

IN THE SUPREME COURT OF INDIA**CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 6994 OF 2016**

(Arising out of Special Leave Petition (Civil) No.29454 of 2012)

MOHHAMED KHAN (D) TH. LRS. ...APPELLANTS

VERSUS

IBRAHIM KHAN & ANR. ...RESPONDENTS

ORDER

1. Leave granted. This appeal has been preferred against the judgment and order dated 31st January, 2012 passed by the High Court of Madhya Pradesh, Bench at Gwalior in Second Appeal No.135/1994 whereby the Second Appeal of the appellant was dismissed by the High Court, by holding that the suit is not barred by the principle of *res judicata*, which was the main plea of the appellant-defendant in the suit.

2. The respondent-plaintiff filed suit for possession stating that the plaintiff was the owner of the suit property by virtue of sale deed dated 24th May, 1972 executed in his favour by the defendant and that the appellant-defendant had forcibly dispossessed the plaintiff in September, 1983. The stand of the appellant-defendant in contesting the suit was that an earlier suit No. 105 A of 76 on the same cause of action was dismissed by the trial court on 21st February, 1981 against which appeal was dismissed on 16th July, 1985 and the present suit was filed thereafter on 3rd October, 1985 which was barred by *res*

judicata. The trial court *vide* judgment and decree dated 29th September, 1992 upheld this plea and dismissed the suit. It was held:-

“The documents produced on behalf of plaintiff Ex.P-2 copy of statement of Mohammad Khan, Ex. D-1 judgment dated 16-7-1985 of appellate court and on perusal of sale deed Ex.P-1 and pleading it is undisputed that on the basis of this sale deed Ex.P-1 the plaintiff has filed suit for declaration of title, possession and permanent injunction against Mohammad Khan with regard to disputed land of survey No.136/137 having total area of 4.139 hecets before the Court of Civil Judge Class-I, Basoda which has been dismissed on merits. As such under section 11 of CPC principle resjudicata will be applicable.”

3. The respondent preferred an appeal on which the appellate court reversed the finding as follows :-

“In my opinion the objection taken by plaintiff/appellant with regard to applicability of principle of resjudicata is definitely considerable and for consideration of this principle, definitely defendant was required to produce certified copy of plaint, written statement, plaint issue and judgment of Civil Suit No.105-A/76 so that relief claimed in Civil Suit No.105-A/76 and relief claimed in this suit could have been known minutely. From the facts mentioned in judgment of appeal, Ex.D-1 produced before learned court below it appears that plaintiff has pleaded that by sale deed the plaintiff has purchased land of survey No.137 and some land of Survey No.136, in this manner including both purchased 10 bigha of land and obtained possession and by mistake in sale deed in place of Khasra No.137 it was written 136 and on Khasra No.137, the defendant has taken possession in Mar’75. Hence in sale deed dated 24-5-72 in place of Khasra No.136, Khasra No.137 be amended and possession and mesne profit may also be allowed. When in present suit, the relief claimed is that out of land of Survey No.136-18 bigha 13 biswa, plaintiff has purchased 10 bigha of land on which defendant has

taken possession in Sep'83, hence possession be restored. Hence on minutely reading both the suits it clearly appears that civil suit No.105-A/76 submitted was related to land of Survey No.137 and to amend Survey No.137 in place of Survey No.136 in sale deed and for obtaining possession when this suit is related to 10 bigha land of Survey No.136. In such circumstances when defendant No.1 in Civil Suit No.105-A/76 has admitted that he has sold an area of 10 bigha of Survey No.136 and delivered possession as such subject matter in both the suit is different directly and indirectly. To know this difference the learned court below has not minutely read the same and as such finding given is not correct. Hence it is clear, that in the light of judgment passed in Civil Suit No.105-A/86 principle of resjudicata in present case is not applicable and arguments made by counsel of appellant/plaintiff is correct and arguments of counsel of defendant No.1/respondent No.1 is not correct.”

4. The above finding has been affirmed by the High Court as follows:-

“On a reading of the earlier judgment Ex.D/ 1, on which reliance is placed by the appellant in support of his plea of res judicata, it is not borne out as to what was the real dispute between the parties in the earlier suit. Except filing copy of the judgment (Ex.D/1) in the earlier suit, the appellant-defendant had not filed any other document, including copy of the plaint or written statement of the earlier suit in order to establish his plea of res judicata. The foundation of the claim of respondent No.1 against the appellant in the subsequent suit in which impugned judgment and decree has been passed by the first appellate Court was his alleged dispossession by the appellant from the suit land in September, 1983. The respondent No.1 had purchased the suit land from the appellant by virtue of sale-deed (Ex.P/ 1) dated 24th May, 1972 and he was allegedly dispossessed from the said land by the appellant in September, 1983. The defence that was set up by the appellant in his written statement to this suit of respondent No.1 was that appellant was an illiterate person and that he had kept the suit property

