

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.337 of 2008**

Loknath @ Laxmi Narayan Sahu (Dead) through LR's

(i) Smt. Sandhya Rani, aged about 48 years, Widow of Loknath Sahu,

(ii) Labhan Singh Sahu, aged 22 years, Daughter of Loknath Sahu

(iii) Lohit Kumar Sahu, aged 21 years, son of Loknath Sahu

(iv) Lalas Sahu, aged 18 years, Daughter of Loknath Sahu, and

(v) Lokshakti sahu,, aged 16 years, Daughter of Loknath Sahu

No.(v) minor thorough mother & natural guradian Smt.Sandhya Rani

All resident of Ward No.10, Ganjapara, Mahasamund, District Mahasamund (CG)

----- Appellants/Plaintiffs

Versus

1. Harishchandra, son of Kamla Prasad Sahu, aged 50 years,
2. Smt. Shanti Bai, daughter of Kamla Prasad, wife of Durgaprasad,
3. Hemant @ Golu, son of Harishchandra, aged 22 years,
All resident of Kurmipara, Behind Shri Ram Mandir, P.S. and District Mahasamund (Chhattisgarh)
4. Bisahin Bai, daughter of Late Lallu @ Baldev Teli, wife of Ramkishun, Village Kakdehi, Samouda, permanent resident of Village Devri (Ranisagar, Gullu) Arang, District Raipur (Chhattisgarh)
5. Smt. Savita Kumari, aged 25 years, guardian Bisahin Bai Sahu, wife of Gajendra Kumar Sahu, resident of Village Khirsali (Bandaure), Achanakpur, Thana Tumgaon, Tahsil and District Mahasamund (Chhattisgarh)
6. Devram @ Anju, aged 24 years, guardian Bisahin Bai, resident of Bazar Ward, P.S. and District Mahasamund (Chhattisgarh)

7.State of Chhattisgarh, Through Collector, Mahasamund
(Chhattisgarh)

----- Respondents/Defendants

For LR's of Appellant/Plaintiff:

Mr.H.B.Agrawal, Senior Advocate
with Mrs.Preeti Yadav, Advocate

For Respondent NO.1: Mr.Manoj Paranjape, Advocate

For Res.No.2 & 3: Mr.A.K.Prasad, Advocate

For Respondent No.7: Mr.Anshuman Rabra, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

24/02/2020

1.The substantial question of law involved, formulated
and to be answered in this second appeal preferred
by the appellant/plaintiff is as under:-

"Whether both the courts below were
justified in dismissing the suit holding it
to be hit by principle of res judicata as
contained in Section 11 of the Code of Civil
Procedure, 1908 ignoring the fact that
principle of res judicata is mixed question
of law and fact and it can only be
adjudicated after evidence of the parties is
recorded and that too by recording a
finding, which is perverse to the record ?"

[For the sake of convenience, the parties
would be referred hereinafter as per their
status shown and nomenclature in the suit
before the trial Court].

2. The plaintiff filed a suit for possession stating
inter-alia that he is title-holder of the suit land
and as such, entitled for possession over the suit

land shown in Schedule 'A' appended with the plaint, in which the defendant filed his written statement stating inter-alia that the suit is barred by principle of res judicata, in which, the trial Court on 13.11.2000 has framed the issues including the issue of res judicata being Issue No.5 and thereafter Issue No.5 was taken as preliminary issue before recording evidence and by order dated 9.8.2005 the suit was dismissed as barred by principle of res judicata. On appeal being preferred by the plaintiff, the the first appellate Court affirmed the same. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.

3. Mr.H.B.Agrawal, learned Senior Advocate with Mrs.Preeti Yadav, learned counsel for legal representatives of the appellant/plaintiff, would submit that the question of res judicata does not strike to the root of the jurisdiction of the Court trying subsequent suit and therefore, it could not have been taken as a preliminary issue by the trial

Court under Order 14 Rule 2(2)(b) of the CPC. He would further submit that the plea of res judicata is a mixed question of law and fact and it could not have been decided without recording evidence of the parties. He placed reliance upon the judgments of the Supreme Court in the matters of V. Rajeshwari (Smt.) v. T.C. Saravanabava¹, Vaish Aggarwal Panchayat v. Inder Kumar & others² and Foreshore Cooperative Housing Society Limited v. Praveen D. Desai (Dead) Through Legal Representative and others³ in support of his submission.

