

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 238 of 2008****Judgment reserved on 20/08/2020****Judgment delivered on 28/08/2020**

1. Bechan Singh S/o Guda (died) through LRs. :-

a. Harsh Lal Singh S/o Late Bechan Singh, Aged about 61 years.

b. Kunti D/o Late Bechan Singh, W/o Nehru, Aged about 58 years.

c. Ram Singh S/o Late Bechan Singh, Aged about 46 years.

All are R/o Village Bansipur, Post Jarhi, P.S. Bhatgaon, Tahsil Pratappur, District Surajpur, Chhattisgarh.

---Appellant/Defendant No. 1

Versus

1. Mansarovar W/o Biharilal, Aged about 50 years, Caste Rajwar, Occupation Cultivator. – **Plaintiff**
Gambhira S/o Subran (died and deleted).

2. Bhagwat S/o Gambhira, Aged about 38 years, Caste Gond.

3. Baran S/o Shiv Prasad, Aged about 40 years.
Sohra S/o Shikari (died and deleted).

4. Bandhan S/o Sonhar (died) through LRs. :-

(A). Babulal S/o Bandhan (died) through LRs. :-

(a). Parwati Wd/o Lage Babulal, Aged about 50 years, R/o Banshipur, P.S. and Tahsil Pratappur, District Surajpur, Chhattisgarh.

(B). Dharamjit S/o Bandhan, Aged about 40 years, R/o BanSHIPur, P.S. and Tahsil Pratappur, District Surajpur, Chhattisgarh.

All are R/o Village BanSHIPur P.S. and Tahsil Pratappur, District Sarguja, Chhattisgarh.

5. State of Chhattisgarh, Through the Collector, Surguja, Ambikapur, Chhattisgarh.

--- Respondents/Defendants

For Appellant	:- Mr. Ashok Ku. Shukla, Advocate
For Respondent 1	:- Ms. Hamida Siddiqui, Advocate
For State	:- Mr. Jitendra Pali, Dy. A.G.

Hon'ble Shri Justice Sanjay K. Agrawal
C.A.V. Judgment

1. Proceedings of this matter have been taken up through video conferencing.

2. This second appeal preferred by the appellant/defendant No. 1 (now his Lrs.) was admitted for hearing on the following substantial questions of law :-

"A. Whether the lower Appellate Court erred in reversing the finding recorded by the trial Court that the judgment and decree passed in civil suit No. 30-A/1963 operates as *res judicata* in the present suit ?"

B. Whether in view of the finding recorded by the lower Appellate Court in

para 25 of the judgment that possession of the appellant/plaintiff over the suit land was not proved, the lower Appellate Court was not justified in granting a relief of injunction against the appellants ?"

(For the sake of convenience, the parties will herein-after be referred to as per their status before the trial Court).

3. Sole plaintiff – Mansarovar filed a suit for permanent injunction simpliciter stating *inter alia* that the suit land shown in Schedule 'A' of the plaint was originally held by her father Kisun Ram which he transferred to the plaintiff as bhoomiswami by Will dated 04/01/1978 and since then she has been in cultivating possession of the said suit land. On 23/10/1979, the defendants harvested the crops sown by the plaintiff on some part of the suit land and further threatened her to do the same on other parts of the suit land as well. On account of that, the necessity arose for filing the suit for permanent injunction thereby restraining the defendants from interfering with her possession. The plaintiff also amended her plaint later on 04/08/1994 and inserted the plea that after the death of her father Kisun Ram on

03/06/1979, a village panchayat was convened and all the encroachers of plaintiff's land were removed and plaintiff was given possession of the said land and in alternative, the plaintiff pleaded that if any of the defendants prove and establish their possession, then their possession be taken as that of an encroacher and decree for recovery of possession be also granted in her favour.

4. Defendants denied the plaint averments by filing written statement and stating that plaintiff's father Kisun Ram had filed civil suit No. 30A/63 (Ramkishun v. Dila and Ors.) which was dismissed on 22/12/1967 (Ex. D/1) and the appeal preferred by the plaintiff's father was also dismissed on 18/06/1984 as abated (Ex. D/3), as such, plaintiff's suit is barred by the principle of *res judicata* and furthermore, plaintiff is also not in possession of the suit land, therefore, she is not entitled for decree as claimed.

5. Learned trial Court, after evaluating the oral and documentary evidence on record, dismissed the suit vide its judgment and decree dated 23/03/2007 holding that plaintiff is not the title and possession holder of the suit land and

plaintiff's suit is barred by principle of *res judicata*.

6. On appeal being preferred by the plaintiff, learned first appellate Court allowed the appeal vide its judgment and decree dated 08/05/2008 and held that plaintiff's suit is not barred by the principle of *res judicata* and though further held that plaintiff has failed to prove her title and possession over the suit land, but still granted decree for permanent injunction and restoration of possession in favour of the plaintiff.

