

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO.10586 OF 2019

APPARAO RAMA KOLEKAR  
VERSUS  
MANGALBAI DEVIDAS MANE AND OTHERS

Mr.K.K.Kulkarni, Advocate for the petitioner.

**( CORAM : Ravindra V.Ghuge, J.)**

**DATE : 27/08/2019**

PER COURT :

1. The petitioner/original defendant in RCS No.223/2012 is aggrieved by the impugned order dated 08/07/2019 passed by the Trial Court, by which his application Exh.56, has been rejected.

2. The learned Advocate for the petitioner submits that the respondents had preferred RCS No.312/2011 seeking partition and separate possession on 13/12/2011. When the suit was pending, the same plaintiffs filed another RCS No.223/2012 seeking partition and separate possession on 05/07/2012 concerning the same suit property. Subsequently, the 2011 suit was dismissed for want of prosecution on 04/01/2014. Exh.56 was filed by the petitioner on 11/12/2017 praying for an issue as regards *res-judicata* to be

framed. This request was made after 4 years when the earlier suit was dismissed in default.

3. The Trial Court has concluded that in the earlier suit, there was no decision on the merits of the claims and as such, the issue raised in the subsequent suit was not substantially considered and adjudicated upon in an earlier suit so as to attract the bar of *res-judicata*.

4. It is undisputed that the 2011 suit was dismissed in default. The defendants' claim that they have no knowledge of the earlier suit. This knowledge was gathered in December 2017 and therefore Exh.56 was filed on 11/12/2017.

5. Considering the above, I do not find that the issue of *res-judicata* would be attracted. The impugned order dated 08/07/2019 is restricted to the prayer of the petitioner to frame an issue as to whether the second suit is affected by the principle of *res-judicata*. This petition being devoid of merit, is therefore dismissed.

6. Needless to state, the issue whether the filing of RCS No.223/2012 on 05/07/2012, was permissible in view of RCS

No.312/2011 filed on 13/12/2011, when both the suits were for partition and separate possession filed by the same plaintiff, is kept open.

**( Ravindra V.Ghuge, J.)**