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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
HEMANT GUPTA; V. RAMASUBRAMANIAN, JJ.
MAY 06, 2022
CIVIL APPEAL NO.3680 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 20375 OF 2021)
SATHYANATH & ANR. V. SAROJAMANI

Code of Civil Procedure, 1908; Order XIV Rule 2 - The plea of res judicata in appropriate cases may be determined as preliminary issue when it is neither a disputed question of fact nor a mixed question of law and fact - Preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the Court or the bar to the suit is made out, the Court may decide such issues with the sole objective for the expeditious decision. *[Referred to Ramesh B. Desai and Ors. v. Bipin Vadilal Mehta and Ors (2006) 5 SCC 638] (Para 20, 30)*

Code of Civil Procedure, 1908; Order XIV Rule 2, Order XX Rule 5, Order XLI Rules 24 & 25- To avoid the possibility of remanding back the matter after the decision on the preliminary issues, it is mandated for the trial court under Order XIV Rule 2 and Order XX Rule 5, and for the first appellate court in terms of Order XLI Rules 24 and 25 to record findings on all the issues. *(Para 33)*

Code of Civil Procedure, 1908; Order XLI Rules 24 and 25 - If evidence is recorded by the learned Trial Court on all the issues, it would facilitate the first Appellate Court to decide the questions of fact even by reformulating the issues - It is only when the first Appellate Court finds that there is no evidence led by the parties, the first Appellate Court can call upon the parties to lead evidence on such additional issues, either before the Appellate Court or before the Trial Court. *(Para 32)*

For Petitioner(s) Mr. S. Nagamuthu, Sr. Adv. Mr. M.P. Parthiban, AOR Mr. A.S. Vairawan, Adv. Mr. R. Sudhakaran, Adv. Mrs. Shailni Mishra, Adv. Mr. T. Hari Hara Sudhan, Adv. Mr. Vikash G.R., Adv.

For Respondent(s) Mr. V. Balachandran, Adv. Mr. Siddharth Naidu, Adv. M/S. Ksn & Co., AOR

J U D G M E N T

HEMANT GUPTA, J.

1. The challenge in the present appeal is to an order dated 3.9.2021 whereby in the revision petition filed by the defendant under Article 227 of the Constitution of India, the trial court was directed to frame preliminary issue as to whether the suit is barred by res judicata.

2. The plaintiffs-appellants filed O.S. No. 95 of 2016 against the respondent, their paternal aunt. The appellants claimed a declaration for declaring the appellants as absolute owners of the suit property, judgment and decree in O.S. No. 65 of 2003 as null and void, and, for permanent injunction restraining the defendant and their agents in

disturbing the peaceful possession and enjoyment of the suit property by the appellants in any manner. Initially, the defendant filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908[1] for rejection of the plaint but the same was dismissed by the trial court on 20.6.2017. It is thereafter, the defendant filed an application to frame issues under Order XIV Rule 2(2) of the Code to treat the following as the preliminary issues:

"1. Whether the suit is not hit by resjudicata and estoppel as claimed by the defendant in the written statement in Para- I 0 & 11.

2. Whether the suit is not hit by resjudicata and estoppel as claimed by the defendant in the written statement in Para-12.

3. Whether the suit is not barred by limitation as contented by the defendant in the written statement in Para-13.

4. Whether the Plaintiffs have deliberately and wantonly abused the process of the court, as contented by the defendant in the written statement in Para-15 and 16.

5. Whether the suit is not valued properly and court fee paid is deficient as claimed by the defendant in Para 18 of the Written statement."

3. The learned trial court dismissed the application of the defendant on 3.10.2019 . Such order of the learned trial court was challenged in revision petition under Article 227 of the Constitution of India wherein the High Court ordered the framing of issue of res judicata as preliminary issue.

