

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**W.P.(227) No. 208 of 2021****Order Reserved on 9.9.2021****Order Delivered on 24.9.2021**

Vikash Gupta S/o Umashanker Gupta Aged About 35 Years R/o Near Sindhu Bhagwan, Chakradhar Nagar Raigarh, Tahsil And District Raigarh Chhattisgarh.

---- Petitioner**Versus**

Yashodabai D/o Rajumal (Since Dead) Through LRs

1. Laalchand S/o Late Sheetal Das Dhameja Aged About 65 Years R/o Chakradhar Nagar, Pakki Kholi, Sindhi Colony, Raigarh, Tahsil And District Raigarh Chhattisgarh.
2. Bihari S/o Late Rewachand Rajput Aged About 46 Years R/o Kaserpara, Chakradhar Nagar Raigarh, Tahsil And District Raigarh Chhattisgarh
3. Umashankar Gupta S/o Siyaram Gupta (Since Dead) Through L R S Nill

3(A) Seema Devi W/o Umashanker Gupta Aged About 35 Years

3(B) Vikrant Gupta S/o Late Umashanker Gupta Aged About 33 Years

3(C) Vijeta Gupta D/o Umashanker Gupta Aged About 31 Years

4. Nagar Palika Nigam Through Municipal Commissioner, Raigarh Chhattisgarh
5. State Of Chhattisgarh Through Collector, Raigarh Chhattisgarh.

---- Respondents

For the Petitioner	:	Shri Amit Sharma, Advocate.
For Respondent No.1(A)	:	Shri Hari Agrawal, Advocate.
For Respondent No.4	:	Shri Vivek Kumar Agrawal, Advocate on behalf of Sudeep Agrawal, Advocate.
For Respondent No.5/ State	:	Shri Ajay Kumrani, P.L.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV ORDER**

Heard.

1. This petition is directed against the order dated 16.2.2021, by which the learned trial Court has allowed the application of the respondent/ plaintiff under Order XVIII Rule 17 of the CPC.

2. it is submitted by learned counsel for the petitioner that the representative of plaintiff – Yashoda Bai (dead) is respondent No.1(A) – Laalchand, who had filed a civil suit praying for relief of possession and permanent injunction with respect to suit the property bearing Khasra No.251/11, 12 and 13 measuring 1481 sq.ft which has been encroached upon by the petitioner and construction is being raised upon the same. The suit is being contested by the petitioner/ defendant. It is further submitted by counsel for the petitioner that the respondent/ plaintiff filed an application under Order VI Rule 17 of the CPC, alongwith the application under Order VII Rule 14(c) of the CPC and another application under Order XVIII Rule 17 of the CPC, which was dismissed by the trial Court vide order dated 31.7.2019 and the said order was challenged before this Court in W.P.(227) No. 633 of 2019. The said petition has been disposed of by the order dated 6.2.2020, in which the application under Order VI Rule 17 of the CPC was allowed.

Reliance has been placed on the judgment of Supreme Court in the case of **Canara Bank vs. N.G. Subbaraya Setty & Anr.** reported in (2018) **16 SCC 228** on the point that the previous order has the effect of *res-judicata*. It is submitted that the impugned order is illegal and unsustainable.

3. Learned counsel for the respondent opposes the submissions and submits that the application under Order XVIII Rule 17 of the CPC was consequential to the order on application under Order VI Rule 17 of the CPC. Learned trial Court while dismissing the applications of amendment by order dated 31.7.2019 had dismissed the application under Order XVIII Rule 17 of the CPC without discussing the merits of that application, therefore,

there being no finding on the merit of the Order XVIII Rule 17 of the CPC, the same was fit to be considered. Further, the circumstances changed consequent to the order of this Court in W.P.(227) No. 633 of 2019, by which the application for amendment was allowed. The respondent has also very clearly mentioned in the application under Order XVIII Rule 17 of the CPC that this application has been filed consequent to the incorporation of the amendment in the plaint, therefore, no error has been committed by the learned trial Court in passing the impugned order.

Relying on the judgment of Supreme Court in the case of **Escorts Farms Ltd. previously known as M/s. Escorts Farms (Ramgarh) Ltd. vs. Commissioner, Kumaon Division, Nainital, U.P. and Others**, reported in **(2004) 4 SCC 281**, it is submitted that the principle of *res judicata* will not be applicable to such an order. Further, relying on the judgment of the Supreme Court in the case of **Bhanu Kumar Jain vs. Archana Kumar and Another**, reported in **(2005) 1 SCC 787** on the same point it is submitted that *res judicata* debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties, therefore, the previous order dated 31.7.2019 of the trial Court does not have the effect of *res judicata* for decision on the application filed later on. Hence, the petition be dismissed.

4. Heard learned counsel for the parties and perused the documents present on record.

5. Considered on the submissions. As per the submissions and the facts present in the case, the application for amendment filed by the respondent was dismissed by the earlier order dated 31.7.2019. The respondent then

succeeded in Writ Petition No.633 of 2019, by which the incorporation of the amendment as prayed by the respondent was ordered. The prayer for the respondent under Order XVIII Rule 17 of the CPC was clearly consequential to the prayer of amendment. When the prayer of amendment was rejected, the consequential prayer became infructuous on which basis, the learned trial Court dismissed the previous application without expressing anything on merits of the same. After the application for amendment was allowed, the consequences of the incorporation of the amendment were also revived and it was the demand of circumstance that the parties concerned should be granted opportunity to bring evidence on the basis of the fresh amendment.

6. The provision under Section 11 of the CPC provides for *res judicata* according to which, there is a prohibition that 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 the 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 and in that case principle of *res judicata* shall be applicable.

7. Application under Order XVIII Rule 17 of the CPC cannot be deemed to be a suit or an issue for decision or any substantial issue. Order on such an application is an interlocutory order, depending on the circumstances present for decision on such application. It is clear from the facts present in this case that at the stage of passing order on 31.7.2019, the dismissal of an application for amendment resulted in dismissal of an application under

Order XVIII Rule 17 of the CPC. After the application for amendment was allowed, the circumstance for re-examination of the plaintiff witness also came up. Therefore, the application for re-examination of the plaintiff for the purpose of exhibiting the documents filed later on, was revived on which the impugned order has been passed. Hence, I am of this view that principle of *res judicata* shall not be applicable to such an order. Apart from that, such an order passed at the interlocutory stage by any Court can be recalled by the same Court for which there is no bar present under the Code of Civil Procedure. Hence, on the basis of these discussions, I am of this view that the learned trial Court has not committed any error in passing the impugned order and the present petition is dismissed and disposed of.

Sd/-

(Rajendra Chandra Singh Samant)
Judge