7. Questioning the impugned judgment and decree passed by the first appellate Court, this second appeal has been preferred by the appellant/defendant No. 1 in which two substantial questions of law have been framed and set out in the opening paragraph of this judgment.

8. Mr. Ashok Kumar Shukla, learned counsel for the appellant/defendant No. 1 would submit that the first appellate Court is absolutely unjustified in holding that plaintiff's suit is not barred by the principle of *res judicata* and it has further erred in granting decree for permanent injunction in plaintiff's favour after having held that she

is not in possession of the suit land. He further submits that the first appellate Court has ignored the fact that though the suit was not for title, yet after holding her to be the title-holder decree for delivery of possession has been granted in her favour which is contrary to the law, as such, the impugned judgment and decree passed by the first appellate Court deserves to be set aside and that of the trial Court be restored.

9. Mrs. Hamida Siddiqui, learned counsel for the respondent No. 1/plaintiff, would submit that the suit is not barred by the principle of *res judicata* and since the plaintiff has proved her title, therefore, she has rightly been granted the decree for restoration of possession, as such, the second appeal deserves to be dismissed.

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

Answer to substantial question of law 'A':-

11. In order to decide this, it would be appropriate to notice the legal position *qua* the plea of *res judicata*. It is well settled law that the plea of

res judicata is a mixed question of law and fact and it has to be decided upon submission of proper pleadings i.e. copies of plaint, written statement and copy of the judgment of the earlier suit and the issue has to be framed in this regard and then such plea has to be established before competent Civil Court by adducing legal evidence.

12. The plea of *res judicata* only bars investigation and decision on merits finally decided between parties earlier if the defendant omits to plead the plea of *res judicata* and prove the same and the Court investigates and decides matters on merits. Such a decision would not be bad for want of jurisdiction. Plea of *res judicata* is one which might and ought to have been raised as a defence and established in order to operate as a bar in exercise of jurisdiction to try and dispose of the matter subsequently otherwise the latter decision will prevail and plea of *res judicata* itself will be barred by constructive *res judicata* and latter decision overlooking the bar of *res judicata* alone will prevail.

13. In Madhukar D. Shende v. Tarabai Aba Shedage¹,

the Supreme Court held that *res judicata* is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed, such a plea cannot be permitted to be raised for the first time. The Supreme Court held as under:-

“14..... 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.....”

14. In Sheodan Singh v. Darhyao Kunwar², Their

Lordships of the Supreme Court laid down the law relating to the essential elements that need to be satisfied before a plea of *res judicata* can be raised by party. It was held as under:-

“ (9) A plain reading of S. 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 be-

¹ (2002) 2 SCC 85

² AIR 1966 SC 1332

tween 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 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. Further Explanation I shows that it is not the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as *res judicata* it will have to be seen whether all the five conditions mentioned above have been satisfied."

15. Principles of law laid down in Sheodan Singh

(supra) has been followed and restated very recently by the Supreme Court in the matter of City Municipal Council Bhalki by its Chief Officer v. Gurappa (dead) by legal representatives and another³.

16. In a recently pronounced judgment in the matter of Vaish Aggarwal Panchayat v. Inder Kumar & others⁴, Their Lordships of the Supreme Court have held in no uncertain terms that plea of *res judicata* involves mixed question of law and fact and it requires evidence to be recorded and it cannot be a ground to reject plaint under Order 7 Rule 11(d) of the CPC. Their Lordships relied

³ (2016) 2 SCC 200

⁴ AIR 2015 SC 3357

upon the earlier decision of the Supreme Court rendered in the matter of V. Rajeshwari v. T.C.

Saravanabava⁵, which held as under:-

"11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

12. The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation of the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal [see (Raja) Jagadish Chandra Deo Dhabal Deb v. Gour Hari Mahato (AIR 1936 PC 258), Medapati Surayya v. Tondapu Bala Gangadhara Ramakrishna Reddi (AIR 1948 PC 3) and Kattaragadda China Anjaneyulu v. Kattaragadda China Ramayya (AIR 1965 AP 177)]. After so stating, the Court further observed that:-

'Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa (1976) 4 SCC 780 the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had

5 (2004) 1 SCC 551

been decided by the judgment which operates as *res judicata*."

