

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.614 OF 2022
WITH
INTERIM APPLICATION NO.3743 OF 2022
IN
APPEAL FROM ORDER NO.614 OF 2022**

1. Kashinath Krushna Kadam (Decd)
Through Legal heirs

1A. Kamal Kashinath Kadam
Age 60 years, Occ : Agriculturist ...

1B. Prakash Kashniath Kadam
Age 40 years, Occ : Agriculturist ...

1C. Sharad Kashinath Kadam
Age 30 years, Occ : Agriculturist ...

1D. Vandana Jagannath Damame
Age 35 years, Occ : Agriculturist
R/at: Retharebudruk,
Tal. Karad, Dist: Satara ...

2. Dilip Pandurang Kadam
Age 40 years, Occ : Agriculturist ...

3. Arjun Pandurang Kadam
Age 38 years, Occ : Agriculturist ...

4. Chandrakant Pandurang Kadam
Age 34 years, Occ : Agriculturist ...
Nos.1A to 1C & 2 to 4 are R/at:
Shelkabav, Tal. Kadegaon, Dist: Sangli. ...

Appellants
(Orig. Defendants)

vs.

1. Tanaji Aatmaram Kadam
Age 68 years, Occu: Agriculturist ...

2. Shivaji Aatmaram Kadam
Age 66 years, Occu: Agriculturist ...
3. Bhanudas Aatmaram Kadam
Age 64 years, Occu: Agriculturist ...
4. Lata Pandharinath Kadam
Age 46 years, Occu: Agriculturist ...
5. Anil Pandharinath Kadam
Age 28 years, Occu: Agriculturist ...
6. Sunita Subhash Shinde
Age 26 years, Occu: Agriculturist ...
7. Ganesh Pandharinath Kadam
Age 25 years, Occu: Agriculturist ...
Nos.1 to 7 are R/at: Shelkabav,
Tal. Kadegaon, Dist: Sangli ... Respondents
(Orig. Plaintiff Nos.1
to 6 and Defendant
No.5)

Mr. Mahindra Deshmukh for the Appellants.

Mr. Kuldeep U. Nikam with Prasad Avhad for Respondent Nos.1 to 7.

CORAM : SHYAM C. CHANDAK, J.

RESERVED ON : 31st JULY, 2024

PRONOUNCED ON : 22nd OCTOBER, 2024

JUDGMENT :

Present appeal is impugning a Judgment and Order dated 14th March 2022, passed by the Court of learned District Judge-4, at

Sangli, thereby said Court allowed a Regular Civil Appeal No.254/2017 and set aside the Judgment and Order dated 9th August, 2017 passed by the Court of learned Civil Judge, Junior Division, *Kadegaon* in Regular Civil Suit No.147/2010, and remanded the suit for re-trial. (Hereinafter, the parties are being referred to as per their status in the suit i.e., Appellants as '*Defendants*' and Respondent Nos.1 to 6 as '*Plaintiffs and Respondent No.7 as Defendant No.5*')

2) Heard, Mr.Deshmukh, learned Advocate for the Appellants and Mr.Nikam, learned Advocate for the Respondent Nos.1 to 7.

3) Rule. Rule is made returnable forthwith and taken up for final hearing with the consent of the parties.

4) The suit property is as under :-

1A) Land bearing Gat No.469 admeasuring *oH-80 Are*, uncultivable *oH-1 Are*, situated at *Mouje Shelakbav*, Taluka Kadegaon, District Sangli.

1B) Out of the aforesaid land, western side *oH-09Are* land, having four boundaries as under :-

To East	Plaintiffs' land out of the suit property.
To South	Land of Plaintiff and Defendants in common Gat No.467
To West	Defendants' land in Gat No.468
To North	Land of Hanmant Tukaram Mahadik

5) The Plaintiffs averred that the suit property 1A is their ancestral property and is in their possession and occupation. The Defendants are having their land *Gat* No.468, adjoining to the west of the suit property 1A. From the last 7-8 months, the Defendants have illegally encroached the suit property 1A, claiming that the said land was given to them by a Court of law. Hence, the Plaintiffs got the suit property 1A measured on 23rd March, 2010, which revealed that the Defendants have encroached upon the suit property 1A to the extent of suit property 1B i.e. *9Are*. The Plaintiffs questioned the Defendants about the encroachment, but they claimed that now it has become their property and refused to remove the encroachment. Thus, the cause of action arose for the suit on 23rd March, 2010, therefore, the Plaintiffs filed the said R.C.S.No.147/2010 for the relief of removal of the encroachment and recovery of the possession of said *9 Are* land. It is stated that, the Defendant No.5 was not present, hence, he has been arrayed as formal party to the suit.

6) Defendant Nos.1 to 4 resisted the suit by entering their written statement (Exh.12). Thereafter, the Defendant No.1 expired. His legal heirs-Defendant Nos.1A to 1D adopted the written statement in their defence *vide purshish* dated 30th December 2014.

