

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.425 OF 2019

WITH

CIVIL APPLICATION NO.3879 OF 2012

BASANTILAL CHUNILAL JASABHATI

VERSUS

SHANTILAL CHUNILAL JASABHATI AND OTHERS

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Mr. N.C. Garud, Advocate for the appellant

Mr. V.S. Badakh, Advocate for respondent Nos.1, 2A to 2C

Mr. S.S. Bora, Advocate for the respondent No.9

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 27th JULY, 2021

PRONOUNCED ON : 01st OCTOBER, 2021

ORDER :

1 Present appeal has been filed by the original plaintiff challenging the concurrent Judgment and Decree passed by both the Courts below. Present appellant-original plaintiff had filed Regular Civil Suit No.18/1998 before Civil Judge Junior Division, Jamkhed, Dist. Ahmednagar for partition, separate possession along with other ancillary reliefs. The said suit came to be dismissed on 07.03.2005. Original plaintiff then challenged the said

decree by filing Regular Civil Appeal No.164/2005 before learned Principal District Judge, Ahmednagar. The said appeal came to be dismissed on 30.11.2011. Hence, this Second Appeal.

2 Heard learned Advocate Mr. N.C. Garud for the appellant, learned Advocate Mr. V.S. Badakh for respondent Nos.1, 2A to 2C and learned Advocate Mr. S.C. Bora for the respondent No.9.

3 It has been vehemently submitted on behalf of the appellant-original plaintiff that both the Courts below have not considered the evidence – oral as well as documentary, and the law points involved in the case properly. A perverse finding has been arrived at. The First Appellate Court has not adhered to the provisions of Order XLI Rule 31 of the Code of Civil Procedure, 1908 while dealing with the First Appeal. Both the Courts below have wrongly held that the suit properties except properties described in para No.1A are not the Joint Hindu Family properties. In other words, it has been wrongly held by both the Courts below that properties described in para Nos.1B to 1E are the self acquired properties of the defendants. Further, as regards the property described in para No.1A of the plaint, it has been held that the suit is barred by principles of *res judicata*. Admittedly, present original defendant Nos.1 and 2 had filed Regular Civil Suit No.18/1998 for partition. Present plaintiff was defendant No.1 in that suit. It was only in

respect of one property. The said suit was decreed and, therefore, present plaintiff had preferred Regular Civil Appeal No.293/1997. In fact, a pursis was filed on 08.01.2002, while pending the said appeal saying that since he has already filed Regular Civil Suit No.18/1998 for partition and separate possession and the copy of the Exh.1 of the suit was attached to the pursis, it was said that, he does not want to proceed with the appeal and, therefore, prayed for the disposal of the appeal. Accordingly, order was passed on 08.01.2002 by the learned District Judge, Ahmednagar - "The appellant does not want to prosecute the appeal vide Exh.31. Hence, the appeal is dismissed for want of prosecution with no order as to costs." The purpose behind giving that pursis was that other properties were not included and, therefore, for a concise adjudication of the dispute that was withdrawn and, therefore, there could not have been bar under Section 11 of the Code of Civil Procedure. Both the Courts below have wrongly held that the present suit was barred by principles of *res judicata*.

3.1 Reliance has been placed on the decision in **V. Rajeshwari vs. T.C. Saravanabava, 2004 (2) Mh.L.J., 865**, wherein it has been held that - "*When the earlier suit was confined to a small portion of the entire property, then the decision as to specified part of property would not constitute res judicata for the entire property which was the subject matter of the subsequent*

litigation.”