4. Learned counsel for the appellants relied upon provisions of Order XIV Rule 2 of the Code to contend such Order XIV Rule 2 has been substituted by Central Act No. 104 of 1976, whereby the Court is mandated to pronounce judgment on all issues, even though the suit can be disposed of on a preliminary issue. It was argued that such amendment was necessitated to avoid delay in the disposal of the proceedings inasmuch as if only a preliminary issue is decided, the further appeal and revision would be preferred only against the preliminary issue and after the preliminary issue is decided in favour of the plaintiffs, the evidence has to be led on the remaining issues. Therefore, to ensure expeditious disposal of the proceedings and to avoid possibility of remand by the appellate or revisional jurisdiction, it was made mandatory for the Court to record reasons on all the issues. Such finding would obliviate the possibility of remand at appellate or revisional stage, even if the finding on preliminary or other issues are to be reversed.

5. Order XIV Rule 2 before amendment by the Act No. 104 of 1976 reads thus:

"R. 2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

6. The said provision came up for consideration before this Court in a judgment reported as **Major S. S. Khanna** v. **Brig. F. J. Dillon**[2]. It was held that under Order XIV

[1] For short, the 'Code'
[2] AIR 1964 SC 497

Rule 2 of the Code where issues both of law and of fact arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and postpone the settlement of the issues of fact until other issues of law have been determined. It was held as under:

"18. ……. Under Order 14 Rule 2 Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."

7. The Order XIV Rule 2 after the substitution of Rule 2 by the Act No. 104 of 1976, effective from 1.4.1977, reads thus:

"2. Court to pronounce judgment on all issues.—(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

8. Some other provisions of the Code, which are relevant to decide the issues raised in the preset appeal are as follows:

"ORDER XX

JUDGMENT AND DECREE

"5. Court to state its decision on each issue. – In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit.

ORDER XLI

APPEALS FROM ORIGINAL DECREES

24. Where evidence on record sufficient, Appellate Court may determine case finally. - Where the evidence, upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from. - Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time."

9. The amended provision of Order XIV came up for consideration before the Full Bench of Allahabad High Court in a judgment reported as **Sunni Central Waqf Board and Ors.** v. **Gopal Singh Vishrad and Ors.**[3] It was held that material changes had been brought about by substituting Order XIV Rule 2 of the Code. The word 'shall' in the unamended provision has been replaced by the word 'may' in the substituted provision, therefore, it is now discretionary for the Court to decide the issue of law as a preliminary issue, or to decide it along with the other issues. It was further held that even all issues of law cannot be decided as preliminary issues and only those issues of law falling within the ambit of clause (a) and (b) of sub-rule (2) of Rule 2 could be decided. The High Court held as under:

"22. Under the above provision once the court came to the conclusion that the case or any part thereof could be disposed of on the issues of law only it was obliged to try those issues first and the other issues could be taken up only thereafter, if necessity survived. The court had no discretion in the matter. This flows from the use of the word "it shall try those issues first". Material change has been brought about in legal position by amended O. 14, R. 2 which reads as follows:—

xxx xxx xxx

24. The word "shall" used in old O. 14, R. 2 has been replaced in the present Rule by the word "may". Thus now it is discretionary for the Court to decide the issue of law as a preliminary issue or to decide it along with the other issues. It is no longer obligatory for the Court to decide an issue of law as a preliminary issue.

25. Another Change brought about by the amended provision is that not all issues of law can be decided as preliminary issues. Only those issues of law can be decided as preliminary issues which fell within the ambit of cls. (a) and (b) of sub-r. (2) of R. 2 of O. 14. Cl. (a) mentions "jurisdiction of the Court" and clause (b) deals with "bar to the suit created by any law for the time being in force." In the present case cl. (a) is not attracted. The case is sought to be brought within the ambit of cl. (b). For bringing it under cl. (b) Limitation Act and the Muslim Waqf Act have been invoked."

10. A Full Bench of Himachal Pradesh High Court in a judgment reported as **Prithvi Raj Jhingta & Anr.** v. **Gopal Singh & Anr.**[4], held as under:

"8. The legislative mandate is very clear and unambiguous. In the light of the past experience that the old Rule 2 whereby, in the fact-situation of the trial Court deciding only preliminary issues and neither trying nor deciding other issues, whenever an appeal against the judgment was filed before the Appeal Court and the Appeal Court on finding that the decision of the trial Court on preliminary issues deserved to be reversed, the case per force had to be remanded to the trial Court for trial on other issues. This resulted in delay in the disposal of the cases. To eliminate this delay and to ensure

[3] AIR 1991 ALL 89
[4] AIR 2007 HP 11

the expeditious disposal of the suits, both at the stage of the trial as well as at the appeal stage, the legislature decided to provide for a mechanism whereby, subject to the exception created under sub-rule (2), all issues, both of law and fact were required to be decided together and the suit had to be disposed of as a whole, of course based upon the findings of the trial Court on all the issues, both of law and fact.

