

**THE HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT
JABALPUR**

Civil Revision No.	566 of 2019
Parties Name	Suresh Kesharwani and another Vs. Roop Kumar Gupta and another.
Bench Constituted	Single Bench
Judgment delivered by	Hon'ble Shri Justice Vishal Dhagat.
Whether approved for reporting	Yes
Name of counsel for parties	For applicants : Shri A. Rajeshwar Rao, Advocate. For respondents : Shri A.K. Jain, Advocate.
Law laid down	Order 23 of C.P.C. is based on principle of waiver. If liberty under Order 23 Rule 3 is not sought and plaintiff has abandoned his claim then the subsequent suit on same subject matter and claim is barred.
Significant paragraph numbers	Para No. 8.

(ORDER)
06.08.2020

Applicants namely Suresh Kesharwani and Geeta Kesharwani are defendants before the trial Court and non-applicant No. 1 is plaintiff before the trial Court. Applicants (hereinafter referred to as defendants) had filed an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 before the trial Court making a prayer that civil suit RCS No.430/2019 is not maintainable as same is barred by principle of *resjudicata*. Earlier non-applicant No. 1 (hereinafter referred to as plaintiff) has filed a suit bearing registration number RCS No. A769/2018. Defendants averred that parties, pleadings and

prayer in former Civil Suit No. 769/2018 is same as made in the subsequent suit No. 430/2019. It was further pleaded in the application that plaintiff has filed an application under Order 23 Rule 1 of CPC in civil suit No. 769/2018 for simple withdrawal of suit. Learned trial Court vide its order dated 10/04/2019 allowed the application for withdrawal of suit on condition that plaintiff is precluded to file the suit on the same subject matter in future.

2. On basis of aforesaid pleadings, defendants made a prayer in their application to reject the plaint filed by the plaintiff and further be pleased to impose heavy cost on plaintiff for abuse of process of law in the interest of justice.

3. Learned trial Court vide its order dated 27/06/2019 rejected the application filed by the defendants. Learned trial Court held that former suit which was filed by the plaintiff was not decided on merits and nature of relief claimed in former suit, i.e. RCS-A769/2018 and subsequent suit, RCS No. 430/2019 is different, therefore, subsequent suit of plaintiff is not barred by the principle of resjudicata.

4. Impugned order dated 27/6/2019 is under challenge in civil revision on the grounds that fresh Civil Suit filed by the plaintiff is barred by the principle of resjudicata, learned trial Court has allowed withdrawal of suit under Order 23 Rule 1 of CPC with condition that plaintiff will be precluded to bring fresh suit again for the same cause of action. It was also pleaded that learned trial Court ignored the fact that former suit was amended on 18.01.2019 and Smt. Geeta Kesharwani and Suresh Kesharwani was made a party to the suit. Prayer for amending relief clause and to substitute clause a was also allowed ie. to declare sale deed dated 03.08.2018 to be null and void. Prayer for permanent injunction to restrain purchasers to disturb plaintiff in enjoyment of 8 feet passage and declaration that purchasers have no right to dispossess plaintiff on basis invalid sale deed.

5. Counsel appearing for plaintiff opposed the application on the ground that cause of action in both the civil suits is different. In former suit cause of action is dated 02.08.2018 and in subsequent suit cause of action is 24.04.2019. Former suit RCS-A769/2018 was not decided on merits therefore principle of resjudicata is not attracted and therefore Civil Revision filed by the defendants may be dismissed.

6. Heard the counsel appearing for both the parties. On perusing the application filed under Order 7 Rule 11 CPC, 1908, two points has been pleaded by the defendants firstly, the suit is barred by resjudicata and secondly, plaintiffs were allowed to withdraw the suit vide order dated 10.04.2019 without liberty to institute fresh suit and are precluded to file the suit on the same subject matter.

7. Now it is to be seen whether the trial Court has committed an error of jurisdiction in dismissing the application filed by defendants under Order 7 Rule 11 CPC, 1908. Trial Court came to finding that earlier suit was not decided on merits and relief sought in both the suits are different therefore suit is not barred under Section 11 of CPC by principle of resjudicata. Trial Court did not advert to fact whether plaintiff can bring a fresh suit in face of order dated 10.04.2019.

