

**IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER****Appeal/TA/ 1680/2009/Bikaner**

1- Lalagar s/o Bhakhtawargar

2- Poonagar s/o Bhakhtawargar

Caste Gusaai r/o Nadara, Tehsil Kolayat, Dist. Bikaner.

**..... Appellants****Versus**

1- Moolagar s/o Chaingar

2- Madhagar s/o Chaingar

3- Lichhma w/o Dhokalram

4- Deeparam s/o Dhokalram

All Caste Gusaai, r/o Nadara village, Tehsil Kolayat, Dist. Bikaner.

5- Ramkanwar w/o Kishan Singh caste Rajput, r/o Dhupalia, Tehsil Nokha, District Bikaner.

6- Hanuman s/o Rekham

7- Ramdhan s/o Rekham

Both by caste Bisnoi, r/o Roda, Tehsil Nokha, District Bikaner.

8- Rajasthan Government.

**----- Respondents****Division Bench****Shri Moolchand Meena, Member****Shri Priyavrat Pandya, Member****Present:-**

Mr. Ajit Singh, Counsel for the appellants.

Mr. Ashok Nath, Counsel for the respondents.

**Decision**

Dated:- 18-11-2013

This appeal, under section 225 of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as 'the Act of 1955') has been preferred by the appellants against the order dated 30-01-2009 passed by the Revenue Appellate Authority, Bikaner (First

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Appellate Court) in appeal No.151/06 Moolgar & others vs. Lichhma & others.

2- Brief facts of the case leading to this appeal are that respondents filed a suit for partition under section 53 of the Act of 1955 against appellants and respondents No.3 to 8 in the Court of Sub Divisional Officer, North, Bikaner (trial court). The appellants filed an application under section 11 of Civil Procedure Code, 1908 in the suit with submissions that previous suit for partition between the same parties and for the same disputed land has been decided by the Court on 03-12-1982. The preliminary decree of partition has been issued and Tehsildar was directed to submit proposals for partition. The Tehsildar has submitted his report/ proposals on 07-09-2000 in the Court. The present suit by plaintiffs/respondents has been filed for the same land between the same parties, which is barred by principle of resjudicata. So it was requested that the subsequent suit be dismissed as not maintainable.

3- The trial court, after hearing both the parties, accepted the application under section 11 of CPC filed by defendants/present appellants and dismissed the suit on the ground of resjudicata vide its decision and decree dated 30-06-2006.

4- The plaintiffs/respondents, aggrieved by trial court's decision dated 30-06-2006 filed first appeal before the First Appellate Court, which was accepted vide impugned order dated 30-01-2009 and decision and decree of the trial court dated 30-06-2006 was set aside.

5- The appellants/defendants have preferred this second appeal in the Board against order dated 30-01-2009 passed by the First Appellate Court. It has been requested that order of the First Appellate Court be set aside and decision and decree dated 30-06-2006 passed by the trial court be upheld.

6- Appellant No.2 Poonamgar (Poonamgiri) has withdrawn the appeal to his extent vide his application dated 11-

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11-2011, therefore now this appeal is only by appellant No.1 Shri Lalagar.

5- We have heard learned counsels for both the parties on merits of the appeal.

6- The learned counsel for the appellant has submitted that previous suit for partition has been decided by the competent court regarding same land and between the same parties, so the present suit is barred by law on account of resjudicata, but the First Appellate Court, without understanding the provisions of section 11 of the Civil Procedure Code, 1908 has set aside the legal decision of the trial court. The decision of the appellate court suffers from legal error and it is an example of wrongly applied jurisdiction. Therefore, the appeal may be accepted and the impugned order dated 30-01-2009 passed by the appellate court may be set aside.

7- The learned counsel for the respondents has contended that the trial court had decided application under section 11 CPC in a cursory manner without understanding the matter involved in the case. The decree dated 03-12-1982 has lapsed and now it cannot be executed, so it has become necessary to file new suit. It has also been submitted that previous suit was decreed on compromise, and such a compromise decree does not operate as resjudicata. Therefore has rightly interfered in the matter and has directed the trial court to adjudicate the suit after getting written statement, framing issues and affording proper opportunity to be heard to the parties. This decision is well within the jurisdiction of the First Appellate Court and does not suffer from any legal or factual irregularity. The First Appellate Court has simply remanded the case to the trial court for deciding afresh and this order is prejudice to none of the parties. Therefore, it does not warrant any interference in the second appeal. The appeal is forceless and deserves to be dismissed.

7- We have gone through the record of the case available in the file, and have given a thoughtful consideration to the rival submissions made by learned counsels for the parties.

