

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.75 of 2011**

1. Dinesh Kumar, S/o. Kuhru Ram Rautiya, aged about 22 years,
2. Manoj Kumar S/o. Kuhru Ram Rautiya, aged about 20 years,
R/o. Village Bene, Post Office Narayanpur, Police Station Narayanpur, Tahsil Kunkuri, District Jashpur (CG)

---- Appellants/Plaintiffs**Versus**

1. Gopal S/o. Bharthu, aged about 27 years,
2. Sukhan S/o. Bantha, aged about 32 years,
3. Shiv Kumar S/o. Bantha, aged about 42 years,
4. Kuhru Ram, S/o. Bantha, aged about 47 years,
5. Jagannath S/o. Kandara, aged about 34 years,
6. Gudari (deleted)
7. Bandhan (died) through LR's
7A. Sagun S/o Late Bandhan, aged about 40 years, R/o Village Bene, P.O. Narayanpur, P.S. Narayanpur, Tehsil Kunkuri, District Jashpur (CG)
8. Fagun S/o. Bandhan, aged about 30 years,
Respondents No.1 to 5 and 8 R/o. village Bene, Police Station & Tahsil Kunkuri, District Jashpur (CG)
9. Lukhan, S/o. Sudhan, aged about 50 years, R/o. village Darakharika, Police Station & Tahsil Kunkuri, District Jashpur (CG)
10. State of Chhattisgarh, through: Collector, Jashpur (CG)

---- Respondents/Defendants

For Appellants/Plaintiffs:

Mr. Anurag Singh, Advocate

For Respondents No.2 to 5 & 8:

Mr. Harish Khuntia, Advocate

For Respondents No.1, 7(A) and 9:

None present

for Respondent No.10/State:Mr. Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

06/07/2021

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

"Whether both the Courts are justified in dismissing the suit of the plaintiffs invoking Order 7 Rule 11 of the CPC holding that the suit is barred by the principle of res-judicata, by recording finding which is perverse and contrary to the record ?"

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

2. Two plaintiffs filed a suit for declaration of title and permanent injunction stating inter-alia that defendant No.9-Lakhan is not legal heir of Sudhan @ Ronha and he has no right and title over the suit property, as such, he be restrained from interfering with right and title over the suit property mentioned in Schedule "A" appended with the plaint. During pendency of the suit, defendant No.9 filed an application under Order 7 Rule 11 of the CPC stating inter-alia that the suit is barred by principle of res-judicata as earlier the plaintiffs father filed a

suit bearing Civil Suit No.72A/90 against defendant No.9. The trial Court granted that application and dismissed the suit holding the suit to be barred by principle of res-judicata, against which, the plaintiffs preferred first appeal. The first appellate Court while affirming the judgment and decree of the trial Court dismissed the appeal. 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/plaintiffs, in which one substantial question of law has been formulated, which have been set-out in the opening paragraph of this judgment for sake of completeness.

3. Mr.Anurag Singh, learned counsel for the appellants/plaintiffs, would submit that both the Courts below are absolutely unjustified in dismissing the suit holding it to be barred by principle of res-judicata overlooking the fact that plea of res-judicata is mixed question of law and fact which can be adjudicated only after framing the issue, as such, the judgment and decree of both the Courts below deserve to be set-aside.

4. None present for respondents No.1, 7(A) and 9 though served.

5. Mr.Harish Khuntia, learned counsel for respondents

No.2 to 5 and 8, would submit that they are formal parties.

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

7. The plaintiffs suit for declaration of title and permanent injunction was dismissed by the trial Court invoking Order 7 Rule 11 of the CPC holding that the suit is barred by principle of *res-judicata*, which has been affirmed by the first appellate Court.

8. 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.

9. 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.....”

10. 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:-

1 (2002) 2 SCC 85
2 AIR 1966 SC 1332

“(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 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 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.”

11. 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.

12. In a recently pronounced judgment in the matter of Vaish Aggarwal Panchayat v. Inder Kumar & others⁴, Their Lordships of the Supreme Court have

3 (2016) 2 SCC 200

4 AIR 2015 SC 3357

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 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 Katragadda China Anjaneyulu v. Katragadda 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 judg-

5 (2004) 1 SCC 551

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

13. Following the principle of law laid down by the Supreme Court in the above-stated judgments (supr), it is quite vivid that since plea of res-judicata is a mixed question of law and fact and it could not have been adjudicated without framing an issue & without recording evidence and thereby the trial Court committed error which has been perpetuated by the first appellate Court. Therefore, both the Courts below have committed legal error in entertaining a plea of res-judicata without framing an issue in that regard.

14. Accordingly, the judgment and decree passed by both the Courts below are hereby set-aside. The substantial question of law is answered in favour of the plaintiffs and against the defendants. The matter

is remitted to the trial Court to proceed in accordance with law and decide the issue of res-judicata along with other issues. The trial Court is directed to decide the suit within three months from the date of receipt of a copy of this judgment.

15. The second appeal is allowed to the extent indicated hereinabove. No order as to cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-