

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.163 OF 2018
WITH
CIVIL APPLICATION NO. 222 OF 2018
IN
APPEAL FROM ORDER NO.163 OF 2018
WITH
CIVIL APPLICATION NO. 703 OF 2019
IN
APPEAL FROM ORDER NO.163 OF 2018**

Karna Shripad Ande and Ors. Appellants
V/s.
Smt. Bebibai Uma Gode and Ors. Respondents

Shri Girish R. Agrawal, Advocate for Appellants.
Shri Sunil Dighe, Advocate for Respondents.

**CORAM : M. S. KARNIK, J.
DATE : 24th JUNE, 2019.**

P. C.:

Admit.

2. By consent of the parties the matter is heard finally.
3. The Appellants herein - the Original Defendant nos. 1 to 7 have challenged the order dated 6th January, 2018 passed by District Judge-8, Nashik in Appeal against the order passed by the Trial Court dismissing the suit filed by the plaintiffs on the ground

that the said suit is barred by res-judicata. Learned counsel for the Appellants invited my attention to the averments made in the plaint by the mother of the respondents in Regular Civil Suit No. 67 of 2007 instituted earlier in point of time. It is the contention of the learned counsel for the appellants that the mother of the present plaintiffs previously filed Regular Civil Suit No. 67 of 2007 and the plaintiffs herein were party defendant nos.6 to 10 in the said suit. Learned Counsel for the appellants invited my attention to the judgment and decree dated 23rd November, 2009 passed by the Learned Judge in RCS No. 67 of 2007. It is submitted by learned counsel for the appellants that the present plaintiffs who were the defendant nos. 6to 13 in the said suit, by filing written statement at exhibit no. 28 had accepted the plaint and the suit filed by their mother. He would further invite my attention to the averments made in the plaint in RCS No. 67 of 2007 and contended that on the basis of the very same averments which formed the basis for the dismissal of RCS No. 67 of 2007, the plaintiffs instituted the present suit. In the submission of learned counsel, the suit is barred by principles of res judicata.

4. Before the trial court an application was filed by the appellants/original defendant nos. 1 to 7 that the suit be dismissed as it is hit by the principles of res judicata. The Trial Court proceeded to hear the application and passed an order dated 2nd January, 2015 allowing the application below exhibit 47 and held that the suit is hit by principles of res judicata. Accordingly, necessary orders were passed below Exhibit-1.

5. Being aggrieved by the order, the original plaintiffs filed Regular Civil Appeal No.103 of 2016 before the Principal District Judge, Nashik at Nashik. The First Appellate Court by the impugned order held that when a plea of res judicata is raised then the issue must be framed and then only trial court can proceed to decide the application. The said issue not having been framed by the trial court as preliminary issue, the appellate court set aside the order passed by the trial court and remanded the matter to the trial court for framing such issue and then decide the matter afresh.

6. Learned Counsel for the appellant would rely on the decision of Apex Court in the case of ***Rishabh Chand Jain and***

Another V/s. Ginesh Chandra Jain reported in **2017 (1) Mh.L.J.16** in support of his submissions. He would thus contend that the appellate court was in error in remanding the matter back to the trial court only on the ground that the trial court did not frame the issue. He would also rely upon the decision of Apex Court in the case of ***Abdul Rahman v. Prasony Bai*** reported in **2003 AIR SCW 14**.

7. Learned Counsel for the respondents/original plaintiffs on the other hand supported the order passed by the Appellate Court. He would submit that considering the averments made in the plaint and the application it was necessary for the trial court to have framed the necessary issue. He would submit that in the absence of there being any evidence on record, the recourse of the First Appellate Court is justified.

8. Heard learned counsel for the parties.

9. The First Appellate Court has remanded the matter to the trial Court observing that the trial Court should frame preliminary issue as a plea of res-judicata is raised. It is further

observed by the Appellate Court that the trial Court shall frame the issue of res-judicata from the pleadings and shall decide the preliminary issue in the facts and circumstances by giving an opportunity to both sides to lead their evidence. In my opinion, when the trial Court did not frame a specific issue of res judicata, whether the plea of res judicata can be decided without any evidence on record on the basis of the stand taken by the present plaintiffs in a previously instituted suit which came to be dismissed calls for a deliberation by the First Appellate Court in the facts of the present case.

10. In the present case, it is specific contention of the appellants – original defendant Nos. 1 to 7 that the averments made in the Plaint in the suit instituted by their mother on the previous occasion were accepted by the respondents – original defendant Nos. 6 to 13. This previously instituted suit by the mother came to be dismissed.

11. The Appellate Court has proceeded on the footing that as the issue of res judicata was not framed the order passed by the

trial Court is vitiated. No doubt, the present suit was yet to reach the stage of evidence. It is true that the trial Court passed an order on an application made by the defendants that the suit is barred by res judicata without recording any evidence in the present suit. This was at a stage on an application made by defendants only because the present plaintiffs had admitted the averments made in the Plaint in the previously instituted suit by their mother. The present plaintiffs were party defendants to the suit instituted by their mother. The Appellate Court should have considered whether these facts by itself are sufficient to constitute res judicata without framing a preliminary issue or whether for deciding this question in the fact situation of the present case it necessarily calls for leading evidence. Undoubtedly, if the Appellate Court does come to a conclusion that the facts on record and the case as made out by the plaintiffs are not sufficient to uphold the plea of res judicata without evidence, the Appellate Court would then obviously proceed to issue appropriate direction to the trial Court to frame a preliminary issue of res judicata while remanding the matter.

12. I am conscious that in the present suit the evidence is yet to be recorded. The observations of the Apex Court also are in the context where the parties went to trial fully knowing the rival case after leading evidence in support of their respective contentions. It was only that a specific issue of res judicata was not framed.

13. However, in the facts of the present case, since the contention is raised by the defendants that the suit is barred by res judicata on account of dismissal of an earlier suit in which the Plaintiff in the earlier Suit was admitted by the defendant Nos. 6 to 12 who are now the plaintiffs, and as even the preliminary suit was dismissed after evidence was recorded, it is necessary to examine whether this can by itself form the basis of upholding the plea of res judicata without the necessity of framing an issue of res judicata and without recording evidence. As indicated earlier the Appellate Court has only proceeded on the footing that merely because the issue of res judicata is not framed as preliminary issue by the trial Court, the order of the trial Court would stand vitiated.

14. It is made clear that the Appellate Court shall consider the Appeal afresh on its own merits and without being influenced by any observations made by me in this order. It is again made clear that I have not expressed any opinion on this aspect but this remand is only to enable the First Appellate Court to examine the question whether the issue of res judicata is required to be framed as a preliminary issue or not in the facts and circumstances of the present case and in the light of law laid down by the Apex Court.

15. All the contentions of the parties are kept open.

16. The Appeal is remanded to the Appellate Court for a fresh decision in accordance with law.

(M. S. KARNIK, J.)