8. Section 11 of the Code of Civil Procedure is based on principle of resjudicata. As per Section 11 of CPC, no Court shall try any suit or issue in which the matter is directly and substantially in issue has been directly and substantially in issue in the 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 issue has been substantially raised and has been heard and finally decided by such Court. Section 11 of CPC creates bar on trial of subsequent suit by Court if issues which have been directly and substantially in issue between same parties in former

suit has been decided on its merits. However, Order 23 of CPC is not based on principle of restjudicata but it is based on principle of waiver of rights by the plaintiff. As per Order 23 Rule 1 of CPC, plaintiff may at any time after institution of the suit abandon his suit or abandon a part of his claim in suit or withdraws from suit or part of a claim against all or any of the defendants. If such withdrawal is made without permission of Court envisaged in Order 23 Rule 3, then plaintiff shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. Order 23 of Code of Civil Procedure,1908, is based on the principle of waiver of the rights of the plaintiff and not resjudicata. Order 23 of CPC and Section 11 of CPC are based on different principles.

9. Learned trial Court had appreciated section 11 of the Code of Civil Procedure,1908, and had rightly held that subsequent suit filed by the plaintiff is not barred by the principle of resjudicata but trial Court failed to appreciate whether plaintiff will be precluded to bring fresh suit on same subject matter as subsequent suit is hit by Order 23 Rule 3 of Code of Civil Procedure,1908.

10. Considered the pleadings made in civil suit No. 430/2019 and former suit bearing No. 769/2018. In previous suit and subsequent suit plaintiff subject matter and claim of petitioner is not only same but identical.

Prayer is Civil Suit No.430/2019 is as under :

(a) That a judgment and decree for declaration be passed and it be declared that plaintiff has an easement right of light and air to use 8 feet of open land lying behind the flat of 101, Sobhapur, Jabalpur. It be further declared that sale deed dated 04-08-2018, is void under law as the sale deed has been executed by seller who did not have absolute title over the land. It be further declared that purchasers defendants do not have any

right to dispossess the plaintiff by force on the basis of invalid sale deed.

(b) That a judgment and decree for permanent injunction be passed and purchasers defendants be restrained permanently from causing any disturbance in the easement rights of the plaintiff over 8 feet of land as stated above and also cause any forceful dispossession of the plaintiff over 8 feet of land.

Prayer in Civil Suit No.769/2018 after amendment is as under :

(a) That a judgment and decree for declaration be passed and it be declared that plaintiff has an easement right of light and air to use 8 feet of open land lying behind the flat of 101, Shobhapur, Jabalpur. It be further declared that sale deed dated 03.08.2018, is void under law as the sale deed has been executed by seller, who did not have any title over the land. It be further declared that purchasers defendants do not have any right to dispossess the plaintiff by force on the basis of invalid sale deed. And cause any disturbance in the enjoyment of passage of 8 feet as stated above.

(b) That a judgment and decree for permanent injunction be passed and purchasers defendants be restrained permanently from causing any disturbance in the easement rights of the plaintiff over 8 feet of land as stated above and also cause any forceful dispossession of the plaintiff over 8 feet of land.

Order 23 Rule 3 lays down that plaintiff shall be precluded from instituting any fresh suit in respect of such subject matter or claim or part of claim. The emphasis is on words subject matter and claim.

11. Plaintiff cannot bring a subsequent suit i.e. Civil Suit No. 430/2019 as former Civil Suit No. 769/2018 was withdrawn

without liberty to institute fresh suit. Learned trial Court failed to appreciate Order 23 of CPC,1908, and passed impugned order dated 27.06.2019 only on basis of principle of resjudicata.

12. In view of aforesaid, I allow the civil revision filed by the applicants and set aside order dated 27.06.2019 and hold that plaintiff is precluded from filing subsequent Civil Suit No. 430/2019.

(VISHAL DHAGAT)
JUDGE

vkt