors v/s. Sri Ramakrishna Tapovanam and Ors*, reported in *[JT (2005) 4 SC 472]* it was observed that ;

"The object and purport of principle of res judicata as contained in Section 11 of the Code of Civil Procedure 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 principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."

15. It is to be noted that, both the Courts who had dealt with Regular Civil Suit No.339 of 1998 and 139 of 2004 were the competent Courts of civil jurisdiction who were entitled to decide the suit for perpetual injunction. The principle of *res judicata* will apply to the issues also which were involved and one of the issue involved in both the suits was ownership of the present appellant. In both the suits it has been specifically held that the present appellant has failed to prove the ownership over the suit property. Further unless ownership is proved it cannot be said that he would be entitled to possession of the suit property. We may not be concerned with whether the defendant - respondent in this case was able to prove his title over the suit property or not. When the plaintiff cannot reagitate his own title and cannot demand a possession, that is sufficient to nonsuit him. Therefore from both the angles that is as regards failure to prove the cause of action as well as on the principle of *res judicata*, both the courts below have taken appropriate view. There is no error on their part to appreciate the facts as well as the law. Under such circumstance, no case is made out to admit the second appeal, hence second appeal is dismissed as **not admitted**. Send the record and proceeding to the concerned Court.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.