9. Based upon the aforesaid reasons therefor, and in the light of legislative background of Rule 2 and the legislative intent as well as mandate based upon such background, as well as on its plain reading, we have no doubt in our minds that except in situations perceived or warranted under sub-rule (2) where a Court in fact frames only issues of law in the first instance and postpones settlement of other issues, under sub-rule (1), clearly and explicitly in situations where the Court has framed all issues together, both of law as well as facts and has also tried all these issues together, it is not open to the Court in such a situation to adopt the principle of severability and proceed to decide issues of law first, without taking up simultaneously other issues for decision. This course of action is not available to a Court because sub-rule (1) does not permit the Court to adopt any such principle of severability and to dispose of a suit only on preliminary issues, or what can be termed as issues of law. Subrule (1) clearly mandates that in a situation contemplated under it, where all the issues have been framed together and have also been taken up for adjudication during the course of the trial, these must be decided together and the judgment in the suit as a whole must be pronounced by the Court covering all the issues framed in the suit."

11. A Single Bench of Punjab and Haryana High Court in a judgment reported as **Hardwari Lal** v. **Pohkar Mal and Ors**.[5] compared the provision of Order XIV Rule 2 prior to and after the amendment and held as under:

"5. A comparative reading of the said provision as it existed earlier to the amendment and the one after amendment would clearly indicate that the consideration of an issue and its disposal as preliminary issue has now been made permissible only in limited cases. In the unamended Code, the categorisation was only between issues of law and of fact and it was mandatory for the Court to try the issues of law in the first instance and to postpone the settlement of the issues of fact until after the issues of law had been determined. On the other hand, in the amended provision there is a mandate to the Court that notwithstanding that a case may be disposed of on a preliminary issue, the Court has to pronounce judgment on all the issues. The only exception to this is contained in sub-rule (2). This subrule relaxes the mandate to a limited extent by conferring a discretion upon the Court that if it is of opinion that the case or any part thereof may be disposed of "on an issue of law only," it may try that issue first. The exercise of this discretion is further limited to the contingency that the issue to be so tried must relate to the jurisdiction of the Court or a bar to the suit created by a law in force."

12. A Single Bench of Patna High Court in a judgment reported as **Dhirendranath Chandra** v. **Apurba Krishna Chandra and Ors**.[6] held that even if the case may be disposed of on a preliminary issue, the Court is bound to pronounce judgment on all the issues, subject to the provision in sub-rule (2) according to which if the case or any part thereof may be disposed of on issue of law only and if that issue relates to jurisdiction of the Court or a bar to the suit created by law for the time being in force, the Court may try such issue first. The High Court held as under:

"6. A plain reading of R. 2 will show that ordinarily even if the case may be disposed of on a preliminary issue, the Court is bound to pronounce judgement on all issues. This ordinary rule is

[5] AIR 1978 P&H 230
[6] AIR 1979 Pat 34

subject to only one exception which has been provided in subrule (2) according to which if the case or any part thereof may be disposed of on issue of law only and if that issue of law relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force the court may try such issue first. It is, therefore, clear that a departure from the ordinary rule provided in sub-rule (1) of R. 2 can be made by the Court only in the circumstances mentioned in sub-rule (2) and even in these circumstances the Court has only a discretion that it may try an issue of law relating to the points mentioned in clauses (a) and (b) of sub-rule (2) as a preliminary issue before framing other issues. There is, however, nothing in sub-rule (2) which in my opinion makes it obligatory for the Court to try such an issue first in all cases. If, therefore, the Court is of opinion that in any particular case it will be more expedient to try all the issues together and therefore, if it refuses to try and decide any issue of law even on the points referred to in cls. (a) and (b) of subrule (2) as a preliminary issue before taking up other issues. xxxx "

