

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.136 of 2008****Judgment reserved on :03.02.2020****Judgment delivered on:12.02.2020**

Jaibunniyan (since dead)

1. Samiullah, aged about 38 years, Son of Shri Ajimulla;

2. Kalimullah, aged about 30 years, Son of Shri Ajimulla,

Both resident of Marwahi, Tahsil Pendraroad, District Bilaspur (CG)

3. Sarwari Begum (wrongly mentioned as Sakhri Begum), aged about 32 years, D/o Shri Ajimulla, wife of Shri Rafique Khan, Resident of Sihoraroad, Jabalpur (M.P.)

4. Hamid Ullah, aged about 22 years, Son of Shri Ajimulla;

5. Animullah, aged about 20 years, Son of Shri Ajimulla,

Both resident of Marwahi, Tahsil Pendraroad, District Bilaspur (CG)

6. Shabnam Begum, aged about 25 years, Wife of Shri Wahid Khan, D/o Shri Ajimulla, Resident of Marwahi, Tahsil Pendraroad, District Bilaspur (CG). At residing at Purani Basti, Shahdol (M.P.)

----- Appellants/Defendants No.4 to 10**Versus**

1. Mohd. Sidhdik, aged about 35 years, Son of Late Shri Safiullah;

2. Mohd. Rafique, aged about 33 years, Son of Late Shri Safiullah;

All resident of Village Marwahi, Tahsil Pendraroad, District Bilaspur (CG)

3. Abdul Hasan (Dead) through LR's

a. Abdul Samad, aged about 46 years, S/o Late Abdul Hasan, Occupation Business, R/o Marwahi, Post Marwahi, Distrit Bilaspur (CG)

b. Rabiya Begam, aged about 44 years, W/o Ramjan Khan, R/o. Jharkhand, Post Manendragarh, District Koriya (CG)

c. Abdul Shahid, aged about 42 years, S/o Late Abdul Hasan, R/o Marwahi, Post Marwahi, District Bilaspur (CG)

d. Sabra Begam, aged about 40 years, D/o late Abdul Hasan, R/o Marwahi, Post Marwahi, District Bilaspur (CG)

e. Abdul Rashid, aged about 38 years, S/o Late Abdul Hasan, R/o. Marwahi, Post Marwahi, District Bilaspur (CG)

f. Rakhiya Begam, W/o Salim Khan, aged about 36 years, R/o Marwahi, Post Marwahi, District Bilaspur (CG)

g. Abdul Wahid, aged about 34 years, S/o late Abdul Hasan, R/o Marwahi, Post Marwahi, District Bilaspur (CG)

h. Abdul Hamid, S/o Late Abdul Hasan, aged about 32 years, R/o Marwahi, Post Marwahi, District Bilaspur (CG)

----- **Plaintiffs NO.1 to 3**

4. Sattar Mohammed, aged about 65 years, Son of Late Shri Karamat Khan;

5. Barkatutta, aged about 57 years, Son of late Shri Karamat Khan;

6. Mohd. Naim, aged about 55 years, Son Late Shri Karamat Khan;

The respondent No.4 to 6 are resident of Village Marwahi, Tahsil Pendraroad, District Bilaspur (CG)

----- **Respondents/Defendants**

For Appellants/Defendants No.4 to 10:

Mr. Shashi Bhushan Tiwari, Advocate

For Respondents:

Mr. Rajendra Tripathi, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in this defendants No.4 to 10 second appeal is as under:-

"Whether the lower appellate Court was justified in holding that the judgment Ex.D1 did not operate as *res judicata* in the suit ?"

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

2. Three plaintiffs beings sons of Safiullah and Hafizullah filed a suit against the defendants for declaration of title and permanent injunction stating inter-alia that that they are also title-holders of the suit land along with defendants No.4 to 10 and other defendants be restrained from alienating the suit land.

3. Defendants No.5, 6, 8 and 9 filed their written statement controverting the allegations made in the plaint and also pleaded that earlier Hafizullah, father of plaintiff No.3, filed Civil Suit No.191-A/1957, which was decided on 17.4.1961 by the Second Civil Judge Class-I, Bilaspur, decreeing the claim of the plaintiff therein for joint possession to the extent of 1/3rd, against which, first appeal was filed by father of the defendants being Civil Appeal

No.22-A/1961. That appeal was allowed on 21st February, 1964 and the judgment & decree of the trial Court was set aside holding that Hafizullah-plaintiff therein had no title over the suit land and as such, prayed for dismissal of suit.

4. The trial Court upon evaluation and after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 22.2.2001, dismissed the suit on merits as well as on the ground that the judgment and decree dated 21st February, 1964 (Ex.D-1) would operate as res-judicata. On appeal being preferred by the plaintiffs, the first appellate Court reversed the judgment and decree of the trial Court holding that Ex.D-1 would not operate as res-judicata. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants No.4 to 10, in which substantial question of law has been formulated, which has been set out in the opening paragraph of this judgment.