6.1) The Defendants have not admitted and denied each and every allegation, averment and statement made against them in the plaint. The Defendants have denied that they have encroached upon the suit property, as averred. They have contended that the Plaintiffs have filed this suit to take disadvantage of a mistake of a *Gat* Consolidation Officer. They have specifically contended that, in fact the *Gat* Scheme was made applicable to *Mouje Shelakbav* in the year 1962-63. Before the Consolidation Scheme (amalgamation), Survey No.79/1/2 admeasuring *3 acres* and *13 gunthas* and Survey No.79/1/3 admeasuring *28 gunthas* were the ancestral lands of the Defendants. Whereas lands bearing Survey No.79/1/4 admeasuring *37 gunthas* and Survey No.79/1/1 admeasuring *29 gunthas*, were owned by the Plaintiffs. During the *Gat* Scheme, out of the land Survey No.79/1/2, *0H-90Are*, area bearing *Gat* No.637, was independently recorded/mutated in the name of the Defendants and, the remaining *43Are* land was again divided in two parts. While consolidating the *Gat* No.468, the Consolidation Officer consolidated said *Gat* No.468 comprising of total *14Are* land out of Survey No.79/1/3, No.79/1/1 and No.79/1/2, in which Plaintiffs' *29Are* land out of pre-*Gat* Survey No.79/1/1, was included. As a replacement thereof, the Plaintiffs received *29Are* of

land in *Gat* No.469 out of (pre *Gat*) Survey No.79/1/2 of the ownership of the Defendants. Thus, since 1962-63 the Plaintiffs and Defendants are having separate occupation of their respective lands.

6.2) It is contended that the Plaintiffs' 9Are eastern side land out of their pre *Gat* Survey No.79/1/4 was included in the land bearing *Gat* No.470, of Shamrao Kadam, which is to the east of the Plaintiffs' said land. In consideration, the Plaintiffs took the land of Shamrao Kadam in *Gat* No.687. However, while preparing '9 x 3' and 9 x 4' extracts of the said consolidation, the Consolidation Officer did not include in the *Gat* No.468 the Defendants' 14Are land out of Survey No.79/1/2. As a result, less area has been recorded in 7 X 12 extract of *Gat* No.468.

6.3) It is contended that, in fact only 29 *gunthas* land out of Survey No.79/1/2 and only 28 *gunthas* land out of Survey No.79/1/4 being included in the Plaintiffs' *Gat* No.469, the Plaintiffs were never and are not in occupation of more area than that. However, the Plaintiffs mischievously held the measurement to take disadvantage of the mistake of the Consolidation Officer and the extra area noted in their 7 X 12 record. It is contended that without establishing the ownership of 80Are land in *Gat* No.469, the Plaintiffs' suit is not

tenable in law. It is contended that as the Defendants have already given to the Plaintiffs their 29 *gunthas* land out of Survey No.79/1/2 at the time of *Gat* consolidation, the Plaintiffs are not entitled to get more area than that from the Defendants.

6.4) It is contended that, the Plaintiff No.1 being an ex-military man and a SBI employee, he has influenced the creation of a false record of *Gat* No.469 having hands in glove with Consolidation Officer. It is contended that, never the 80 *Are* land was and is in the occupation of the Plaintiffs. Therefore, there is no question of the Defendants encroaching upon the Plaintiffs' land. It is contended that, the Plaintiffs' have not stated as to when the Defendants have committed the encroachment. The cause of action stated in the plaint is false and incorrect. The suit is barred by limitation, as the cause of action shall be deemed to have occurred in 1962-63.

6.5) The Defendants contended that, the measurement of *Gat* No.469 dated 23rd March 2010, is a private one and illegal, therefore, it is not acceptable to the Defendants. In the alternate it is contended that, if on merit it is revealed that, the Defendants have encroached the 9 *Are* land in *Gat* No.469, they have become its owner by adverse possession as since 1962-63 till date they are in continuous open,

unobstructed and peaceful occupation of the said land. Hence, the Plaintiffs are not entitled to remove encroachment by the Defendants.

6.6) It is contended that earlier the Plaintiffs' had filed a R.C.S. No.109/1995 against the same Defendants for the relief of removal of the same alleged encroachment in the suit property and recovery of its possession. The said suit was tried on merits and dismissed by a Judgment dated 2nd February, 2002. The Plaintiffs assailed the said Judgment in R.C.A. No.61 of 2002. However, the said Appeal came to be dismissed by the District Court on 1st September 2008. The decision in R.C.A. No.61 of 2002 has attained finality. The subject matter property and parties to R.C.S.No.109/1995 and the subject matter property and parties in this R.C.S. No.147/2010 are the same. The issues involved in the earlier suits and in this suit, are same. Therefore, this R.C.S.No.147/2010 has been barred by the principle of *Res-judicata*. Thus, the defendants have prayed to dismiss the suit.

7) In view of the rival pleadings, the Defendants submitted an Application at Exhibit.15 and prayed for framing a preliminary issue i.e., "*Whether suit of the Plaintiff is hit by the principle of Res-judicata?*". The parties did not lead evidence on the said issue. After considering the material pleadings, documents on record and hearing

the parties, the trial Court answered the preliminary issue '*in the affirmative*'. In this regard, the trial Court held that, considering the Judgment in R.C.S.No.109 of 1995 and the Judgment in R.C.A. No.61 of 2002, it is apparent that, the issues that may be raised by virtue of the reliefs sought in this suit in respect of the encroached area, the said issues have been already adjudicated by the Courts of competent jurisdiction. The Plaintiffs have not raised the issue of jurisdiction. There is no direction in the Judgment in R.C.A. No.61 of 2002 that the parties to the suit should get their lands measured. Therefore, there is no substance in the averment by the Plaintiffs that, as per decision in R.C.A. No.61 of 2002, the parties should get their land measured; but the Defendants are not ready to measure their land; hence, the Plaintiffs got their land measured which revealed the encroachment; and thus, there is a fresh cause of action for the suit. Therefore, and as provided in Section 11 of the Code of Civil Procedure ('*CPC*', for short), there is bar of res judicata to this suit. Accordingly, the trial Court dismissed the suit.

8) However, in the impugned Judgment and Order of R.C.A. No.254/2017, the learned Judge of the First Appellate Court observed that the decision in R.C.A No.61 of 2002, the same District Court

held that, “the Cadestral Surveyor has committed fatal defect in preparing the survey map. The survey map prepared on that basis was against the rule incorporated in survey manual. The measurement was totally defective. The surveyor has not measured the land of the Defendants, even adjoining land to locate the encroachment. Thus, the measurement already carried out was defective and hence the dispute regarding the encroachment of disputed portion of land was not at all resolved between the parties. The surveyor Mr. Namdeo Patil had admitted that after consolidation scheme, the area of the Plaintiffs’ land was increased. Under such circumstances, in view of various judgments of the High Courts and Supreme Court that dispute of encroachment can be resolved by joint measurement of lands of the Plaintiffs and lands of the Defendants, and as there was no joint measurement of lands of the parties at the time of filing of first suit i.e. R.C.S. No.109/1995, the dispute has not been finally decided between parties.” Therefore, the First Appellate Court held that the suit is not barred by the principle of *Res-judicata*, and quashed and set aside the trial Court’s Judgment and Decree in R.C.S. No.147/2010 and remanded the suit for decision afresh with following directions :-

(a) The learned Civil Judge, Junior Division, Kadegaon to frame the necessary issues after considering the pleadings of the parties.

(b) The learned Civil Judge, Junior Division, Kadegaon to give opportunity to both the parties to adduce the evidence.

(c) The learned Civil Judge, Junior Division, Kadegaon is directed to appoint Taluka Inspector Land Record (TILR) to carry out the joint measurement of land of plaintiffs and land of defendants directing to T.I.L.R. to carry out the measurement as per the Survey Manual and file his detail report along with the suitable map.

(d) The Plaintiffs to deposit the necessary fees for joint measurement within one month from the receipt of record and proceedings and first date fixed by Civil Judge, Junior Division, Kadegaon.

(e) If the Plaintiffs failed to deposit the necessary fees within the prescribed period the suit shall stand dismissed.

(f) The T.I.L.R. is to carry out the measurement within 3 months from the date of the order.

9) Learned Counsel Mr. Deshmukh for Defendants strongly submitted that, looking at the rival pleadings in this suit, there could be only 2 issues in this suit for decision i.e., (i) whether the Plaintiffs

prove their title over the 'disputed portion of the land'? (ii) Whether the Defendants have become owner of the 'disputed portion of the land', by adverse possession ?

9.1) He submits that, during first round of limitation, the R.C.A No.61/2002 was decided on 1st September, 2008. Subsequent suit was decided on 16th September 2010 i.e., exactly after two years. The alleged area of encroachment in the first suit and subsequent suit is same. The parties and subject matter of the suit are same. He submits that, the earlier suit was decided on merit. The decision in R.C.A No.61/2002 has attained finality. The Plaintiffs failed to prove their ownership over the 81Are land stated in that suit. As a result, they also failed to prove the alleged encroachment. Therefore, the trial Court was justified in disposing of the suit, only on the basis of the findings as to the preliminary issue of res judicata. Secondly, the need of fresh measurement was not directly or implicitly expressed by the First Appellate Court in the Judgment in R.C.A.61/2002. Even if such measurement is undertaken and it indicates an extra land, it would not confirm any title to the Plaintiffs as the decision in R.C.A No.61/2002 is in existence, holding that the Plaintiffs have failed to prove their ownership on the land over their 66 *gunthas* land. However, the

finding and decision in this suit has been unnecessarily quashed and set aside by the First Appellate Court by way of the impugned Judgment and Order, which is erroneous as well as illegal because in the facts, the case does not require a fresh measurement. Hence, the impugned Judgment and Order is liable to be quashed and set aside and the Judgment and Order of the trial Court be restored.

10) In contrast, learned Counsel Mr. Nikam for Plaintiffs submits that, even though the issue of encroachment was framed in the first round of litigation, no finding was possible in that regard due to faulty measurement of the lands, as all the lands owned by the Plaintiffs and the Defendants were not measured together. Therefore, even though the trial Court accepted the rival pleas of encroachment and ownership by adverse possession, the First Appellate Court set aside the said findings in R.C.A No.61/2002. If the measurement was proper, the decision of the suit in the trial Court would have been in favour of the Plaintiffs and so of the R.C.A No.61/2002. However, the Plaintiffs are not restricted in law from getting the suit property measured again and file this fresh suit to claim the necessary relief, may it be identical to the earlier suit. Hence, the Plaintiffs got the suit property thoroughly measured and then filed this suit.

10.1) He submits that, the cause of action on account of the encroachment is of continuous nature, hence, this suit is maintainable at the instance of the Plaintiffs because the issue of the encroachment was not decided on merit during the first round of litigation. He submits that, considering the averments in the plaint, contentions in the written statement and evidence proposed by the Plaintiffs in this second suit, the trial Court was duty bound to frame and decide the material issues i.e., whether the Plaintiffs prove that they are owner of the suit property *81Are*; that, whether the defendants have encroached upon *9Are* of the suit property; and that whether the Plaintiffs are entitled for recovery of possession of the encroached land? However, without thinking of framing such significant issues, the trial Court dismissed the suit only on the basis of the finding as to the preliminary issue. As such, the Judgment and Order of the trial Court was not only erroneous on facts but also in law. Therefore, the same has been rightly quashed and set aside by the First Appellate Court in R.C.A No.254/2017. In view thereof, the impugned Judgment and Order cannot be held as faulty so as to interfere with the same. As a result, the Appeal may be dismissed.

11) Looking at the controversy that surfaced from the rival contentions, first it is apposite to analyze the question that “*Can a trial Court frame and decide an issue as to bar of res judicata, as a preliminary ‘Issue of law’ or not?*” To get an answer to this question, it is needful to look into the decisions cited by the learned Counsel for the parties.

12) In *Govinda Goga Donde and Anr. vs. Mayur Ramesh Bora*¹, while answering the reference, the three Judges’ bench in paragraph 28 and 29, has held as under :-

“**28.** Sub-rule (2) of Rule 2 of Order 14 confers power on the Court to adjudicate issues relating to the jurisdiction of the Court or such bar created by any law for the time being in force which has the effect of disposing of “any part thereof”. The expression “any part” thereto occurring in sub-rule (2) of Rule 2 of Order 14 of the CPC, is conspicuously absent in Section 9-A of the CPC, which provides an indication that what was intended by the Legislature at the time of introduction of Section 9-A of the CPC was disposal of suit in its entirety and not part of the suit.

29. For the reasons assigned above, we are of the view that while exercising power under Section 9-A of the CPC, the Trial Court cannot frame an issue which has the effect

1. W.P. No.6769/2011 (Bom), dd. 18.07.2024.

of disposing of suit in part or cause of action in part. It is therefore held that while exercising power under Section 9-A of the CPC, the Trial Court can frame an issue of jurisdiction only if result of such issue would dispose of the suit or cause of action in its entirety. ...”

13) In *Sathyanath and Anr. vs. Sarojamani*², the challenge in the appeal was to an Order dated 03.09.2021 whereby in the revision petition filed by the defendant under Article 227 of the Constitution of India, the trial Court was directed to frame preliminary issue as to whether the suit is barred by res judicata. While examining this challenge, the Apex Court considered the provisions of Section 11, Or. 14 R. 2, Or. 41 Rr. 24 & 25 and Or. 20 R. 5 of the CPC, various earlier pronouncements by the Hon’ble Supreme Court and several High Courts.

13.1) In paragraph 6, the Apex Court referred the pre-amended Or. 14 R.2. In paragraph 7, the Apex Court held that, in a judgment reported as Major S. S. Khanna vs. Brig. F. J. Dillon [AIR 1964 SC 497], it was held that under Order 14 Rule 2 of the Code where issues both of law and of fact arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on the

2. (2022) 7 SCC 644.

issues of law only, it shall try those issues first, and postpone the settlement of the issues of fact until other issues of law have been determined. Then the Apex Court considered the amended provisions of Or. 14 R.2 and in paragraph 16, 17, 23, 25, 26, 28 and 29, it is held as under :-

“**16.** The matter has also been examined by this Court in a judgment reported as Ramesh B. Desai and Ors. vs. Bipin Vadilal Mehata and Ors. [(2006) 5 SCC 638] wherein it was held as under:

“**13.** Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S. S. Khanna vs. Brig. F. J. Dillon and it was held as under: (SCR p. 421)

“xxx xxx xxx”

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above

quoted decision still holds good and there can be no departure from the principle 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 the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.”

“17. This Court in Ramesh B. Desai held that the principles enunciated in Major S. S. Khanna still hold good and 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 the decision on issue depends upon the question of fact, it cannot be tried as a preliminary issue. The said finding arises from the provision of Order XIV Rule 2 clause (a) and (b). After the amendment, discretion has been given to the Court by the 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., the bar to file a suit before the civil court such as under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and numerous other laws particularly relating to land reforms. Hence, if Order XIV Rule 2 is read along with Order XII Rule 5, the Court is expected to decide all the issues together unless the bar of jurisdiction of the court or bar to

the suit in terms of sub-rule (2) clause (a) and (b) arises. The intention to substitute Rule 2 is the speedy disposal of the lis on a question which oust either the jurisdiction of the Court or bars the plaintiff to sue before the Civil Court.

“xxx xxx xxx”

23. The different judgments of the High Court referred to above are in consonance with the principles laid down by this Court in Ramesh B. Desai (Supra) that not all issues of law can be decided as preliminary issues. Only those issues of law can be decided as preliminary issues which fell within the ambit of clause (a) relating to the “jurisdiction of the Court” and (b) which deal with the “bar to the suit created by any law for the time being in force.” The reason to substitute Rule 2 is to avoid piecemeal trial, protracted litigation and possibility of remand of the case, where the appellate Court differs with the decision of the trial Court on the preliminary issues upon which the trial Court had decided.

“xxx xxx xxx”

25. In Abdul Rahman vs. Prasony Bai & Anr. [(2003 1 SCC 488)], this Court was examining a suit filed by the appellant in the year 1999 to declare that the defendant is not the daughter of Mangal Singh and that the appellant is in adverse possession even during the life time of Mangal Singh. An additional issue was framed regarding the jurisdiction of the civil suit to try the said suit. The High

Court in proceedings passed an order on 29.11.2001 dismissing the suit on the preliminary issue whether the dispute to the present civil suit has already been decided and adjudicated by the Court and is barred by the principles of res judicata. An *intra* Court appeal was filed which was dismissed on 4.12.2001 and thereafter, the matter travelled to this Court. In these circumstances, this Court held as under:

“21. For the purpose of disposal of the suit on the admitted facts, particularly when the suit can be disposed of on preliminary issues, no particular procedure was required to be followed by the High Court. In terms of Order 14 Rule 1 of the Code of Civil Procedure, a civil court can dispose of a suit on preliminary issues. It is neither in doubt nor in dispute that the issues of res judicata and/or constructive res judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Such issues, in fact, when facts are admitted, ordinarily should be decided as preliminary issues.”

26. A perusal of the above judgment of this Court shows that it was an admitted fact that issue of res judicata and of constructive res judicata can be adjudicated as preliminary issue. Since it was an admitted fact, it cannot be said that principle of law has been enunciated that a plea of res judicata can be decided as a preliminary issue.

13.2) In ***Sathyanath and Anr.*** (Supra), in paragraph 28 the Apex Court referred the decision in Shrihari Hanumandas Totala vs. Hemant Vithal Kamat [(2021) 9 SCC 99], and noted that, “... the plea of res judicata requires consideration of pleadings, issues and decision in the previous suit and such a plea would be beyond the scope of Order VII Rule 11. However, in the operative paragraph, it was observed that the trial Court shall consider whether a preliminary issue should be framed under Order XIV, and if so, to decide it within a period of three months of raising the preliminary issue.” Then, in paragraph 29 held as under :-

“**29.** This Court was thus examining the scope of Order VII Rule 11 of the Code, whereas such is not the issue in the present appeal. In fact, the defendant has filed an application for framing of preliminary issues. The direction of the High Court is on such application. Therefore, such application needs to be considered in the light of the provisions of Order XIV Rule 2 of the Code.

13.3) In ***Sathyanath and Anr.*** (Supra), in paragraph 30 and 31, the Apex Court referred the decision in the case of Jamia Masjid vs. K. V. Rudrappa, [(2022) 9 SCC 225 and in particular paragraph 26 and 66]. Then in paragraph 32 and 33 thereof, it is held as under :-

32. A perusal of the said judgment would show that only issue Nos. 5 and 6 were decided relating to res judicata and limitation as preliminary issues by judgment dated 3.2.2006. This Court set aside the finding on the preliminary issue by judgment dated 23.9.2021 i.e., almost more than 15 years later when the matter was remanded back to the trial Court. The absence of the decision on all issues have necessitated the matter to be remanded back, defeating the object of expeditious disposal of lis between the parties. The conclusion in Para 66.1 is that the plea of res judicata in appropriate cases may be determined as preliminary issue when it is neither a disputed question of fact nor a mixed question of law and fact. Such finding is what this Court held in Ramesh B. Desai.

33. We find that the order of the High Court to direct the learned trial court to frame preliminary issue on the issue of res judicata is not desirable to ensure speedy disposal of the lis between parties. Order XIV Rule 2 of the Code had salutary object in mind that mandates the court to pronounce judgments on all issues subject to the provisions of sub-Rule (2). However, in case where the issues of both law and fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that suit first, if it relates to jurisdiction of the Court or a bar to the suit created by any law for the time being in force. It is only in those circumstances that the findings on other

issues can be deferred. 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).

14) In ***R. M. Sundaram alias Meenakshisundaram vs. Sri Kayarohanasamy and Neelayadhakshi Amman Temple (Through its Executive Officer) Nagapattinam, Tamil Nadu***³, in paragraph 36, it is held as under :-

“36. General principle of res judicata under Section 11 of the Code contains rules of conclusiveness of judgment, but for res judicata to apply, the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit. Further, the suit should have been decided on merits and the decision should have attained finality. Where the former suit is dismissed by the trial Court for want of jurisdiction, or for default of the plaintiff's appearance, or on the ground of non-joinder or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or

3. 2022 SCC OnLine SC 888

succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation, or for failure to pay additional Court fee on a plaint which was undervalued, or for want of cause of action, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be res judicata in a subsequent suit. The reason is that the first suit is not decided on merits.”

15) Considering the law laid down in the aforesaid reported decisions it is clear that, not all issues of law can be decided as preliminary issues. Only those issues of law can be decided as preliminary issues which fell within the ambit of clause (a) relating to the “jurisdiction of the Court” and (b) which deal with the “bar to the suit created by any law for the time being in force”. The reason to substitute Rule 2 is to avoid piecemeal trial, protracted litigation and possibility of remand of the case, where the appellate Court differs with the decision of the trial Court on the preliminary issues upon which the trial Court had decided. Hence, in my considered view, depending on facts of the case, an issue as to bar of res judicata can be framed and decided as “preliminary issue of law”.

15.1) Now the second question is whether the instant suit is barred by res judicata or not ? In this regard it is significant to note that there is no disagreement between the parties herein as to the fact that the averments of the Plaintiffs and contentions of the Defendants in the earlier suit as well as in this suit, are exactly same. In the earlier R.C.S. No.109/1995, the trial Court had framed following issues :-

- 1) Whether plaintiffs prove that, defendants have made encroachment in land described in para 1 (b) of plaint i.e. suit land?
- 2) Whether defendants prove that, they are owner of the suit land by adverse possession ?
- 3) Whether Plaintiffs are entitled to recover possession of suit land ?
- 3A) Whether the suit is within limitation ?
- 4) What relief ?

15.2) In view of the evidence on record, the trial Court answered the said issue Nos.1 and 2 '*in the affirmative*', issue Nos.3 and 3A '*in the negative*' and hence, dismissed the R.C.S. No.109/1995.

16) However, in R.C.A. No.61/2002 against that Judgment, the First Appellate Court considered following points for determination :-

- 1) Whether the plaintiffs prove title over the 'disputed portion of the land' ?

2) Whether defendants are the owners of the 'disputed portion of the land' by adverse possession ?

16.1) After considering the evidence and rival submissions, the First Appellate Court answered the points as “No” for following reasons (*in paragraph 13 to 18 of Judgment*). Accordingly, it allowed the Appeal and quashed and set aside the trial Court's Judgment and Decree in R.C.S. No.109/1995. Said reasons are as under :-

13. After careful perusal of pleadings in defence, it will certainly appear that, the required ingredient of defendants' animus to blame them for laying hand on the 'disputed portion of the land', is missing. Defendants required to plead and establish '*animus possessendi*'. For whatever longer period, the defendants may be having in possession of 'disputed portion of the land', unless they prove animus against true owner and accept his title of 'disputed portion of the land', the defendants cannot claim title by prescription.

The learned trial Court, while recording such finding of fact, has committed a legal error, although has at some places in judgment has quoted correct position of law, but has come to wrong conclusion to hold that, defendants have become owners of 'disputed portion of the land' (9 Rs), by adverse possession.

14. At the out-set, it is to be noted that, the cadastral surveyor has committed fatal defect in preparing the

survey map. At this juncture, it would not be out of place to mention, from the evidence of surveyor that, the survey and map prepared thereon is against the rule incorporated in the survey manual. The measurement is totally defective. The surveyor has not measured the land of defendants, even the adjoining land, to locate the encroachment. He has fixed as many as six new points while adopting measurements as per plane-table method. Without measuring the adjoining or adjacent land of defendants, the survey manual does not allow cadestral surveyor to declare that, the particular piece of land has been encroached upon by the contiguous or adjoining owner.

15. The surveyor *Namdeo Patil*'s evidence does not show that, he had *tippan* (टिप्पण) book or *phalani* (फाळणी) maps with him. He measured the land of defendants Gat No.468 alone. He obtained the signatures of persons present at the time of measurement, which included defendants. He knows that, after consolidation scheme was employed, the area of plaintiff's land was increased. He admits that, he found only one old fixed stone on north-east boundary.

16. Even if it is assumed that, on the basis of fixed stone he has measured by using plane-table method, the "suit land" alone, without measuring the land of defendants, it was not possible for him to include the 'disputed portion of land' in the "suit land", unless he has measured all the *Pot hissas* (पोट हिस्से/हिस्सा) of original survey numbers, as

per the consolidation record of original holdings. He also knows that, the defendants have preferred an appeal before *Jamabandi Ayukt* (जमाबंदी आयुक्त), Pune (Consolidation Commissioner), and thus the parties have resorted to remedy provided in statue for correction of record.

17. Apart from that, what is evidence of plaintiffs to prove their title to the extent of 80 + 1 Rs, recorded in their name in the record of right or 7x12 extract of Gat No.469 ?

Plaintiffs' witness in his cross examination admits that, the consolidation scheme was applied to his village in the year in 1957-58. At that time, name of his father was recorded to the land S.No. 79/1/1 and 79/1/4. Both these lands ad-measure 29 *gunthas* and 37 *gunthas*, respectively. That means his total holding was to the extent of 66 Rs. At the time of consolidation, there was exchange of the lands, within the vicinity. Defendants say that, there was no superiority or inferiority. Therefore, plaintiff cannot maintain a claim over more than 66 Rs. Whereas, undisputedly; the land to the extent of 80+1 Rs., came to be recorded in favour of plaintiffs, as Gat No. 469, the "suit land". It is not the case of plaintiffs that, during exchange of lands, they received more area of land from and out of defendants' land, to consolidate the block of defendants. Therefore, against this admission, the plaintiff even cannot lay claim before consolidation officer, now, to

state that he was holding title over 80+1 Rs. of land although so recorded to the 7x12 record.

18. However, the learned trial Court has recorded affirmative finding about the title of plaintiff, over “suit land” block No.469, in entirety, i.e. 80+1 Rs., which per-se is incorrect in view of above discussed position of evidence on record, i.e. the admission of plaintiff.

19. Defendants have given details as to how the blocks were consolidated and how the plaintiffs own 66 gunthas of land alone and there is no encroachment.

The learned trial Court ought to have recorded negative finding as to title of plaintiffs over the ‘disputed portion of suit land’. He has mixed the “suit land” and ‘disputed portion of the land’, though the pleadings are very specific raised in defence by written statement, to come to know that 14 Rs. land is extraneously recorded to the 7x12 extract alone, there is exchange of 28 or 29 *gunthas* between plaintiffs and defendants to form respectively block Nos. 469 and 468, without changing the original acerage, over which both have held the title since the time of their ancestors.

The learned trial Court thus has also committed error in recording finding of fact in issue No.1, holding plaintiffs to be title holder of the “suit land” Gat No.469 in its entirety.

In this situation, I am inclined to accept arguments on behalf of respondents to exercise powers vested in this

Court, under Order under Order 41, Rule 33 Civil Procedure Code, 1908, to convert findings of facts though there is no cross objections, but to confirm the “impugned judgment and decree”.

17) Looking at the pleadings of the Plaintiffs it is evident that, they have claimed that they are owner of the entire *81Are* suit property 1A and 1B, as it is their ancestral property. Same fact they had pleaded in the earlier suit. To prove that fact the evidence adduced and relied by the Plaintiffs in the earlier suit and this suit is same. There is no dispute that on the strength of said evidence in the earlier suit, the trial Court held that, the Plaintiffs are owner of the suit property 1A and 1B, however, in the R.C.A. No.61/2002 the First Appellate Court clearly held that, “the Plaintiffs’ witness in his cross examination admits that, the consolidation scheme was applied to his village in the year in 1957-58. At that time, name of his father was recorded to the land S.No. 79/1/1 and 79/1/4. Both these lands ad-measure *29 gunthas* and *37 gunthas*, respectively. That means his total holding was to the extent of *66Rs*. At the time of consolidation, there was exchange of the lands, within the vicinity. The Defendants say that, there was no superiority or inferiority. Therefore, plaintiffs cannot

maintain a claim over more than 66Rs. However, 80+1 *Are*. land came to be recorded in favour of plaintiffs, as Gat No. 469, the “suit land”. Neither it is case of the Plaintiffs nor there is evidence that, during exchange of lands, they received more area of land from and out of Defendants’ land, to consolidate the block of Defendants. Therefore, against this admission, the Plaintiffs even cannot lay their claim before the Consolidation Officer, now, to state that the Plaintiffs were holding a title over 80+1 *Are* of land although so recorded to the 7x12 record. The First Appellate Court, therefore, held that, the affirmative finding of the learned trial Court, as to issue No.1, about the title of the Plaintiffs, over “suit land” block No.469, in entirety, i.e. 80+1 *Are*, is per-se incorrect in view of the above discussed position of evidence on record, i.e. the admission of Plaintiff. Further, the First Appellate Court held that, the Defendants have given details as to how the blocks were consolidated and how the plaintiffs own 66 *gunthas* of land alone and there is no encroachment. Hence, the learned trial Court ought to have recorded a negative finding as to title of plaintiffs over the ‘disputed portion of suit land’. Thus, what the First Appellate Court held is that, the Plaintiffs have failed to prove their ownership over the entire 81*Are* land including encroachment on the disputed 9*Are* land.”

