

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 795 OF 2005

1. Shrikant Waman Pawaskar

Age : 69 years, Occupation : Service

2. Mrs. Savita Shrikant Pawaskar

Age : 64 years, Occupation : Household work

3. Sachin Shrikant Pawaskar

Age : 29 years, Occupation : Service

All R/at : Shashi Bhuwan, Nivkhol,

Tal. Dist : Ratnagiri

....Appellants

(Orig. Defendants)

V/s.

Mrs. Deepali Dinanath Pawaskar

Aged : 58 years, Occupation : Service

R/at : Shashi Bhuwan, Nivkhol,

Tal. Dist : Ratnagiri

...Respondent

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Mr. Rakesh Bhatkar, Advocate for the Appellants.

Mr. V.S. Sawant i/by. Mr. P.M. Jadhav, Advocate for the
Respondent.

CORAM : SANDEEP K. SHINDE, J.

JUDGMENT RESD ON : 8TH MARCH, 2019.

JUDGMENT PRON. ON : 16TH APRIL, 2019.

JUDGMENT :

1. Heard learned Counsel for the parties.
2. This Appeal involves the following substantial question of law :

“Rejection of first suit on the ground that the same was premature and not on merits, whether the finding rendered in the first suit would be binding the parties, as well as, the learned trial Judge in the second suit on the ground of res-judicata ?

3. This Appeal is preferred by the defendant against the decree of possession passed in Regular Civil Suit No. 105 of 2000 at the instance of the respondent-plaintiff which was confirmed by the learned Joint District Judge, Ratnagiri by judgment and order dated 18th February, 2005 passed in Regular Civil Appeal No. 57 of 2001.

4. I will refer the parties as per the status in the trial Court. The plaintiff's father-in-law, Waman bequeathed the suit property to her by Will dated 5th May, 1978. Her father-in-law died on 15th January, 1983. Brothers-in-law, of plaintiff, namely Shrikant and Sachin had filed Regular Civil Suit No. 86 of 1985 for partition of the suit property. In the said suit, the plaintiff had proved a Will dated 5th May, 1978 and therefore the said suit was dismissed. Against the decree in Regular Civil Suit No. 86 of 1985, the brothers-in-law of the plaintiff filed Civil Appeal No. 50 of 1993 in the District Court at Ratnagiri.

5. Pending Regular Civil Appeal No. 50 of 1993, the plaintiff had filed Regular Civil Suit No. 98 of 1993 against her brothers-in-law to recover the suit property (hereinafter called as "the first suit").

6. The first suit was dismissed by the learned Judge by judgment and order dated 31st August, 1995. One of the issues in the first suit was;

“Whether the suit is premature?”

7. Admittedly, the first suit was instituted when the Regular Civil Appeal preferred by the plaintiff's brothers-in-law against the decree in Regular Civil Suit No. 86 of 1985, was pending. On the backdrop of these facts, the learned Judge recorded a finding as under :

. To attract the principle of res-judicata contemplated by Section 11 Civil Procedure Code, it is no doubt necessary to prove that the suit has been heard and finally decided by the Competent Authority. The fact in issue regarding Will is yet to be heard and finally decided by this Court (emphasis supplied).

Thus the first suit was dismissed on the ground that the factum of Will being proved by the plaintiff had not attained finality.

8. I have gone through the judgment in the first

suit which was predominantly dismissed on the ground of having found it was premature because the date on which this suit was instituted, the findings relating to the factum of proving the Will had not attained finality as the Appeal, against the decree passed in Regular Civil Suit No. 86 of 1985 was pending in the District Court.

