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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 431 OF 2013

Shri Sakharam Pandu Vartha
(Since deceased) through Lrs.

1(a) Sakun Sakharam Vartha and others ... Appellants

Vs.

Smt.Povali Vajya Govari and others ... Respondents

Mr.Rupesh Lanjekar, Advocate for Appellants.

CORAM : R. G. KETKAR, J.

DATE : 05th MAY, 2015

P.C. :

. Heard Mr.Rupesh Lanjekar, learned Counsel for the appellants at length.

2. By this appeal under section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the appellants, hereinafter referred to as defendants, have challenged the judgment and decree dated 22/12/2005 passed by the II Joint Civil Judge, Junior Division, Palghar in Regular Civil Suit No.30 of 1999 as also the judgment and decree dated 11/04/2008 passed by the Ad-Hoc District Judge-2, Palghar in Civil Appeal No. 04 of 2006. By these orders, the Courts below decreed the suit instituted by the respondents, hereinafter referred to as plaintiffs and permanently restrained the defendants from disturbing the possession of the plaintiffs over the suit property as also from encroaching upon the suit property.

3. In support of this appeal, Mr.Lanjekar strenuously contended that Rama Vartha, father of Changya Vartha and Pandu Vartha was cultivating the suit land. The plaintiffs are the heirs and legal representatives of Changya Vartha and defendants are the legal representatives of Pandu Vartha. After the death of Rama, suit land was inherited by Changya and Pandu. The Courts below committed serious error in holding that plaintiffs are the owners and possessors of the suit land. He submitted that the Courts below failed to appreciate that the suit land was cultivated by Rama Vartha – grandfather of plaintiffs and defendants and consequently, plaintiffs cannot claim exclusive ownership and possession over the suit land. He further submitted that parties belong to Scheduled Tribes community and therefore, they are governed by the Old Hindu Law. After the death of Changya, neither plaintiffs nor their mother will get any share in the ancestral property.

4. Mr.Lanjekar further submitted that in any case, the present suit was not maintainable as plaintiffs had earlier instituted Regular Civil Suit No. 33 of 1991 praying for perpetual injunction. The suit was dismissed in default. He submitted the present suit is, therefore, barred by principle of resjudicata. In any case, having regard to the provisions of Order 9 Rules 8 & 9 of C.P.C, the plaintiffs are precluded from instituting a fresh suit on the same cause of action.

5. I have considered the submissions advanced by Mr.Lanjekar. I have also perused the material on record. Mr.Lanjekar submitted that Rama Vartha was cultivating the suit land as a tenant. This aspect is considered by the Courts below. In paragraph 9, the learned trial Judge, after considering the evidence on record, has held that Changya Vartha (father of the plaintiffs) was a tenant in the year 1955-56 till 1959-60. The names of Rama Vartha and Pandu Vartha are not shown in the tenancy column. 7/12 extracts for the years 1959-60 and onwards show that the name of Shantibai Changya Vartha as a tenant of the suit property. The mutation entry No. 224 at Exhibit 33 shows that name of Shantibai – mother of the plaintiffs is entered in the ownership column as also in the column of possessor. After the death of Shantibai, names of present plaintiffs were entered vide mutation entry No. 108 at Exhibit 35. The mutation entry No. 21 at Exhibit 38 shows that price determined under the Bombay Tenancy and Agricultural Lands Act, 1948 was paid and certificate under section 32M thereof was issued. In paragraph 10, the learned trial Judge recorded a finding that though defendants came with the case that Rama Vartha was cultivating the suit land as a tenant and after his death, Changya, being a Karta of the joint family, started cultivating the suit land on tenancy basis, no documentary evidence was filed firstly to indicate that Rama was cultivating the suit land and secondly Changya was

cultivating the suit land as a Karta of the joint family. As far as the Appellate Court is concerned, it has considered this aspect in paragraph 6. The learned District Judge also considered the admissions given by the witness examined by the defendants namely defendant No.1. The Courts below, after considering the evidence on record, have concurrently held that Rama was not cultivating the suit land as a tenant. Changya was cultivating the suit land and after his death, his widow Shantibai was cultivating the suit land.

6. Mr.Lanjekar further submitted that the parties belong to Scheduled Tribes community and as such, are governed by the Old Hindu Law. After the death of Changya Vartha, neither Shantibai nor plaintiffs will inherit any share in the property. As I have already held that defendants failed to establish that Rama Vartha was cultivating the suit land, I do not find any merit in the submission as well. Lastly, Mr.Lanjekar submitted that the present suit is hit by principle of resjudicata as also the plaintiffs had instituted suit namely Regular Civil Suit No. 33 of 1991 for perpetual injunction. The suit was dismissed in default. In any case, even if principles of resjudicata are not applicable, in view of Order 9 Rules 8 & 9, plaintiffs are precluded from instituting a fresh suit on the same cause of action. I do not find any merit in either of the submissions. In the first place, the learned trial Judge rightly held that earlier suit was dismissed in default and therefore, principle of resjudicata will

not be applicable as it was not decided on merits. Secondly, perusal of appeal memo filed by the defendants did not indicate that any such ground was raised in the appeal. Thirdly, even before the Appellate Court, no contention was advanced on the ground that suit is barred by principle of resjudicata. I, therefore, do not find any merit in the submission of Mr.Lanjekar that the suit is barred by principle of resjudicata. As far as submission based on Order 9 Rules 8 & 9 of C.P.C., is concerned, it is not possible to accept this submission as in case of suit for injunction, cause of action is continuous and therefore, it cannot be said that the plaintiffs instituted suit on the same cause of action. No such contention was advanced in the Courts below. For all these reasons, I do not find any merit in the submissions of Mr.Lanjekar. No question of law, much less any substantial question of law arises in the appeal. Hence, Appeal fails and the same is dismissed.

(R. G. KETKAR, J.)