17. Reverting to the facts of the present case in light of the principles of law laid down by Their Lordships of the Supreme Court in the above-stated judgments, it is quite vivid that though the defendants have raised the plea of *res judicata* and the trial Court has also framed issue No. 8 in this regard as to whether the suit is barred by the principle of *res judicata*, but on a careful perusal of the documents available on record particularly filed by the defendants, it would appear that only the copy of the judgment passed by the trial Court in the earlier suit filed by Ram Kisun and the copy of the judgment passed by the appellate Court in the appeal preferred by Ram Kisun have been filed whereas the copy of the plaint in that suit has not been filed and in absence of the copy of the plaint, it cannot be ascertained whether the suit property in that suit is identical to the suit land in this suit and whether the subject matter in both of the suits are same thereby attracting the principle of *res judicata*. Therefore, in the considered opinion of this Court, in absence of the pleadings of the earlier suit particularly

when the plaint of that suit has not been filed, it cannot be ascertained as to whether the subject matter of the previous suit filed by Ram Kisun is same as that of this suit filed by the plaintiff, as such, the first appellate Court has rightly held that the suit filed by the plaintiff is not barred by the principle of *res judicata*.

Answer to Substantial question of law 'B' :-

18. In order to decide this, it would be appropriate to notice the original plaint filed by the plaintiff initially on 08/11/1979 wherein she has simply pleaded that she is the title-holder and is in cultivating possession of the suit land but the crops sown by her on some parts of the suit land has been harvested by the defendants which compelled her to file the suit for permanent injunction, but later on by order dated 04/08/1984, she amended the plaint and pleaded that pursuant to the death of her father Ram Kisun, a meeting of the village panchayat was convened and each and every encroacher from her father's land was removed and the possession was handed-over to the plaintiff but if any of the defendants are still found in possession of parts

of the suit land then the relief of delivery of possession also be granted to her.

19. Per contra, it is the stand of the defendants that plaintiff has no title over the suit land as in the earlier suit, plaintiff's father's title has already been negated. Moreover, her suit is also barred by the principle of *res judicata* and she has only filed the suit for permanent injunction so as to restrain the defendants from interfering with her possession and in alternative, the plea for delivery of possession has been inserted subsequently.

20. The question is, whether only the suit for injunction simpliciter is maintainable without a prayer for declaration ?

21. Section 34 of the Specific Relief Act provides as under :-

"34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.”

22. The Supreme Court in the matter of Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and Ors.⁶ considered the question as to when a bare suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief and held as under :-

“13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a

threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over the plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

15. In a suit for permanent injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and the defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licenseses. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally."

23. Their Lordships summarized the legal position qua the prohibitory injunction as under :-

"21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the

case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annamuthu Thevar*⁷). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

⁷*Annamuthu Thevar v. Alagammal*, (2005) 6 SCC 202

24. The proposition laid down in Anathula Sudhakar (supra) (paragraph 14) has been followed with approval in the matter of Kurella Naga Druva Vudaya Bhaskara Rao v. Galla Jani Kamma alias Nacharamma⁸.

25. In a recently pronounced judgment of Their Lordships of the Supreme Court in the matter of Balkrishna Dattatraya Galande v. Balkrishna Ramharose Gupta and another⁹, it has been held that possession of the plaintiff on the date of suit is a must for grant of permanent injunction, and observed as under: -

“17. As discussed earlier, in a suit filed under Section 38 of the Specific Relief Act, possession on the date of suit is a must for grant of permanent injunction. When the first respondent-plaintiff has failed to prove that he was in actual possession of the property on the date of the suit, he is not entitled for the decree for permanent injunction.”

26. Reverting to the facts of the present case in light of the aforesaid judgments, it is quite vivid that the first appellate Court has clearly reached to the finding that plaintiff is not in possession of the suit land and once it has been found that the plaintiff is not in possession, the decree for permanent injunction could not

8 (2008) 15 SCC 150

9 2019 SCC OnLine SC 135

have been granted in her favour as it is well-settled law that in order for grant of decree for permanent injunction, possession on the date of filing the suit is a must as held by the Supreme Court in Balkrishna Dattatraya Galande (supra).

27. The title of the plaintiff is in serious dispute particularly when by filing the documents Exhibits D/1 and D/3 by the defendants, it has been shown that plaintiff's father Ram Kishun had filed a civil suit with respect to the suit property which was dismissed by the trial Court negating his title and then the appeal preferred by him was also dismissed, therefore, in light of the decision of the Supreme Court in Anathula Sudhakar (supra), the plaintiff ought to have filed a comprehensive suit for declaration of title and permanent injunction and she also could have sought the consequential relief of restoration of possession, if any. As such, on the basis of the bare suit filed by the plaintiff for permanent injunction and in alternative simply seeking recovery of possession based on previous possession, it cannot be held that the first appellate Court was right in holding that

plaintiff has proved her title over the suit land. There is neither any pleading with regard to her title nor any document filed by her except for a copy of khasra panchshala. Therefore, the first appellate Court has committed legal error in granting decree for restoration of possession and subsequently, decree for permanent injunction in favour of the plaintiff.

28. Consequently, the judgment and decree passed by the first appellate Court is hereby set aside and that of the trial Court is restored. The second appeal is allowed to the extent indicated herein-above.

29. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet