IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL
ON THE 03rdOF AUGUST, 2023

SECOND APPEAL NO.414 OF 2000

Between:-

1. **USHA RAI, W/O SHRI KAMAL SINGH RAI, AGED ABOUT 27 YEARS, R/O SANDIYA ROAD, PIPARIA, TEHSIL PIPARIA, DISTRICT HOSHANGABAD**

2. **KAMAL SINGH RAI S/O SHRI MUNSILAL RAI, AGED ABOUT 37 YEARS, OCCUPATION: BUSINESSMAN, R/O SANDIYA ROAD, TEHSIL PIPARIYA, DISTRICT HOSHANGABAD (MADHYA PRADESH)**

……..APPELLANTS

(BY SHRI G.S. BAGHEL, ADVOCATE)

AND

SANSKRIT PATHSALA SAMITI, PIPARIYA THROUGH ITS VICE PRESIDENT SHRI HIMMAT SINGH MUKTIYAR, AGED ABOUT 70 YEARS, R/OMAHARANA PRATAP WARD, PIPARIYA, DISTRICT HOSHANGABAD (MADHYA PRADESH)

……...RESPONDENT

(BY SHRI AJAY KUMAR JAIN, ADVOCATE)

This appeal coming on for final hearing this day, the Court passed the following:

JUDGMENT

This second appeal has been preferred by appellants/plaintiffs challenging the judgment and decree dated 29/01/2000 passed by Additional District Judge, Sohagpur in Civil Appeal No.17-A/1993, affirming the final order dated 27/07/1993 passed by Civil Judge Class-II, Pipariya in Civil Suit No.4-A/1989, whereby dismissing the suit as barred by res judicata.

2. Facts in short are that the appellants/plaintiffs had instituted a suit for declaration of title and permanent injunction with the allegations that the plaintiff 1 is owner of plot No.15 admeasuring 1740 sq.ft. of Khasra No.2/1 situated in Pipariya, which was purchased by her from Rameshchandra vide registered sale deed dated 01/04/1980. It is also alleged that respondent had filed a civil suit no. 38-A/80 for possession of land 0.04 acre, which was dismissed on 04.05.1982 by the Court of Civil Judge Class-II, Sohagpur, which was reversed in appeal and suit was decreed on 08.10.1987 by first appellate Court, which attained finality vide order dtd. 05.05.1988 passed in SA no. 15/88 by High Court.

3. The appellants further pleaded that Khasra No.2/1 was having total area 0.26 acre, out of which the defendant purchased 0.17 acre vide registered Sale deed dtd. 23.01.1961. As mutation of defendant was done over 0.13 acre only, therefore, the defendant got registered sale deed on 15.10.1962 again about an area 0.04 acre, as such the defendant is bhumiswami of an area 0.17 acre. The plaintiffs contended that plaintiff's land/plot admeasuring 0.04 acre is different from the property owned by the defendant. Accordingly, the plaintiffs instituted the suit for declaration of title and permanent injunction.

4. The respondent/defendant appeared and filed written statement denying the plaint allegations and contended that neither Rameshchandra Sharma nor the plaintiff 1 is owner of the plot admeasuring 1750 sq.ft. It is

contended that there is already a decree passed in respect of the suit plot in favour of the defendant and the decision given in previous Civil Suit No.38-A/80 operates res judicata to the present suit. On inter-alia contentions the suit was prayed to be dismissed.

5. Record shows that on the basis of pleadings of the parties, learned trial Court did not frame requisite issues and on 27.06.1990 framed only one issue of res judicata and after hearing arguments, decided the same and dismissed the suit vide its final order dated 27/07/1993 holding the present/later suit to be barred by principle of res judicata.

6. Against the final order dated 27/07/1993, the plaintiffs/appellants preferred civil appeal, which was also dismissed by first appellate Court vide impugned judgment and decree dated 29/01/2000.