13. A Single Bench of Bombay High Court in a judgment reported as **Usha Sales Ltd.** v. **Malcolm Gomes and Ors**.[7] held that after the amendment, a duty is cast upon the Court that it must proceed to hear all the issues and pronounce the judgment on the same, except that the Court may try an issue relating to the jurisdiction of the Court or to the legal bar to the suit as a preliminary issue. It was held to be more in the nature of discretion rather than a duty. It was held as under:

"11. From the above it is easily seen that there is an obligation cast upon the Court that even though a case may be disposed of on a preliminary issue the Courts shall subject to the provision of sub-rule (2) pronounce judgment on all issues. In other words, the obligation to decide a question of law as a preliminary issue if that decision disposes of the case or part of the case is no longer, there. Similarly, the discretion to decide any other issue as a preliminary issue has been taken away totally from the Court. On the other hand, a duty is cast upon the Court that it must proceed to hear all the issues and pronounce judgment on the same.

12. There is, however, a small exception carved out to the above provision. The Court may try an issue relating to the jurisdiction of the Court or to the legal bar to the suit as a preliminary issue but this is more in the nature of a discretion rather than a duty and the Court is not bound to try any issue despite the provision contained in sub-r. (2) of R. 2 of O. 14 of the Code. The words "it may try" are clearly indicative of the fact that discretion is given to the Court and no duty is cast upon the Court to decide any issue as a preliminary issue."

14. A Single Bench of Jammu and Kashmir High Court in a judgment reported as **Smt. Aruna Kumari** v. **Ajay Kumar**[8] held as under:

"4. …..Admittedly both the parties have to lead evidence regarding both the issues. In case issue No. 2 is allowed to be treated as preliminary the parties will certainly lead evidence in the case and instead of disposing of the case expeditiously it will prolong the matter and frustrate the very basis of law contained in Order XIV, Rule 2, Civil Procedure Code. The evidence to be led by both the parties will almost cover both the issues and it cannot, therefore, be said that by allowing issue No. 2 to be treated as preliminary the trial of the case would be expedited. When we review the whole law on the point it becomes clear that where issue of jurisdiction is a mixed question of law and fact requiring evidence to be recorded by both the sides same cannot be treated as a preliminary issue."

[7] AIR 1984 Bom 60

[8] AIR 1991 J&K 1

15. The matter has also been examined by this Court in a judgment reported as **Ramesh B. Desai and Ors.** v. **Bipin Vadilal Mehta and Ors.**[9] wherein it was held as under:

"13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna v. Brig. F.J. Dillon [(1964) 4 SCR 409 : AIR 1964 SC 497] and it was held as under: (SCR p. 421)

"xxx xxx"

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

16. This Court in **Ramesh B. Desai** held that the principles enunciated in **Major S. S. Khanna** still hold good and the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue depends upon the question of fact, it cannot be tried as a preliminary issue. The said finding arises from the provision of Order XIV Rule 2 clause (a) and (b). After the amendment, discretion has been given to the Court by the expression 'may' used in sub-rule (2) to try the issue relating to the jurisdiction of the Court i.e. territorial and pecuniary jurisdiction, or a bar to the suit created by any law for the time being in force i.e., the bar to file a suit before the Civil Court such as under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and numerous other laws particularly relating to land reforms. Hence, if Order XIV Rule 2 is read along with Order XII Rule 5, the Court is expected to decide all the issues together unless the bar of jurisdiction of the Court or bar to the suit in terms of sub-rule (2) clause (a) and (b) arises. The intention to substitute Rule 2 is the speedy disposal of the lis on a question which oust either the jurisdiction of the Court or bars the plaintiff to sue before the Civil Court.

17. We may state that the First Schedule appended to the Code contains the procedure to be applied in respect of the matters coming for adjudication before the Civil Court. Such procedure is handmaid of justice as laid down by the Constitution Bench judgment of this Court reported as **Sardar Amarjit Singh Kalra (Dead) by Lrs.** v. **Pramod Gupta (Smt) (Dead) by Lrs. & Anr.**[10] wherein it was observed as under:

"26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice……."