4. On the other hand, Mr. Manoj Paranjape, learned counsel for respondent No.1 and Mr. A.K. Prasad, learned counsel for respondents No.2 and 3, would submit that both the Courts below have rightly dismissed the suit as barred by principle of res judicata.

5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

6. In order to decide the plea raised as the Bar, it would be appropriate to re-produce the provisions contained in Order 14 Rule 2 of the CPC which states

1 (2004) 1 SCC 551

2 AIR 2015 SC 3357

3 (2015) 6 SCC 412

as under:-

"ORDER 14-Settlement of Issues and Determination of Suit on issues of Law or on Issues Agreed upon.

2. Court to pronounce judgment on all issues.-(1) Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues."

(2) Where the issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or
(b) a bar to the suit created by any law for the time being in force."

7. A careful reading of sub-rule 2(b) of Rule 14(2) of the Code of Civil Procedure would show that the issue relating to jurisdiction of the Court or the bar to the suit created by any law for the time being in force can be taken as a preliminary issue covered by Order 14 Rule 2(a) of the CPC.

8. The issue raised herein is no-longer res integra and stand decided by Their Lordships of the Supreme Court; however, for sake of convenience, some of judgments may be noticed gainfully herein.

9. In the matter of Ramrameshwari Devi v. Nirmala Devi⁴ while dealing with Order 14 Rule 2, Their Lordships of the Supreme Court have held as under:-

"25. Sub-rule (2) of Order 14 refers to the

4 (2011) 8 SCC 249

discretion given to the court where the court may try an issue relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as a preliminary issue."

- 10.** The controversy pertaining to the provisions contained in Order 14 Rule 2 had come up for consideration before Their Lordships of the Supreme Court in Major S.S. Khana v. Brig. F.J. Dillion⁵, wherein it has been ruled thus:-

"18 Under Order 14 Rule 2 of the Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lopsided trial of the suit."

- 11.** In Ramesh B. Desai V. Bipin Vadilal Mehta⁶, while dealing with the issue of limitation, Their Lordships of the Supreme Court opined that:

"19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting

5 AIR 1964 SC 497

6 (2006) 5 SCC 638

point of limitation has to be ascertained which is entirely a question of fact."

The Court further proceeded to state that a plea of limitation is a mixed question of fact and law. On a plain consideration of the language employed in sub-rule (2) of Order 14 it can be stated with certitude that when an issue requires an inquiry into facts it cannot be tried as a preliminary issue. In the said judgment the Supreme Court opined as follows:

"13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before the Supreme Court in **Major S.S. Khanna** (supra) and it was held as under:-

"18..... Under Order 14 Rule 2 of the Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issue. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit.'

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above-quoted decision still

holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

12.

13. Very recently, Their Lordships of the Supreme Court while taking note of the judgments of the Supreme Court in the matters of Ramrameshwari Devi (supra), Major S.S. Khanna (supra) & Ramesh B. Desai (supra) in the matter of Satti Paradesi Samadhi and Pillayar Temple Vs. M. Sankuntala (Dead) through legal representatives and others⁷ have held that issue requiring inquiry into the facts cannot be tried as preliminary issue and further held issue of bar of limitation requiring inquiry into facts cannot be tried as a preliminary issue and observed in paragraph 16 as under:-

"16. We have not expressed any opinion with regard to the issue of limitation except saying that the present issue could not have been taken up as a preliminary issue. As the suit is pending since 1997 we would request the learned Single Judge of the High Court of Madras to dispose of the suit as expeditiously as possible."

14. Now, the question would be issue of res judicata is an issue relates to jurisdiction of the Court as enumerated in Order 14 Rule 2 (2) (b) of the CPC.
15. The principle of res judicata has been codified

7 (2015) 5 SCC 674

in Section 11 of the CPC, which states as under:-

"11. Res judicata.- No Court shall 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, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.-For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so

litigating. Explanation VII-The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.- An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

16. The Supreme Court in the matter of Sheodan Singh v. Daryao Kunwar⁸ has laid down the law relating to the essential elements that need to be satisfied before a plea of res judicata can be raised by a party. Paragraph 9 of the report states as under:-

"9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely-(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit; (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (iii) The parties must have litigated under the same title in the former suit; (iv) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and (v) 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."