3.2 Further reliance has been placed on the decision in **City Municipal Council, Bhalki, by its Chief Officer vs. Gurappa (dead) by L.Rs. and another, 2016(5) Mh.L.J., 1**, wherein it has been held that -

“The principle of *res judicata* is a need of any judicial system, that is, to give finality to the judicial decisions of the disputes between parties. It also aims to prevent multiplicity of proceedings between the same parties of the same subject-matter of the lis. An issue which was directly and substantially involved in a former suit between the same parties, and has been decided and has attained finality cannot be reagitated before the Courts again by instituting suit or proceeding by same parties on the same subject-matter of earlier lis. 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, 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. Since neither the reliefs claimed in the two suits were identical, nor the parties are the same and nor could the decision in the first suit said to have been on merits, it cannot be held in the singular facts and circumstances that the suit was barred by *res judicata*.”

3.3 Further reliance has been placed on **Rustomjee Kerawalla Foundation vs. Avisha Gopalkrishnan Kulkarni, 2013 (1) Mh.L.J., 119**,

wherein it has been observed that - “*In order to attract the principles of res judicata, the earlier determination is one which must be rendered on the merits of the dispute.*”

3.4 Further reliance has been placed on **Dayanand Vishwanathrao Kadam vs. Pratibha w/o Dayanand Kadam, 2007 (3) Mah L R 539**, wherein it has been held that when the petitioner-wife had applied for permission to withdraw earlier petition with liberty to file fresh on the same cause of action, and the learned Judge had simply ordered “allowed to withdraw”. This is the only application, which cannot be granted partly. It is either to be granted as a whole or rejected as a whole. There cannot be order of permission to withdraw, but denial of liberty to file fresh suit on the same subject-matter, in other words on the same cause of action. It has been further observed that withdrawal without seeking permission to file fresh suit does not operate as constructive *res judicata*. Similar ratio has been laid down in **Mario Shaw vs. Martin Fernandez and another, 1996(1) Mh.L.J., 564.**

4 It has been further submitted on behalf of the appellant that both the Courts below failed to consider that there was a joint family of appellant and respondents, as their father Chunilal was doing the business of hotel and it was being run by the entire family. There was no separate earning for

respondent No.9, who had then transferred some property in favour of respondent No.10 without any legal necessity. The oral evidence led by the plaintiff has not been properly considered, which could have led to the evidence that all the suit properties are the Joint Hindu Family properties. Under such circumstance, substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, are arising in this case.

5 Per contra, the learned Advocate Mr. V.S. Badakh for respondent Nos.1, 2A to 2C and learned Advocate Mr. S.S. Bora supported the reasons given by both the Courts below and submitted that the present suit for partition and separate possession of properties described in para No.1A was also barred by *res judicata* and as regards other properties described in para Nos.1B to 1E they have consistently held that the plaintiff has failed to prove that they have joint family properties.

6 At the outset, it can be seen that the fact which is not in dispute is that the original defendant Nos.1 and 2 had filed Regular Civil Suit No.130/1987 for partition and separate possession. It can be seen from the documents, which have been produced on record that the said suit was only with a prayer for partition of the house property situated at Jamkhed bearing Grampanchayat No.355, which is now described in para No.1A of the present suit i.e. Regular Civil Suit No.18/1998. Further, it is to be noted that the

earlier suit i.e. Regular Civil Suit No.130/1987 appears to have been filed immediately after Chunilal had expired on 21.03.1986. It will have to be presumed then that defendant No.1 in that suit i.e. present plaintiff had the knowledge as to which are the properties, which have been purchased from the joint family income. When present defendant Nos.1 and 2 had restricted the said suit i.e. Regular Civil Suit No.130/1987, to the extent of one property only, and the present plaintiff was defendant No.1, who was contending that all the joint family properties were not brought into the hotch pot and the suit was hit by partial partition, he could have definitely made a counter claim and prayed for partition of those properties also. Section 11 and Explanation IV to the same of the Code of Civil Procedure runs thus -

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

Explanation II

Explanation III

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

Explanation VI

Therefore, the other properties could have been made ground of defence (accordingly so made also in the written statement in that suit) or attack (by way of counter claim) in such former suit shall be deemed to have been a matter directly or substantially in issue in such suit. Another fact further to be noted from the Judgment in Regular Civil Suit No.130/1987 dated 25.06.1997 that issues No.3 and 4 are framed thus -

3 Does the defendant No.1 prove that the suit is hit by partial partition ?

4 Does the defendant No.1 prove that premises out of Sy.No.963/1 bearing No.2627, 1953 out of land Gat No.88/1, 20 Gunthas and plot No.359 out of Sy.No.6/3 are the joint family property ?