9. It may be stated that, Regular Civil Appeal No. 50 of 1993 was dismissed for default.

10. That since the learned Judge refused the decree of possession of the suit property in the first suit on the ground that, it was pre-mature, the plaintiff has filed the Regular Civil Suit No. 105 of 2000 (Second suit for short) for possession of the suit property from her brothers-in-law. This suit was resisted by the defendant's (brothers-in-law) on the ground that the plaintiff neither probated the will nor obtained letters of administration of the Will. In the alternative plea of adverse possession was also raised. Besides, the suit was also resisted on the ground that it (second suit) was barred by the principles

of res-judicata. The learned trial Judge, as well as, the Appellate Court in Regular Civil Appeal No. 57 of 2001 held that since the first suit was dismissed, being premature, the issue was not heard finally and decided in the first suit. Aggrieved by the concurrent findings rendered by the the trial Court and the Appellate Court, this appeal is preferred which has been admitted on the aforesaid substantial question of law.

11. It is not that every matter decided in a former suit, can be pleaded as res-judicata in a subsequent suit. To consider a matter “res-judicata”, one of the conditions is, the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. To support the plea of res-judicata, it is not enough that the same matter shall be in issue. It is also important that the matter was heard and finally decided. The expression “heard and finally decided” refers to a matter on which the Court, having exercised its judicial mind, has recorded a finding and arrived at a decision on a contested matter.

12. Mr. Sawant, the learned Counsel appearing for the respondent would contend that, when the first suit was dismissed having found it was pre-mature, subsequent suit cannot be said to be barred by res-judicata. Mr. Sawant, has relied upon the judgment of the Apex Court in the case of **Sheodan Singh v. Daryao Kunwar, reported in AIR 1966 Supreme Court 1332 (V 53 C 257)**, wherein it is held that -

“In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff 's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground

of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit.”

. In the case at hand, the first suit was dismissed predominantly on the ground that it was premature and therefore the latter suit was not barred by res-judicata.

13. The learned Counsel appearing for the appellant, has relied on the judgment of the Privy Council in the case of **Kumar Chandra Singh Dudhoria and 9 Ors v. Midnapore Zemindary Co. Ltd. reported in A.I.R. (29) 1942 Privy Council 8**, wherein it is held :

“a decree in a suit expressed to be “subjected to the final decision” of the Privy Council in another case is not a final decree within the meaning of Section 11 and the only proper course in such a case is to adjourn the suit without making any decree, until the final

determination of the other suit.”

. In fact in this case, the learned trial Judge ought to have stayed the proceedings in the first suit since the findings relating to the factum of proving the Will had not attained finality. However, the learned Judge proceeded to frame the issues and dismissed it on the ground that it was a premature suit.

14. The learned Counsel appearing for the appellant has relied on the judgment in the case of **Parsotam Gir (Plaintiff) v. Narbada Gir (Defendant)** reported in P.C. 1899 505 Allahabad Series 22nd March. He has also relied on the judgment in the case of **Guduru Ramarayudu v. Mallela Manikya Roa and Others**, reported in A.I.R. (33) 1946 Madras 372. So far as the judgment in the case of *Parsotam Gir* (supra) is concerned, it was held that -

“in a former suit between the same parties that were now in litigation, in which the same claim upon the title was made, a decree dismissed the suit. But the judgment in the former suit stated that it was left open

to the plaintiff to sue again, and that no matters affecting the rights of the parties were decided between them. Held, that the prior decree was not a final decision within the meaning of Section 13 of the Code of Civil Procedure, and the defence of res-judicata was not maintained”.

. And so far as the case of *Guduru* (supra) is concerned, it has been held that -

“The general rule is that, a party to the suit cannot in a subsequent proceeding be heard to allege that a decree obtained by him in a former litigation was obtained as a result of collusion between himself and the plaintiff. ”

I am of the opinion that, the case of *Guduru* (supra) has no application to the facts of the matter at hand.

14. Thus, taking into consideration the facts of the case and the ratio laid down in the case of *Shedon Singh* (supra), I hold and conclude that since the rejection of the first suit on the ground that the same was premature and not on merits, the findings rendered in the first suit are

not binding on the parties, as well as, on the learned trial Judge in the second suit on the ground of res-judicata. The Question is answered accordingly.

15. In view of this, the Appeal is dismissed with no order as to costs.

(SANDEEP K. SHINDE, J.)