5. Mr. Shashi Bhushan Tiwari, learned counsel for the appellants/defendants No.4 to 10, would submit that in the same subject-matter earlier civil suit has

been decided, therefore, the present suit would operate as res-judicata.

6. On the other hand, Mr. Rajendra Tripathi, learned counsel for the respondents, would submit that the first appellate Court has rightly held that it would not operate as res-judicata, as such, the first appellate Court is justified in holding and decreeing the suit of the plaintiff in which no interference is warranted in jurisdiction under Section 100 of the Code of Civil Procedure.

7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

8. In order to answer the plea raised at the Bar, it would be appropriate to consider first 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."

9. The object and purport of the principle of res judicata as contained in Section 11 of the CPC 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 doctrine of res judicata is conceived not only in larger public interest which requires that all litigation must, sooner than later, come to an end but is also founded on equity, justice and good conscience. (See Swamy Atmananda and others v. Sri Ramakrishna Tapovanam and others¹).

10. In the matter of Satyadhyan Ghosal v. Deorajin Devi² the Supreme Court has held that Section 11 CPC enacts the rule of conclusiveness of judgment as to the points decided, in every subsequent suit between the same parties.

1 (2005) 10 SCC 51

2 AIR 1960 SC 941

11. Sir William B. Hale made remarkable observations on the applicability of principle of res judicata in the following words in the matter of Duchess of Kingstone's case [2 Smith Leading Cases, 13th Ed. Pages 644-645:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first that the judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly on the point, is in like manner, conclusive upon the same matter, between the same parties, coming, incidentally in question in another Court, for a different purpose. But neither the judgment of a Court of concurrent or exclusive jurisdiction, is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

12. The aforesaid dictum has been approved by the Supreme Court in the matter of Daryao Singh v. State of U.P.³.

13. The Supreme Court in the matter of Syed Mohd. Salie Labbai v. Mohd. Hanifa⁴ laid down the conditions for giving effect to the plea of res-judicata and it was held that the following conditions must be proved:-

3 AIR 1961 SC 1457

4 AIR 1976 SC 1569

- (i) That the litigating parties must be the same,
- (ii) that the subject-matter of the suit also must be identical,
- (iii) that the matter must be finally decided between the parties and
- (iv) that the suit must be decided by a Court of competent jurisdiction.

14. The Supreme Court has the opportunity to explain the principle of res judicata in the matter of Lal Chand v. Radha Krishna⁵ wherein it has been held that the principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also found on equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

15. The above-stated proposition has been followed by the Supreme Court in the matter of Sarguja Transport Service v. S.T.A. Tribunal Gwalior⁶.

16. Thus, in order to constitute a plea of res-judicata, the following conditions must be existed:

- (i) There must be two suits one former suit and the other subsequent suit;
- (ii) The Court which decided the former suit must be competent to try the subsequent suit;

5 AIR 1977 SC 789

6 AIR 1987 SC 88

- (iii) The matter directly and substantially in issue must be the same either actually or constructively in both the suits;
- (iv) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit;
- (v) The parties to the suits or the parties under whom they or any of them claim must be the same in both the suits;
- (vi) The parties in both the suits must have litigated under the same title.

17. In the matter of Jaswant Singh and Anr. v. Custodian of Evacuee Property, New Delhi⁷ it has been held by the Supreme Court that in order that a defence of res judicata may succeed, it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings.

18. In the matter of Madhvi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai⁸ it has been held by the Supreme Court that there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision. So if no such issue is raised and if on any other issue, if incidentally any finding is recorded, it

7 AIR 1985 SC 1096

8 AIR 2000 SC 2301

would not come within the periphery of the principle of res judicata.

19. In the matter of Kewal Singh v. Smt.Lajwanti⁹ it has been held by the Supreme Court that at the time when the plaintiff relinquished her first cause of action the defendant was nowhere in the picture, and there being no adjudication between the parties the doctrine of res judicata does not apply.

20. Reverting to the facts of the present case in the light of principle of law laid down by the Supreme Court in the above-stated judgments (supra), it is quite vivid that the defendants while filing written statement did not take any express plea of res-judicata, but by way of para-12 of additional statement they have duly averred that in the earlier Civil Appeal No.22-A/1961 title of father of plaintiff No.3 was not found. The trial Court expressly did not frame any issue in that regard, but while dismissing the suit in para-13 finding was recorded that the suit is barred by principle of res-judicata, which the first appellate Court did not accept. The fact remains that neither the plea of res-judicata was expressly taken in written statement nor issue was framed in that regard by the trial Court, yet the trial Court dismissed the suit

9 (1980) 1 SCC 290

on the plea of res-judicata. It is also pertinent to notice that the defendants did not file pleadings of the earlier plaint, written statement and judgment of the trial Court except the judgment of the first appellate Court vide Ex.D-1, as such, fact of res-judicata was neither expressly pleaded nor raised, no issue was framed in this regard and no pleadings were filed. Therefore, the first appellate Court is absolutely justified in holding that plea of res-judicata is not found to be established, which is finding of fact based on evidence available on record.

21. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

22. Decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-