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**IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**

**Appeal Decree No.1628/2004/TA/Nagaur :**

Murti Mahadev Bhagwan Aasan Math Jogian,  
Village Runiya, Tehsil Jayal, District Nagaur, through :-

1. Pujari Narainnath Chela Onkarnath, R/o Village Runiya, Tehsil Jayal, District Nagaur.
2. Harish S/o Kunaram, by caste Jat, R/o Village Bugarda, Tehsil Jayal, District Nagaur.

... Appellants.

**Versus**

1. Ganga Bishan S/o Jainarain, by caste Brahman, R/o Village Bugarda, Tehsil Jayal, District Nagaur..
2. State of Rajasthan through Tehsildar, Nagaur.

... Respondents.

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**D.B.**

Shri Pramil Kumar Mathur, Member  
Shri D.R. Meena, Member

**Present :**

Shri Thaneshwar Sharma, brief-holder of counsel for the appellants.  
Shri Bhawani Singh, counsel for respondent No.1.  
Shri Hagami Lal Chaudhary, Dy.Govt.Advocate for the State.

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Dated :05 September, 2011

**J U D G M E N T**

Instant second appeal has been filed by the appellants against the judgment & decree passed by the Revenue Appellate Authority, Nagaur on 03.2.2004 in appeal No.138/2003 by which learned R.A.A. has maintained the judgment & decree passed by the learned Assistant Collector, Jayal (Nagaur) dated 16.7.2003 in revenue suit No.298/2002.

2. Essential facts giving rise to this case are that present appellants/ plaintiffs filed a revenue suit against defendants/ respondents claiming that khasra No. 20, 131, 132, 134, 198, 206, 209, 215, 215/2, 220, 254 and 257 are

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in khatedari of temple Mahadev Bhagwan Aasan Math Jogian situated at Village Runiya, Tehsil Jayal, District Nagaur. As per the settled principle of law, temple has status of the minor, so the interest of the minor i.e. temple is being looked after by the Pujari Narainnath. As per section 46 of the Rajasthan Tenancy Act, khatedari of the land belonging to temple/ deity cannot be transferred in the name of any person whatsoever. In spite of that, the khatedari of the land of the deity bearing khasra No.209 area 68 bigha 7 biswa (new No.221 area 6 bigha 7 biswa and 229 area 29 bigha 12 biswa total 35 bigha 19 biswa) has been transferred in the name of the defendant No.1 Ganga Bishan illegally. As per section 46 of the Rajasthan Tenancy Act 1955, khatedari of such land cannot be transferred in the name of any person; therefore, the name of the defendant No.1 as khatedar of the disputed land be deleted from the revenue record and plaintiff be declared the khatedar of that disputed land and possession be recovered from defendant No.1.

3. After summoning, defendant No.1 Ganga Bishan has filed an application before the learned trial court under Order 7 Rule 10 & Rule 11 read with section 21 of the Code of Civil Procedure stating that plaintiff has filed above revenue suit for cancelling the judgment & decree passed on 21.2.1959 in case No.8/57 titled as 'Jainarain etc. Vs. Sanwalnath etc.' passed by Assistant Collector, Nagaur. The jurisdiction to cancel the judgment & decree passed by the competent courts lies with the civil court only and revenue court has no jurisdiction to cancel the judgment & decree. Therefore, the suit is barred by law & liable to be dismissed and in alternate, suit be returned to the plaintiffs.

4. Having regard to the contents mentioned in the above application, the learned trial court after giving opportunity of hearing to plaintiffs by accepting the above application came to the conclusion that revenue suit filed by the plaintiffs is barred by the law, hence directed on 16.7.2003 that the suit filed by the plaintiffs be returned to them for presentation before the competent court.

5. Assailing the judgment & decree passed by the learned Assistant Collector, Jayal (Nagaur) dated 16.7.2003, the present appellants filed first appeal before the learned Revenue Appellate Authority, Nagaur, that too has

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been dismissed by the learned R.A.A. Against which, this second appeal has been filed.

6. I have heard the arguments of learned advocates for the rival parties and perused the record.

7. Learned advocate appearing for the appellants has submitted that both the learned subordinate courts have passed the judgments & decrees on the erroneous grounds. Present appellants are not the party to earlier suit, so the principle of res judicata is not applicable in the case under hand. He further submitted that the question of res judicata is the mixed question of law & facts and cannot be decided without framing issues and without adducing evidence. Hence, judgments & decrees passed by both the learned lower courts are liable to be set aside and second appeal be accepted.

8. On the contrary, learned advocate for the respondent has submitted that both the learned lower courts have not committed any error, both the judgments & decrees are passed with due care and after evaluating the documents on record. Hence, the second appeal is liable to be dismissed.

9. I have given my thoughtful consideration to the rival contentions and scanned the matter carefully.

10. This is the settled principle of law that the provisions of Order 7 Rule 11(d) can be applied only when it appears from the perusal of the averment taken in the plaint that the suit is barred by any law and none else. The respondent No.1 has filed the application before the trial court on the ground that revenue court has no jurisdiction to cancel the judgment & decree, hence the plaint be dismissed or returned. But on the perusal of the averment taken by the plaintiff in his plaint, it appears that plaint does not contain even iota about cancellation of judgment & decree mentioned in the application filed by the respondent No.1 under Order 7 Rule 10 & 11. So on the basis of the facts narrated in the application filed by the respondent, the case of the plaintiffs cannot be thrown out at threshold on spurious ground. Similarly, learned R.A.A. Nagaur, departing from the grounds taken by the respondent No.1, has passed the impugned judgment & decree on the ground of res

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judicata which was strangely, not pleaded by respondent No.1 in his application under Order 7 Rule 10 & 11 CPC. This is also cardinal principle of law that the question of res judicata is the mixed question of law & facts and it could be decided only after framing the issues and giving the reasonable opportunity for adducing the evidence on this ground. Hence, both the learned trial courts have passed the impugned judgments & decrees against the settled provisions of the law.

11. In view of the above, the second appeal filed by the present appellants is liable to be allowed. Hence, the second appeal is accepted and the judgments & decrees passed by the Revenue Appellate Authority, Nagaur dated 03.2.2004 & the trial court dated 16.7.2003 are set aside and the trial court is directed to decide the suit on merits as per the law.

Pronounced in open court.

  
(D.R. MEENA)  
Member

  
(PRAMIL KUMAR MATHUR)  
Member

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