- 17.** The above legal principles laid down by the Supreme Court has been followed in the matter of Syed Mohd. Salie Labbai v. Mohd. Hanifa⁹ and held as under:-

"7..... it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved:

'(1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction."

- 18.** Following the above referred judgments, the Supreme Court in the matter of City Municipal Council Bhalki, by its Chief Officer Vs. Gurappa (dead) by legal representatives and another¹⁰ has held as under:-

"21. Thus, for the bar of res judicata to operate in the subsequent original suit proceedings, the litigating parties must be the same, and the subject-matter of the suit must also be identical. Further, it has also been held by this Court in Ram Gobinda Dawan v. Bhaktabala that for the bar of res judicata to operate in the subsequent original suit proceedings, the decision in the former suit must have been decided on merits on the same substantial questions both on facts and in law that would arise in the subsequent original suit."

9 (1976) 4 SCC 780

10 (2016) 2 SCC 200

19. Thus, in order to press the plea of res judicate in service, the contesting party must be the same and identical and the subject matter must be decided finally between the parties and that too by the court of competent jurisdiction and, therefore, in order to establish the essential elements of res judicata, it is required to be established by filing pleadings and leading evidence.

20. Way back in the matter of Ram Harakh (DEAD) BY LRS. v. Hamid Ahmed Khan (DEAD) BY LRS. and others¹¹, Their Lordships of the Supreme Court has clearly held that issue of res judicata is a mixed question of law and facts and held as under:-

"7.Therefore, the moot question arises for consideration whether there was really a decree of a competent court in the first suit rendered by the civil court and whether it had become final. All these aspects would be required to be considered before the plea of res judicata could be entertained. Such a contention of res judicata based on mixed questions of law and facts, therefore, cannot be entertained by us for the first time at this stage."

21. Likewise, similar proposition has been laid down by the Supreme Court in the matter of Madhukar D. Shende v. Tarabai Aba Shedage¹², in which, again Their Lordships held that plea of res judicata is a question of fact and law as it requires recording of

11 (1998) 7 SCC 484

12 AIR 2002 SC 637

evidence. Paragraph 14 of the report states as under:-

"14.We are not inclined, in the facts and circumstances of this case, to weight the admissibility and binding efficacy of the decision rendered in the earlier suit on the doctrine of res judicata and holding the earlier decisions as conclusive between the parties. Res judicata is a mixed question of fact and law. We do not find the plea of res judicata having been raised in the plaint. Copies of pleadings and issues framed in the earlier suit have not been tendered in evidence and we do not find any issue on res judicata having been framed and tried between the parties in the present suit. No submission raising the plea of res judicata was made before any of the courts below or the High Court. We do not think such a plea can be permitted to be raised before this Court for the first time and at the hearing."

22. On the basis of above-stated analysis, it is held that issue of res judicata though relates to jurisdiction of the court but as it is a mixed question of law & fact and, as such, Order 14 Rule 2(2)(b) of the CPC is not attracted as it is not a pure question of jurisdiction and, therefore, the trial Court is absolutely unjustified in taking the issue of res judicata as a preliminary issue and first appellate Court also failed to notice the said fact and committed illegality in affirming the order of trial Court dismissing the suit.

23. In view of the aforesaid analysis, this Court is

opinion that the judgment of the trial Court taking the issue of res judicata as a preliminary issue and thereby dismissing the suit is hereby set aside and as a consequence judgment & decree of the first appellate Court is also set aside and Civil Suit No.51A/2005 is restored to the file of 2nd Civil Judge, Class-I, Mahasamund, District Mahasamund for hearing and disposal in accordance with law. Since the suit was filed way back on 26.2.81, the trial Court is directed to conclude the trial on or before 15th May, 2020. The District Judge, Mahasamund is also directed to see that the matter is disposed of on or before 15th May, 2020. The parties are directed to appear before the trial Court on **16th March, 2020**. No further notice would be required.

24. The second appeal is allowed to the extent indicated hereinabove. A copy of this order be sent to the District Judge, Mahasamund.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-