

IN THE COURT OF PRINCIPAL SENIOR CIVIL
JUDGE,
HUBBALLI, AT:HUBBALLI

PRESENT

SRI.VENKATESH R. HULGI,
B.Com., LL.B.,(Spl)
PRINCIPAL SENIOR CIVIL JUDGE,
HUBBALLI.

O.S. No. 251/2012

Dated this the 19th day of July 2018

PLAINTIFFS :Smt. Shobha W/o Ashok Thabaz,
Age : 62 years, Occ : Household work,
R/o : “Bahubali Building”,
Mahaveer galli, Hubli and others.

(By Sri L. M. Sheelavant, Advocate)

Vs

DEFENDANTS : 1. Smt. Vimalabai W/o Shantappa Kutte,
Age : 78 years, Occ : Household,
R/o : 'Sujal Kunj', Central Excise
Colony, Gokul road, Hubli and others.

(D-1 to D-3 by Sri S. N. Nadaf,
D-4 to 6 : Sri G.R.A.,
D-7 : exp
D-8 : SKK, Advocate)

ORDER ON PRELIMINARY ISSUE No. 8

The above issue pertains to the principles of resjudicata which is re-produced as under :

“Does the Defendants No. 4 to 6 prove that the suit of the plaintiffs is barred by the principles of resjudicata as contended in para No. 12 of their written statement ?”

2. I have heard the arguments of the learned advocate for the parties on the above Issue and perused the materials placed on record.

3. I find it very necessary to mention the facts of the instant case in brief which are relevant to answer the above issue.

4. This is the suit filed by the plaintiffs against the defendants for the relief of partition and separate possession of their undivided 2/3rd share and also declaration that the

sale deed executed by defendants No.1 to 3 and late Shantappa in favour of defendant No. 4 and subsequent sale deed executed by D-4 in favour of D-5 and the sale deed executed by D-5 in favour of D-6 are illegal, null and void and not binding on the shares of the plaintiffs.

5. According to the plaintiffs, suit properties consisting of a house and backyard in CTS No. 1843 measuring 408 sq. feet situated at Bogar Oni Hubli and the land bearing R.S. No. 796 measuring 9 acres 13 guntas of Kusugal village are the ancestral family properties of plaintiffs and defendants No.1 to 3 having inherited from common propositus Nemappa Bheemappa Kutte. The plaintiffs and D-2 and D-3 being the children of D-1 from late Shantappa one of the sons of propositus Nemappa are entitled for a share in the joint family properties as coparceners. It is contended that both the suit properties are the ancestral family properties of parties and the plaintiffs

and D-1 to 3 are in joint possession and enjoyment of the suit properties. Such being the case, the father of the plaintiffs late Shantappa and D-1 to 3 have sold suit schedule 'A' property. There is no partition between the plaintiffs and D-1 to 3 in respect of the suit properties. Such being the case, during the life time of late Shantappa, himself and D-1 to 3 have sold the suit properties to D-4 without there being any family and legal necessity. In turn D-4 has sold the suit properties in favour of D-5 and D-5 has sold the very property in favour of D-6. Later D-6 has sold the same property in favour of D-7 and 8. The above said transactions are not for family and legal necessities and for the benefit of the joint family. Hence, according to the plaintiffs, the above said sale transactions are illegal, null and void and not binding on the share of the plaintiffs. Hence, they have filed the instant suit.

6. In response to the suit summons , all the defendants except D-7 have appeared through their respective advocate and filed their written statement. D-7 failed to appear before the court and hence, he is placed *exparte*.

7. In their common Written statement, D-4 to 6 apart from denying the entire plaint averments as false, in Paras No. 11 to 13 of their WS the above defendants have contended that the 3rd defendant of the present suit had filed O.S. No. 338/1990 against his family members and the father of above defendants claiming his share in suit schedule properties before II Addl. Senior Civil Judge , Hubli. After the trial the said suit disposed of by the court on 19-08-2002 holding that the father of the Defendants No. 4 to 6 is a bonafide purchaser of schedule II property from the land owners. Being aggrieved by the said findings, D-3 had filed R.A. No. 237/2002. Later it was transferred to the Fast

Track Court, Hubli and re-numbered as R.A. No. 266/2009. Hon'ble Fast Track Court dismissed the appeal by Judgment dated : 27-10-2010 by confirming the findings of the trial court with regard to the transaction of the father of the D-4 to 6 and held that he was the bonafide purchaser. Being aggrieved by the said Judgment, D-3 preferred an appeal before the Hon'ble High Court by filing RSA No. 5536/2011. The said appeal is still pending for inquiry. Thus, the case of the plaintiffs that the suit sale transaction is illegal, null and void and not binding on their share is finally decided by the competent court in a previous suit filed by D-3. Hence the findings given by the court in the previous suit operates as resjudicata to the present case. Hence, the suit is not maintainable.

8. In view of aforesaid pleadings of the parties, this court has framed as many as 15 issues and Issue No. 8 referred to above is pertaining to the principles of law of

Resjudicata. It is a settled position of law that the Issue of principles of resjudicata is the issue of law . Hence, it is treated as a preliminary issue and heard.

9. During the course of arguments, learned advocate for D-4 to 6 , to support his arguments regarding the bar created by the principles of resjudicata has referred to the certified copy of the pleadings in O.S. No. 338/1990 and also the Judgment of the trial court in O.S. No. 338/1990. Learned advocate has also referred to Judgment of Hon'ble Fast Track court Hubballi dated : 27-10-2010 in R.A. No. 266/2009. Learned advocate has also produced certified copy of sale deed of father of D-4 to D-6.