7. Challenging the final order and judgment and decree passed by learned Courts below, instant second appeal was filed, which was admitted for final hearing on 24/08/2005 on the following substantial question of law:

> "Whether the suit of the plaintiffs/appellants could have been legally dismissed on the ground of res judicata without affording the parties an opportunity to adduce evidence and pleadings of the earlier suit?"

8. Learned counsel for the appellants/plaintiffs submits that after framing preliminary issue of res judicata, learned trial Court did not even fix the civil suit for evidence of the parties and without recording evidence and on the basis of arguments of the parties, decided the preliminary issue of res judicata and the procedure adopted by learned trial Court is contrary to the provision contained in Order 14 Rule 1 & 2 CPC as well as contrary to the settled law. He further submits that learned first appellate Court also did not take care of the aforesaid illegality committed by learned trial Court. Accordingly, he submits that the substantial question of law framed by this Court deserves to be decided

in favour of the plaintiffs and the matter deserves to be remanded back to learned trial Court for decision of civil suit afresh in accordance with law.

9. Learned counsel for the respondent/defendant supports the impugned order and judgment and decree passed by learned Courts below and prays for dismissal of the second appeal with the contention that the land in dispute in the instant suit is the same land regarding which the dispute has already been decided by previous judgment and decree passed in civil suit no. 38-A/80 and the learned Court has rightly dismissed the suit holding it to be barred by principle of res judicata and accordingly, he prays for dismissal of the second appeal.

10. Heard learned counsel for the parties and perused the record.

11. Record of trial Court shows that on 27/06/1990, learned trial Court framed preliminary issue of ***res judicata*** and even without fixing the case for evidence of the parties, learned Court fixed the case for arguments on the preliminary issue. However, later on learned Court entertained several other applications and also permitted the parties to file photocopies of some documents but ultimately, the arguments on preliminary issue were heard on 19/07/1993 and learned Court passed the final order on 27/07/1993 deciding the preliminary issue in affirmative in favour of the defendant and dismissed the instant suit holding it to be barred by principle of ***res judicata.***

12. Upon filing civil appeal by the appellants, learned first appellate Court has also not taken care of the aforesaid unknown procedure adopted by learned trial Court and dismissed the civil appeal affirming the final order passed by learned trial Court.

13. For the purpose of convenience, the provisions contained in Order 14 Rule 1 & 2 CPC, are quoted as under:

> **"1. Framing of issues**

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party denied by the other shall form the subject of distinct issue.

(4) Issues are of two kinds :

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2. Court to pronounce judgment on all issues

(1) Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) 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 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, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

14. The aforesaid Rule 1(5) makes it clear that learned Court is required to frame all the necessary issues on the basis of disputed pleadings made in plaint and written statement and Rule 2 provides that if the Court is of opinion that the suit may be disposed of an issue of law only, which relates to jurisdiction of the Court or a bar to the suit created by any law, then the Court may try it as a preliminary issue. The said provisions nowhere say that the issue which requires evidence, may be decided as a preliminary issue. Meaning thereby, if an issue requires evidence, then it should be decided after recording evidence of the parties along with other issues.

15. In the present case, on the basis of pleadings of the parties, learned trial Court neither framed all the relevant issues nor cared to record evidence on the preliminary issue of ***res judicata*** framed by it. It is well settled that the issue of ***res judicata*** is a mixed question of law and fact and should be decided after recording evidence of the parties. The Hon'ble Supreme Court in the case of Sathyanath and another v. Sarojamani **(2022) 7 SCC 644** has held as under :