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[9] (2006) 5 SCC 638

[10] (2003) 3 SCC 272

18. A three Judge Bench in a subsequent judgment reported as **Kailash** v. **Nanhku & Ors.**[11] held that all rules of procedure are handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent but the object of prescribing procedure is to advance the cause of justice. The Court held as under:

"28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6)

"The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. … Justice is the goal of jurisprudence — processual, as much as substantive."

29. In State of Punjab v. Shamlal Murari [(1976) 1 SCC 719 : 1976 SCC (L&S) 118] the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that: (SCC p. 720)

"Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

In Ghanshyam Dass v. Dominion of India [(1984) 3 SCC 46] the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle."

19. This Court in **Sugandhi** v. **P. Rajkumar**[12] held that if the procedural violation does not seriously cause prejudice to the adversary party, Courts must lean towards doing substantial justice rather than relying upon procedural and technical violations. It is not to be forgotten that litigation is nothing but a journey towards truth which is the foundation of justice and the Court is required to take appropriate steps to thrash out the underlying truth in every dispute. It was held as under:

"9. It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way of the court while doing substantial justice. If the procedural violation does not seriously cause prejudice to the adversary party, courts must lean towards doing substantial justice rather than relying upon procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the court is required to take appropriate steps to thrash out the underlying truth in every dispute.

[11] (2005) 4 SCC 480
[12] (2020) 10 SCC 706

Therefore, the court should take a lenient view when an application is made for production of the documents under sub-rule (3)."

20. The provisions of Order XIV Rule 2 are part of the procedural law, but the fact remains that such procedural law had been enacted to ensure expeditious disposal of the lis and in the event of setting aside of findings on preliminary issue, the possibility of remand can be avoided, as was the language prior to the unamended Order XIV Rule 2. If the issue is a mixed issue of law and fact, or issue of law depends upon the decision of fact, such issue cannot be tried as a preliminary issue. In other words, preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the Court or the bar to the suit is made out, the Court may decide such issues with the sole objective for the expeditious decision. Thus, if the Court lacks jurisdiction or there is a statutory bar, such issue is required to be decided in the first instance so that the process of civil court is not abused by the litigants, who may approach the civil court to delay the proceedings on false pretext.

21. In fact, in a judgment reported as **A. Shanmugam** v. **Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam & Ors.**[13], this Court held as under:

"39. Our courts are usually short of time because of huge pendency of cases and at times the courts arrive at an erroneous conclusion because of false pleas, claims, defences and irrelevant facts. A litigant could deviate from the facts which are liable for all the conclusions. In the journey of discovering the truth, at times, this Court, at a later stage, but once discovered, it is the duty of the court to take appropriate remedial and preventive steps so that no one should derive benefits or advantages by abusing the process of law. The court must effectively discourage fraudulent and dishonest litigants."

22. The different judgments of the High Court referred to above are in consonance with the principles laid down by this Court in **Ramesh B. Desai** that not all issues of law can be decided as preliminary issues. Only those issues of law can be decided as preliminary issues which fell within the ambit of clause (a) relating to the "jurisdiction of the Court" and (b) which deal with the "bar to the suit created by any law for the time being in force." The reason to substitute Rule 2 is to avoid piecemeal trial, protracted litigation and possibility of remand of the case, where the appellate court differs with the decision of the trial court on the preliminary issues upon which the trial court had decided.

23. On the other hand, learned counsel for the respondent relies upon the judgments of this Court reported as **Abdul Rahman** v. **Prasony Bai & Anr.**[14], **Srihari Hanumandas Totala** v. **Hemant Vithal Kamat & Ors.**[15] and **Jamia Masjid** v. **K.V. Rudrappa (Since Dead) by LRs. & Ors.**[16] to contend that on a question of res judicata, the preliminary issue needs to be framed.

