

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.517 of 2018

1. Ram Peyare Mahto, Son of Late Ram Prasad Mahto
2. Ramvati Devi, Wife of Late Ram Udgar Mahto
3. Ram Kripal Mahto, Son of Late Prasad Mahto
4. Harekrishna Mahto @ Hari Lal Mahto
5. Sant Lal Mahto
6. Shivendra Mahto @ Shoshiv Mahto
7. Kishori Mahto
8. Sarita Kumari
9. Butai Mahto sons and daughter of Udgar Mahto All residents of village - Pand, P.O. Chak Bahauddin, Anchal, P.S. Sub Division Dalsingsarai, District Samastipur.

... .. Petitioner/s

Versus

1. Ram Sogarath Paswan
2. Jinish Paswan @ Dinesh Paswan both sons of Parmeshwari Paswan
3. Rupak Paswan, Son of Sogarath Paswan
4. Mithilesh Paswan, Son of Jinish Paswan @ Dinesh Paswan All r/o village - Pand, P.O. Chak Bahauddin, Police Station - Dalsingsarai, District - Samastipur.
5. Lalo Devi, Wife of Ram Bilas Paswan d/o Late Parmeshwar Paswan r/o Goshpur, P.O. and Police Station Dalsingsarai, District Samastipur.
6. Krishna Devi, Wife of Jiwachh Paswan daughter of Parmeshwar Paswan Resident of Chamtha, P.O. Chamtha, Police Station Bachhwara, District - Begusarai.
7. Md. Shamim
8. Md. Nadeem
9. Md. Nesar Azam
10. Md. Sarwar All sons of Late Idris Resident of Village - Pand, P.O. Chak Bahadurpur, Police Station - Dalsingsarai, District Samastipur.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Raghib Ahsan, Sr. Advocate Mr. Saba Ashfaq, Advocate
For the Respondent/s	:	Mr. Khalid Ahsan, Advocate Mr. Jitendra Kishore Verma, Advocate Mr. Anjani Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT



Date : 25-04-2023

Heard learned counsel for the parties.

2. This Civil Miscellaneous Application has been filed under Article 227 of the Constitution of India for setting aside the order dated 28.11.2017 in Title Suit No. 19 of 2013 passed by learned Sub-Judge-3, Dalsingsarai whereby and whereunder the application dated 10.02.2014 under Section 11 of Code of Civil Procedure, 1908 filed by the petitioners has been disposed of observing that the issue raised shall be decided at the time of final decision in the suit.

3. Respondent Nos. 1 to 6 are plaintiffs who have filed Title Suit No. 19 of 2013 for declaration of title and possession of the plaintiffs over the suit land. On receiving summons in the suit, the petitioners appeared and filed written statement and thereafter filed a petition dated 10.02.2014 under Section 11 C.P.C. praying to dismiss the suit as barred by *res judicata* in view of the earlier judgment and decree dated 29.12.1989 in Title Suit No. 52 of 1981 passed by learned Munsif, Dalsingsarai whereby and whereunder the title of the petitioner was declared which was affirmed by the judgment and decree dated 31.07.1993 in Title Appeal No. 12 of 1990 and Second Appeal No. 644 of 1993 filed by the plaintiffs of the present suit



was also dismissed vide judgment dated 24.04.2013 (as modified by order dated 12.02.2014) by this Court. The said petition was opposed by the plaintiffs and was dismissed by the learned trial Court vide the impugned order dated 28.11.2017.

4. Learned senior counsel for the petitioners submits that plaintiffs and defendant No. 2 were parties in Title Suit No. 52 of 1981, Title Appeal No. 12 of 1990 and Second Appeal No. 644 of 1993 and the subject matter of the said Title Suit No. 52 of 1981 is identical to the present suit. It is further submitted that the previous Title Suit No. 52 of 1981 had been decided by the Court of competent jurisdiction and the judgment and decree of the said Title Suit No. 52 of 1981 was confirmed in Title Appeal No. 12 of 1990 and the same was reconfirmed in Second Appeal No. 644 of 1993 and the condition of Section 11 of C.P.C. is satisfied. Learned senior counsel for the petitioners submits that there is possibility of two inconsistent decree might come into existence if the provisions of Section 11 C.P.C. is not applied at this stage.

5. Learned senior counsel for the petitioners further submits that the learned trial Court without considering the legal provisions that on a question of *res judicata*, the preliminary issue needs to be framed disposed of the application which is



not justified and is wholly erroneous which requires interference by this Court.

6. On the other hand, learned counsel for the respondents submits that there is different area and boundary of the suit land and other persons have also been made parties in the suit and the principle of *res judicata* shall not apply in the facts and circumstances of the case and the learned trial Court has rightly held that issue of *res judicata* is a mixed question of law and facts which can be decided on the basis of the evidence to be brought on record. Accordingly, at this stage, the Suit cannot be decided by hearing on the issue of *res judicata* as preliminary issue.

7. Order XIV Rule 2 of CPC has been substituted by Central Act No. 104 of 1976, whereby the Court is mandated to pronounce Judgment on all issues, even though the suit can be disposed of on a preliminary issue. After the amendment, discretion has been given to the Court by expression 'may' used in sub-rule (2) to try the issue relating to the jurisdiction of the Court i.e. territorial and pecuniary jurisdiction, or a bar to the suit created by any law for the time being in force i.e. to bar a suit before a Civil Court. The intention to substitute Rule 2 is the speedy disposal of the *lis* which oust either the jurisdiction



of the Court or bars the plaintiff to *sue* before the Civil Court.

8. The Hon'ble Supreme Court in a judgment reported as **Ramesh B. Desai and Ors. Vs. Bipin Vidilal Mehta and Ors. (2006) 5 SCC 638** observed that the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue and where decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

9. It is well settled that if the issue is a mixed issue of law and fact, or issue of law depends upon the decision of fact, such issue cannot be tried as a preliminary issue. In other words, preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the Court or the bar to the suit is made out, the Court may decide such issues with the sole objective for the expeditious decision.

10. The Hon'ble Supreme Court in the case of **Sathyanath and Anr. Vs. Sarojamani** reported as **BLJ 2022 (4) Supreme Court Section, Page 1** observed that it is not disputed that *res judicata* is a mixed question of law and fact depending upon the pleadings of the parties, the parties to the suit etc. It is not a plea in law alone or which bars the



jurisdiction of the Court or is a statutory bar under Clause (b) of Sub-Rule (2) of Order 14 Rule 2 C.P.C.

11. Having heard the learned counsel for the parties and on perusal of impugned order, it appears that the learned trial Court considering the argument on both sides and the material available on record and appreciating the law rightly observed that the question of *res judicata* is a mixed question of law and facts which can be decided only after the evidence came on record and the same can be decided in the final judgment as one of the issues. I find that the impugned order has been passed assigning the reason and it cannot be said to be illegal or perverse which require to be interfered by this Court in supervisory jurisdiction under Article 227 of the Constitution.

12. This Civil Miscellaneous Application is, accordingly, dismissed.

(Sunil Dutta Mishra, J)

ashutosh/-

AFR/NAFR	AFR
CAV DATE	27.02.2023
Uploading Date	25.04.2023
Transmission Date	