These issues were framed on the basis of written statement filed by the present appellant. The findings, those were given to those issues No.3 and 4, are in the negative. He challenged the said Judgment and Decree by filing Regular Civil Appeal No.293/1997. It appears that on 08.01.2002 he

then filed pursis stating that since now he has filed separate suit for partition including all the properties, there is no necessity to go ahead with the appeal. It was then stated that all the rights would be decided in that suit and, therefore, the appeal should be disposed of. Based on this pursis, the order as referred in para No.3 above was passed. Here, it is to be noted that the appeal was “dismissed for want of prosecution” and it was not withdrawn for presentation of any other litigation. Therefore, provisions of Order XXIII of the Code of Civil Procedure are not applicable at all and, therefore, the decisions relied by the learned Advocate for the appellant are not applicable here. The decision in **V. Rajeshwari** (supra) also will not be applicable, as in this case when the appeal was already pending, the subsequent suit was instituted and without seeking any liberty that has been allowed to be dismissed for want of prosecution. Both the Courts below have correctly interpreted that the present appellant-original plaintiff by his own conduct has given finality to the decision in Regular Civil suit No.130/1987, he had raised contention about non inclusion of the rest of the properties and the findings was given in the negative. Therefore, in this case, there is no question of smaller portion or entire property is involved. The principles of *res judicata* laid down in **City Municipal Council, Bhalki** (supra) are rather fulfilled in this case and, therefore, the present suit was barred by the principles of *res judicata*.

7 As regards the other properties are concerned, both the Courts below, even after taking into consideration the evidence that is led, have come to the conclusion that the plaintiff has failed to prove that those properties are Joint Hindu Family properties. The Judgment of the First Appellate Court in fact, adheres to all the requirements of Order XLI Rule 31 of the Code of Civil Procedure. The points for determination have been properly framed and the oral evidence has been considered. Recently in **Singaram vs. Ramanathan (Civil Appeal No.4939 of 2021) decided on 24.08.2021** Hon'ble Supreme Court has observed that -

“11 The scheme of the Code of Civil Procedure accords finality to the findings of fact rendered by the First Appellate Court.

12 This is undoubtedly subject to various well known exceptions which, however, cannot permit the Second Appellate Court to interfere with the findings of fact as a matter of course. Such restrictions are placed on the High Court in order that there is finality to litigation at a particular level in the hierarchy of Courts. The limitation on the exercise of power by the High Court in the Second Appeal interfering with the judgment of the First Appellate Court is premised on high public policy. This limitation is ought to be secured by insisting upon the requirement that a Second Appeal is considered only when there is a substantial question of law. Therefore, the existence of substantial question of law and the judgment which revolves around answering the substantial questions of law are not mere formalities. They are meant to be adhered to.”

8 Therefore, in view of the discussion above made, no substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, are arising in this case. The appeal deserves to be dismissed on the threshold. Accordingly, it is dismissed. Pending Civil Application No.3879 of 2012 stands disposed of

(Smt. Vibha Kankanwadi, J.)

agd

Later on :

1 Learned Advocate appearing for the appellant submits after the pronouncement of the order that the disputed property is in possession of the plaintiff and his client intend to approach the Hon'ble Apex Court and, therefore, interim protection be granted. It is to be noted that all the three Courts, that is including this Court, have taken a consistent view and, therefore, no case is made out to grant any protection. Oral request is rejected.

(Smt. Vibha Kankanwadi, J.)

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