24. In **Abdul Rahman,** this Court was examining a suit filed by the appellant in the year 1999 to declare that the defendant is not the daughter of Mangal Singh and that the

[13] (2012) 6 SCC 430
[14] (2003) 1 SCC 488
[15] (2021) 9 SCC 99
[16] 2021 SCC OnLine SC 792

appellant is in adverse possession even during the life time of Mangal Singh. An additional issue was framed regarding the jurisdiction of the civil suit to try the said suit. The High Court in proceedings passed an order on 29.11.2001 dismissing the suit on the preliminary issue whether the dispute to the present civil suit has already been decided and adjudicated by the Court and is barred by the principles of res judicata. An intra court appeal was filed which was dismissed on 4.12.2001 and thereafter, the matter travelled to this Court. In these circumstances, this Court held as under:

"21. For the purpose of disposal of the suit on the admitted facts, particularly when the suit can be disposed of on preliminary issues, no particular procedure was required to be followed by the High Court. In terms of Order 14 Rule 1 of the Code of Civil Procedure, a civil court can dispose of a suit on preliminary issues. It is neither in doubt nor in dispute that the issues of res judicata and/or constructive res judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Such issues, in fact, when facts are admitted, ordinarily should be decided as preliminary issues."

25. A perusal of the above judgment of this Court shows that it was an admitted fact that issue of res judicata and of constructive res judicata can be adjudicated as preliminary issue. Since it was an admitted fact, it cannot be said that principle of law has been enunciated that a plea of res judicata can be decided as a preliminary issue.

26. In **Srihari Hanumandas Totala**, the property was mortgaged in favour of Karnataka State Finance Corporation[17]. The Corporation auctioned the property as the loan was not repaid. The legal heirs of the borrower filed a suit in OS No. 138 of 2008 challenging the sale deed dated 8.8.2006 executed by the Corporation and partition of the suit property. A separate OS No. 103 of 2007 was filed by the purchaser from the Corporation. Such suit of the purchaser was decreed on 26.2.2009 . The decree in the said suit was affirmed by the High Court on 11.8.2007. The purchaser from the Corporation filed an application under Order VII Rule 11 for rejection of the plaint of OS No. 138 of 2008 . Such application was dismissed by the learned trial court. The order was affirmed in revision by the High Court holding that the ground of res judicata could not be decided merely by looking averments in the plaint. It is the said order which became subject matter of challenge before this Court. This Court found that the plea of res judicata requires consideration of the pleadings, issues and decision in the previous suit and such a plea would be beyond the scope of Order VII Rule 11. However, in the operative paragraph, it was observed that the trial court shall consider whether a preliminary issue should be framed under Order XIV, and if so, to decide it within a period of three months of raising the preliminary issue. The operative part of the order reads thus:

"28. For the above reasons, we hold that the plaint was not liable to be rejected under Order 7 Rule 11(d) and affirm the findings of the trial court and the High Court. We clarify however, that we have expressed no opinion on whether the subsequent suit is barred by the principles of res judicata. We grant liberty to the appellant, who claims as an assignee of the bona fide purchaser of the suit property in an auction conducted by KSFC, to raise an issue of the maintainability of the suit before the Additional Civil Judge, Belgaum in OS No. 138 of 2008. The Additional Civil Judge, Belgaum shall consider whether a preliminary issue should be framed under Order 14, and if so, decide it

[17] For short, the 'Corporation'

within a period of 3 months of raising the preliminary issue. In any event, the suit shall be finally adjudicated upon within the outer limit of 31-3-2022."

27. This Court was thus examining the scope of Order VII Rule 11 of the Code, whereas such is not the issue in the present appeal. In fact, the defendant has filed an application for framing of preliminary issues. The direction of the High Court is on such application. Therefore, such application needs to be considered in the light of the provisions of Order XIV Rule 2 of the Code.

28. In **Jamia Masjid**, the judgment and decree in a second appeal holding that the suit is barred by the principle of res judicata was the subject matter of challenge before this Court. The learned trial court decided Issue Nos. 5 and 6 related to res judicata and limitation as preliminary issue. It was held that suit was not barred by limitation but barred by res judicata. In appeal, such finding was affirmed. However, in second appeal, the matter was remanded to the trial court for disposal of the suit in accordance with law holding that the suit is not barred by res judicata. In appeal against such judgment and decree, appeal was remanded to the High Court. The High Court after remand held that the judgment in a representative suit under Section 92 of the Code binds the parties to the suit and would thus operate as res judicata.