18) In this background, if the trial Court is made to decide this subsequent suit on merit i.e., after hearing the evidence of the parties as directed in the impugned Judgment and Order of the First Appellate Court in R.C.A. No.254/2017, then the first issue the trial Court will have to frame and examine is, whether the Plaintiffs prove that the suit property total *81Ares* land is their ancestral property and they are its owner? However, the trial Court will not be in position to frame and decide this issue and record a new finding on it. Because, this issue has been already fought on merit in the first suit and ultimately in the R.C.A. No.61/2002, the first Appellate Court on reversing the affirmative finding on this issue, held that the Plaintiffs have failed to prove that they are owner of the disputed portion i.e. *9 Are* land. The Plaintiffs have not challenged the Judgment and Order of the first Appellate Court filing Second Appeal as such said Judgment and Order of the First Appellate Court has attained finality. Thus, in short, without proving that the Plaintiffs are owner of *81 Are* land, the question of encroachment cannot be re-examined for a fresh finding. That apart, the Judgment in R.C.A. No.61/2002 also held that, the encroachment is not proved. The preliminary issue was not a mixed question of law and fact. Nor its finding was depending on the

finding of any other issue of fact. The finding on the preliminary issue was sufficient to decide the entire suit. Thus, it has the effect of achieving the objective of the principle of res judicata as well as Or. 14 R.2 (b). Therefore, the learned Judge of the trial Court is correct in framing and deciding the preliminary issue 'in the affirmative'.

19) No doubt, the affirmative finding on the said issue No.1 in the R.C.S. No.109/1995 was purely the finding of fact, but on account of affirmative finding as to issue no.2 of 'adverse possession' and the negative findings on issue Nos.3 and 3A, the suit was dismissed. Thus, overall, the decision in R.C.A. No.61/2002 did not adversely affect the Defendants and finely it was in their favour. However, without there being any cross objection or an independent appeal by the Defendants against the finding as to said issue No.1, the First Appellate Court in R.C.A. No.61/2002 set aside the said finding, exercising powers under Order 41, Rule 33. However, now, this is of no rescue to the Plaintiffs as they have not challenged the decision of the first Appellate Court in R.C.A. No.61/2002 and hence, it has become final. If it is held otherwise, then it would make the principle of res judicata, redundant.

20) In *Kashinath Ramkrishna Chopade Vs. Purushottam Rulshiram Tekade & ors.*⁴, this Court observed and held that, "... The

4. 2005 (6) Bom.C.R., 267.

*cases of boundary disputes and disputes about the identity of lands are instances when a Court should order a local investigation under Order XXVI Rule 9 of CPC. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon". In **Sulemankhan and ors. Vs. Bhagirathibai and ors.**⁵, this noted that, "This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit, in which there is a boundary dispute. The Trial Court as well as First Appellate Court, which are Court of facts, are duty bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map".*

21) Admittedly, the measurement in the earlier suit was defective. This subsequent suit was also filed on the basis of a defective

5. 2014 (4) Mh.L.J., 250.

measurement, as held in the impugned Judgment, therefore, the view of learned Judge of the First Appellate Court is right that dispute of encroachment can be resolved by joint measurement of lands involved in the dispute. Yet, on account of the bar of res judicata, the said learned Judge could not have remanded the suit for fresh decision in view of the new measurement.

22) Considering the facts and circumstances of the case, it appears that, after the decision in the R.C.A. No.61/2002, lately the Plaintiffs realised that the said decision may prove an obstacle in their claim before the Consolidation Commissioner, seeking for correction of the record. Therefore, the Plaintiffs have filed this suit fully aware of the principle of res judicata. All that is discussed in the forgoing paragraphs, is not considered by the learned Judge of the First Appellate Court. As a result, an error crept in the impugned Judgment and Order and hence, it is liable to be quashed and set aside. The Appeal from Order succeeds, thus. Hence, following Order.

- Order -

- 1) Appeal from Order No.614 of 2022 is allowed.
- 2) The impugned Judgment and Order dated 14th March 2022, passed by the Court of learned District Judge-4, at

Sangli, in Regular Civil Appeal No.254/2017 is quashed and set aside.

3) The Judgment and Order dated 9th August, 2017 passed by the Court of Civil Judge, Junior Division, *Kadegaon* in Regular Civil Suit No.147/2010, is restored.

4) The Appeal from Order is disposed of in aforesaid terms. Rule is made absolute.

5) As a result, Interim Application No.3743/2022 stands disposed of.

PREETI
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JAYANI

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[SHYAM C. CHANDAK, J.]