10. By referring to the above documents, learned advocate for D-4 to 6 would contend that it is clear from the above documents that the alleged sale transaction was in question in the previous suit filed between the same

parties and after the trial the court has given a finding that father of D-4 is a bonafide purchaser of schedule II property. The said findings of the trial court is confirmed by the Hon'ble First Appellate Court in R.A. No. 26/2009. Therefore the said findings cannot be re-agitated in the present case as it is hit by the principles of resjudicata. In the previous suit, the court of competent jurisdiction has held that father of D-4 to D-6 is a bonafide purchaser of schedule II property for valuable consideration. That finding operates as resjudicata to the present case. Hence, this suit is hit by the principles of resjudicata in respect of schedule II property. Hence, suit is liable to be dismissed in respect of the schedule II property is the arguments of the learned advocate for D-4 to 6. To support his arguments, learned advocate for defendants has placed reliance on Division Bench decision of our Hon'ble High Court in the case of ***Mahiboobbi Vs. Govind M Haripalle and others (2017(3) KLJ 230***. In the said decision, Hon'ble High Court has held as follows :

“ As can be seen , Issue No. 2 therein and Issue No. 2 in the present suit are in relation to the very same sale deed executed by Mallappa. In other words, the right, if any, of the plaintiffs turns on a finding on the said issue which has already been rendered and has attained finality. The right which the deceased brother of the plaintiff claimed in the former suit is no different from the right which the plaintiffs are claiming in the present suit. The court below having opined that in order to attract the bar of res judicata, the present plaintiffs ought to have claimed under the same title or under the same person and that since the plaintiffs were not claiming under their brother who was the plaintiff in the earlier suit, it would not bind them, is an erroneous proposition. Both the plaintiffs namely, plaintiffs in the earlier suit as well as in this suit were seeking to trace their title to the property de hors the sale deed executed by Mallappa”.

11. Per contra, learned advocate for the plaintiffs would submit that the findings given by the courts in the previous matter do not operate as res-judicata as those findings have not attained the finality. As admitted by the D-4 to 6 in their WS, those findings are challenged by the D-3 by filing RSA No. 5538/2011 which is still pending. Thus, the matter has not attained finality and the findings given by the court in the previous suit has not become a final and conclusive to operate as res-judicata. Hence, according to him the suit is not hit by the principles of res-judicata. Therefore, he has prayed to answer Issue No. 8 against the defendants No. 4 to 6.

12. After having heard the arguments of learned advocate for the parties and on perusal of the materials placed on record, I find that the findings given by

the courts in the previous suit do not operate as res-judicata to the present suit for the following reasons :

13. Before adverting to the merits of the matter, I deem it proper to refer the decision of Hon'ble Apex court in the case of ***M. D. Salie Labbai Vs. Mohammed Hanifa (AIR 1976 SC page : 1569)*** In the said decision, Hon'ble Apex court has given guidelines as to how the plea of res-judicata can be given effect. According to the Hon'ble Apex court following ingredients must be fulfilled to apply the principles of res-judicata :

- 1) That the litigating parties must be same in both the matters.
- 2) That the subject matter of the suit must also be identical.
- 3) That the matter must be finally decided between the parties and
- 4) That the suit must be decided by the court of competent jurisdiction.

14. Similar view is taken by the Hon'ble Apex court in its recent decision reported in ***AIR 2013 SC 3099*** (***Ramji Gupta Vs. Gopi Kishan Agrawal***). In this case, it is held that :

“In order to operate as res-judicata, the findings must be such that it disposes of a matter that is directly and substantially in issue in the former suit and that the said issue must have been heard and finally decided by the court trying such suit.”

15. If we apply the ratio laid down in the above decision to the case on hand, it becomes very clear that the findings given by the court in previous suit though has been confirmed by the Hon'ble First Appellate court , however it has not attained finality as the matter is still pending before the Hon'ble High Court in RSA No. 5336/2011. Thus, one of the important ingredients of res-judicata namely that the matter must be finally and conclusively decided between the

parties is not fulfilled in the present case. It is not the case of D-4 to 6 that above referred RSA is also disposed of by the Hon'ble High Court by confirming the findings of the trial court and Hon'ble First Appellate court regarding the sale transaction.

16. In ***AIR 1998 SC 3118 (= 1998(7) SCC 327)***

Hon'ble Apex court has held that : ***“principles of res-judicata would apply only after the finality of the dispute.”*** The Hon'ble Apex court has held that, ***“when the entire matter was still in appeal and the matter had not attained the finality and was still in dispute, the principles of res-judicata would not arise.”*** Thus, from the ratio laid down in the above decision, it is clear that the findings of the trial court and Hon'ble First Appellate court regarding the sale of suit property in favour of father of D-4 to 6 is not yet attained the finality. Hence, principles of res-judicata do not apply to the case on hand as contended by

the learned advocate for the plaintiffs. It is tried to submit by the Advocate for defendants No. 4 to 6 that atleast present suit shall be stayed till the disposal of RFA pending before the Hon'ble High Court by exercising the power under Sec. 10 of the CPC as the appeal is continuation of a suit. But I do not find sufficient force in this submissions by the learned advocate as no application under Sec. 10 is filed by the D-4 to 6 seeking stay. Hence for the reasons and discussions made above, I answer Issue No. 8 in the negative.

In the result I proceed to pass the following :

ORDER

Issue No. 8 pertaining to the principles of res-judicata is answered in the 'Negative'.

No order as to costs.

(Dictated to the Stenographer, transcribed and typed by her, script corrected, signed and then pronounced in the open Court on this the 19th day of July 2018)

(Venkatesh R.Hulgi),
Principal Senior Civil Judge,
Hubballi.