29. In appeal before this Court, it was considered whether res judicata raises a mixed question of law and facts. The Court held as under:

"26. The court while undertaking an analysis of the applicability of the plea of res judicata determines first, if the requirements of section 11 CPC are fulfilled; and if this is answered in the affirmative, it will have to be determined if there has been any material alteration in law or facts since the first suit was decreed as a result of which the principle of res judicata would be inapplicable. We are unable to accept the submission of the appellants that res judicata can never be decided as a preliminary issue. In certain cases, particularly when a mixed question of law or fact is raised, the issue should await a fullfledged trial after evidence is adduced. In the present case, a determination of the components of res judicata turns on the pleadings and judgments in the earlier suits which have been brought on the record. The issue has been argued on that basis before the Trial court and the first appellate court; followed by two rounds of proceedings before the High Court (the second following upon an order of remand by this court on the ground that all parties were not heard). All the documentary material necessary to decide the issue is before the court and arguments have been addressed by the contesting sides fully on that basis.

xx xx xx

62. In view of the discussion above, we summarise our findings below:

(i) Issues that arise in a subsequent suit may either be questions of fact or of law or mixed questions of law and fact. An alteration in the circumstances after the decision in the first suit, will require a trial for the determination of the plea of res judicata if there arises a new fact which has to be proved. However, the plea of res judicata may in an appropriate case be determined as a preliminary issue when neither a disputed question of fact nor a mixed question of law or fact has to be adjudicated for resolving it;"

30. A perusal of the said judgment would show that only issue Nos. 5 and 6 were decided relating to res judicata and limitation as preliminary issues by judgment dated 3.2.2006. This Court set aside the finding on the preliminary issue by judgment dated 23.9.2021 i.e., almost more than 15 years later when the matter was remanded back to

the trial court. The absence of the decision on all issues have necessitated the matter to be remanded back, defeating the object of expeditious disposal of lis between the parties. The conclusion in Para 62(i) is that the plea of res judicata in appropriate cases may be determined as preliminary issue when it is neither a disputed question of fact nor a mixed question of law and fact. Such finding is what this Court held in **Ramesh B. Desai**.

31. We find that the order of the High Court to direct the learned trial court to frame preliminary issue on the issue of res judicata is not desirable to ensure speedy disposal of the lis between parties. Order XIV Rule 2 of the Code had salutary object in mind that mandates the Court to pronounce judgments on all issues subject to the provisions of sub-Rule (2). However, in case where the issues of both law and fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that suit first, if it relates to jurisdiction of the Court or a bar to the suit created by any law for the time being in force. It is only in those circumstances that the findings on other issues can be deferred. It is not disputed that res judicata is a mixed question of law and fact depending upon the pleadings of the parties, the parties to the suit etc. It is not a plea in law alone or which bars the jurisdiction of the Court or is a statutory bar under clause (b) of sub-Rule (2).

32. The objective of the provisions of Order XLI Rules 24 and 25 is that if evidence is recorded by the learned Trial Court on all the issues, it would facilitate the first Appellate Court to decide the questions of fact even by reformulating the issues. It is only when the first Appellate Court finds that there is no evidence led by the parties, the first Appellate Court can call upon the parties to lead evidence on such additional issues, either before the Appellate Court or before the Trial Court. All such provisions of law and the amendments are to ensure one objective i.e., early finality to the lis between the parties.

33. Keeping in view the object of substitution of sub-Rule (2) to avoid the possibility of remanding back the matter after the decision on the preliminary issues, it is mandated for the trial court under Order XIV Rule 2 and Order XX Rule 5, and for the first appellate court in terms of Order XLI Rules 24 and 25 to record findings on all the issues.

34. Therefore, the order of the High Court remanding the matter to the learned trial court to frame preliminary issues runs counter to the mandate of Order XIV Rule 2 of the Code and thus, not sustainable in law. The learned trial court shall record findings on all the issues so that the first appellate court has the advantage of the findings so recorded and to obliviate the possibility of remand if the suit is decided only on the preliminary issue.

35. Consequently, the appeal is allowed. The order passed by the High Court is hereby set aside.