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8- From mere perusal of decision dated 30-06-2006 passed by the trial court in the present suit, copy of plaint of the previous suit No. 46/79 available in the trial court's file and decision and decree passed on 03-12-1982 in that previous suit, it is evident that suit No.46/79 titled as Poonamgiri vs. Lalagir & others, for partition under section 53 of the Tenancy Act, 1955 and for correction of entries under section 136 of the Land Revenue Act, 1956, between the same parties for the same disputed land, was filed and tried in the Court of Sub Divisional Officer, Bikaner (north) and it was decided on 03-12-1982. Issues were also framed in that previous suit and thereafter it was decided on the basis of compromise between the parties. A preliminary decree for partition was issued and Tehsildar was directed to prepare and submit partition proposals. Partition proposals were submitted by the Tehsildar, but final decision in the suit regarding final decree is still pending. These facts have not been denied by the learned counsel for the respondents. He has simply contended that preliminary decree was passed in the previous suit in the year 1982 and it was not executed within a period of 12 years and therefore the preliminary decree dated 02-12-1982 has lapsed and it cannot operate as *resjudicata* against the present suit.

9- The present respondents Moolgar & others had filed reply to the application under section 11 of the Civil Procedure Code, 1908, wherein it was alleged in the special statement (विशेष विवरण) part of the reply dated 25-02-2002 (para-3) that-

“ --. दिनांक 03-02-1982 को तथाकथित डिक्री जारी की गयी बताई जा रही है। उसका *execution* आज तक नहीं हुआ है। ना ही खातों का विभाजन किया गया है। जबकि मियाद अधिनियम, 1963 की धारा 136 के अनुसार डिक्री का *execution* 12 साल में हो जाना चाहिये। अगर डिक्री *execution* का 12 साल में नहीं होता है तो मियाद अधिनियम, 1963 की धारा 3 के अनुसार उक्त डिक्री एवं आदेश *ineffective* हो जाता है। इसलिये अप्रार्थीगण/ वादीगण द्वारा प्रस्तुत दावे पर *resjudicata* का सिद्धान्त लागू नहीं होता है।”

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Thus the present respondents have not made any specific denial about the previous suit among the same parties and about the same land. Only it has been pleaded that decree passed on 03-12-1982 has not been executed within the stipulated time limit and it has lapsed. So it does not operate as resjudicata.

10- As discussed earlier hereinabove, only preliminary decree has been passed in the previous suit and after inviting partition proposals from the Tehsildar, passing of final decree of partition is pending. It is also not disputed that preliminary decree dated 03-12-1982, vide which shares of the parties have been determined and preparation of partition proposals have been ordered to the Tehsildar, is unchallenged by any of the party. So the litigation between the parties, so as shares of the parties in the disputed land is concerned, has arrived at finality. Only final decree regarding physical partition of the land in question is pending. It is a settled position of law related to immovable property-partition suits that such suits are decided in two stages. After recording findings about shares of parties in the suit-property, preliminary decree of partition is passed first in accordance with decided shares, and after inviting partition proposals through the Court's Commissioner or Tehsildar in suits regarding agricultural land, the Court after affording opportunity to be heard to the parties, passes final decree for physical partition of the property. The suit is considered to be finally decided only after the final decree is passed. Until the final decree of partition is passed, the suit is still pending. It is only the final decree of partition, which is executable. Limitation of 12 years for execution of the decree is applicable only on the final decree and not on preliminary decree. So we don't find any force in respondents' pleading and arguments that decree dated 03-12-1982 has lapsed by afflux of time limit and it does not operate resjudicata on the subsequent suit filed by present respondents.

11- In view of discussions held hereinabove, we are of the considered opinion that decree dated 03-02-1982 passed in the previous suit No.46/79 operates as resjudicata against any subsequent suit amongst the same parties for the same disputed land. So decision dated 30-06-2006 passed by the trial court is in

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accordance of law and the impugned decision dated 30-01-2009 passed by the learned Revenue Appellate Authority, Bikaner without examining the case in the light of provisions of section 11 of the Civil Procedure Code, 1908 is an erroneous decision, which suffers from legal error. Such an erroneous decision cannot be sustained; hence it deserves to be set aside.

12- Consequently, the appeal in hand is accepted and impugned decision dated 30-01-2009 passed by the Revenue Appellate Authority, Bikaner is hereby set aside. No orders regarding costs.

Pronounced in the open Court.

**(Priyavrat Pandya)**  
**Member**

**(Moolchand Meena)**  
**Member**