> "31. 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 Us 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).
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> 32. The objective of the provisions of Order XLI Rules 24 and 25 is that if evidence is recorded by the learned Trial Court on all the issues, it would facilitate the first Appellate Court to decide the questions of fact even by reformulating the issues. It is only when the first Appellate Court finds that there is no evidence led by the parties, the first Appellate Court can call upon the parties to lead evidence on such additional issues, either before the Appellate Court or before the Trial Court. All such provisions of law and the amendments are to ensure one objective i.e., early finality to the lis between the parties.
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> 33. Keeping in view the object of substitution of sub-Rule (2) to avoid the possibility of remanding back the matter after the decision on the preliminary issues, it is mandated for the trial court under Order XIV Rule 2 and Order XX Rule 5, and for the first appellate court in terms of Order XLI Rules 24 and 25 to record findings on all the issues.
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> 34. Therefore, the order of the High Court remanding the matter to the learned trial court to frame preliminary issues runs counter to the mandate of Order XIV Rule 2 of the Code and thus, not sustainable in law. The learned trial court shall record findings on all the issues so that the first appellate court has the advantage of the findings so recorded and to obliviate the possibility of remand if the suit is decided only on the preliminary issue."

16. In the case of Srihari Hanumandas Totala v. Hemant Vithal Kamat and others **(2021) 9 SCC 99**, the Hon'ble Supreme Court has held as under :

> "17. Section 11 of the CPC enunciates the rule of res judicata : a court shall not try any suit or issue in which the matter that is directly in issue has been directly or indirectly heard and decided in a 'former suit'. Therefore, for the purpose of adjudicating on the issue of res judicata it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while

adjudicating on res judicata, before referring to res judicata as a ground for rejection of the plaint under Order 7 Rule 11. Justice R C Lahoti (as the learned Chief Justice then was), speaking for a two Judge bench in V. Rajeshwari v. T.C. Saravanabava, (2004) 1 SCC 551, discussed the plea of res judicata and the particulars that would be required to prove the plea. The court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the 'former suit' while adjudicating on the plea of resjudicata:

> "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.
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> 13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment 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 resjudicata 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. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh v. Bhooralal [AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy, of State for India in Council [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit." (emphasis supplied)"

17. In the present case, learned trial Court just contrary to the settled law did not frame all the issues at once and after framing one issue of res judicata (as a preliminary issue) fixed the case for argument thereon and then decided the same vide final order dtd. 27.07.1993. Apparently the parties were not given any opportunity of adducing evidence in support of their pleas. It is pertinent to mention here that even in the plaint there were sufficient pleadings in respect of previous litigation and plaintiff came with the case, that judgment and decree passed in previous suit is in respect of different property. As such the case

pleaded by the plaintiffs deserved to be decided after recording evidence on all the issues and could not have been dismissed on the ground of res judicata even without affording the parties an opportunity to adduce evidence and pleadings of the earlier suit.

18. Accordingly, the substantial question of law is decided in favour of the appellants and against the respondent.

19. In view of aforesaid, in my considered opinion, final order dated 27.07.1993 passed by learned trial Court so also the judgment and decree dated 29/01/2000 passed by learned first appellate Court deserve to be and are hereby set aside and the matter is remanded to trial Court for deciding the civil suit afresh after framing all the relevant and necessary issues and after giving due opportunity of hearing to both the parties.

20. At this stage, learned counsel for the parties jointly prayed for allowing the application under 26 Rule 9 CPC (IA no.11857/2023) and concedes that there is dispute of boundaries of the suit property(s) owned by them, which can be decided only by appointment of Commissioner. Involvement of dispute of boundaries is also apparent from the order dtd. 27.07.1993 passed by learned trial Court, therefore, the IA 11857/23 deserves to be and is hereby disposed off with observation that learned trial Court at the appropriate stage of suit, shall appoint commissioner to demarcate the disputed property as per provisions contained in Order 26 Rule 9 CPC.

21. Looking to the dispute involved in the present case, learned counsel for the respondent (Shrikrishna Sanskrit Pathshala Samiti Pipariya) also undertakes that till decision of instant civil suit, he will not execute the decree of possession passed on 08.10.1987 by 2nd Addl. District Judge, Hoshangabad in civil appeal no. 18-A/1987.

22. Parties are directed to appear before trial Court on **04/09/2023.**

23. With the aforesaid observations, this second appeal is hereby allowed and **disposed off**. No order as to costs.

24. Interim application(s), if any, shall stand disposed off.

(DWARKA DHISH BANSAL)
JUDGE

RS