*with respondent No.1 as a collateral security for repayment of loan of Rs.5,500/- taken by him in 1972 and that respondent No.1 taking undue advantage of illiteracy of appellant, had got the sale-deed (Ex.P/1) executed from him on 24th May, 1972. The appellant had further taken a defence in his written statement that he had re-paid the loan taken by him from respondent No.1 after about three years i.e. on or around 1975 and the possession of the suit property was restored to him by respondent No.1 around that time itself. The appellant had denied that he had taken possession of the suit property from respondent No.1 forcibly or in illegal manner as alleged in the plaint. It is apparent on a perusal of the judgment (Ex.D/1) in the earlier suit No.105-A/1976 that the parties were not at issue in that case regarding the nature of transaction contained in sale-deed (Ex.P/1) dated 24th May, 1972. It is also apparent from the judgment (Ex.D/1) that in that suit the appellant had not taken a defence that the transaction shown in sale-deed (Ex.P/1) was indeed a document executed to secure the loan taken by him from respondent No.1. The essential ingredients to constitute the plea of *res judicata* do not exist in the present case.”*

5. We have heard learned counsel for the parties.
6. Only contention raised on behalf of the appellant is that earlier suit being between the same parties in respect of the same property and for the relief of possession based on title, the trial court was right in holding that the judgment in the earlier suit operated as *res judicata* and reversal thereof by the appellate court could not have been sustained.
7. In the present suit, the respondent plaintiff alleged that he was dispossessed in September, 1983. The fact remains that earlier suit was dismissed on 21st February, 1981 and appeal against the decree of the trial court was pending before the appellate court which was dismissed on 16th July, 1985. Thus, the mere fact that the

respondent plaintiff pleaded that he was dispossessed in September, 1983 which fact was not pleaded in the earlier suit filed in the year 1976 could not be a ground to hold that the earlier decision between the parties was not *res judicata*. The matter directly and substantially in issue in the earlier suit was the claim of the respondent plaintiff to title to the suit property and right to the possession which was also the issue in the second suit. Mere fact that in the second suit he gave a different date of dispossession was not enough to hold that the principle of *res judicata* was not applicable particularly, when the second date of dispossession was during pendency of the proceedings in the earlier suit. Other reason given by the High Court that the defence put up by the appellant defendant in the present proceedings was not the defence in the earlier suit or that the defence was barred by Sections 91 and 92 of the Evidence Act could be of no consequence. Even if the said defence is ignored or the respondent plaintiff is permitted to raise the plea of Sections 91 and 92 of the Evidence Act, the plea of *res judicata* could not be ignored. *Res judicata* applies when issue in earlier suit is directly and substantially the same as in the subsequent suit irrespective of the plea taken with reference to such an issue in the two suits. The finding on the issue of title and right of possession, having been heard and finally decided in the earlier suit, operated as a bar to trial of the subsequent suit as rightly held by the trial court. Thus, the reversal of the said finding by the appellate court and the High Court is unsustainable.

8. Learned counsel for the respondent though called upon to meet the above contention, expressed her inability to do so on the ground that her client had taken away the brief and had not engaged any other counsel. This by itself could not be a ground to issue fresh notice to the respondent who had been duly served and was duly represented by a counsel.

9. Accordingly, we allow this appeal, set aside the impugned judgment of the High Court and restore the judgment of the trial Court dated 29th September, 1992 in Suit No.209-A/1985 and dismiss the suit.

.....J.
(V. GOPALA GOWDA)

.....J.
(ADARSH KUMAR GOEL)

NEW DELHI;
JULY 26, 2016.

ITEM NO.3

COURT NO.8

SECTION IVA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s). 29454/2012

(Arising out of impugned final judgment and order dated 31/01/2012 in SA No. 135/1994 passed by the High Court of M.P. at Gwalior)

MOHHAMED KHAN(D) TR.LRS.

Petitioner(s)

VERSUS

IBRAHIM KHAN & ANR.

Respondent(s)

(With appln. (s) for exemption from filing O.T. and interim relief and office report)

Date : 26/07/2016 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE V. GOPALA GOWDA
HON'BLE MR. JUSTICE ADARSH KUMAR GOEL

For Petitioner(s) Mr. Prashant Shukla, Adv.
Ms. Anushree Mishra, Adv.
Mr. Kush Agrawal, Adv.
Mr. Nikilesh Ramachandran, Adv.

For Respondent(s) Ms. Prerna Mehta, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Heard.

Leave granted.

The appeal is allowed in terms of the signed order.

(S. K. RAKHEJA)
COURT MASTER

(SUMAN JAIN)
COURT MASTER

(Signed order is placed on the file)