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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

*SECOND APPEAL NO. 374 OF 2016
with
CIVIL APPLICATION NO. 704 OF 2016*

Maryambi Ahamad Haju
(Since deceased through heirs) & Ors. ... Appellants/Applicants.

V/s.

Anant Mahadev Surve & Ors. ... Respondents.

Mr. S.M. Railkar for the Appellants/Applicants.
Mr. Sanskar Marathe for Respondent 1.

CORAM : N.M. Jamdar, J.

03 May, 2016.

Oral Order :-

The Appellants challenge the judgment and decree passed by the District Judge, Ratnagiri dated 4 January 2016 allowing the Appeal and decreeing the Suit filed by the Respondent – Plaintiff and directing the Appellants to deliver possession of the suit property to the Respondent – Plaintiff.

2. The Regular Civil Suit No. 30 of 1997 was filed by the Respondent – Plaintiff in the Court of Civil Judge, Junior Division,

Rajapur for recovery of the suit property from the Appellants. It was the contention of the Respondent – Plaintiff that the suit property is of the ownership of the Respondent – Plaintiff which was given in mortgage to the predecessor of the Appellants by a deed of mortgage dated 15 November 1939 for period of 50 years and after the expiry of the period of mortgage when the Respondent – Plaintiff sought redemption of the mortgage, the Appellants refused, hence, a suit for possession needed to be filed.

3. The Appellants contested the suit by taking up the various contentions. The main contention was that the mortgage deed is not proved and that the Appellants are in possession of the suit property much prior to mortgage as a tenant. The learned Civil Judge upheld the title of the Respondent – Plaintiff, however held that the Respondent – Plaintiff failed to prove the mortgage deed and accordingly dismissed the suit by judgment and order dated 18 September 2010. The Appeal No. 86 of 2010 was filed by the Respondent – Plaintiff in the District Court, Ratnagiri. The learned District Judge negatived the theory of tenancy put forth by the Appellants and accepted the deed of mortgage, confirmed the title of the Respondent – Plaintiff and directed the Appellants to hand over the suit property.

4. The learned Counsel for the Appellants submitted that the Appellants are tenants in the suit property much prior to the mortgage. He submitted that the mortgage deed is an unregistered mortgage and the mortgage deed has not been proved as it has not been produced from

proper custody. He submitted that the Appellate Court has not noticed the decision in Suit of 1959, while there was no reference to the deed of mortgage. The learned Counsel for the Respondent – Plaintiff relied upon the distribution table, the entries in revenue record and contended that since the title of the Respondent – Plaintiff is proved, the decree for possession ought to follow.

5. There is a concurrent finding to which there is no challenge that the Respondent – Plaintiff is the owner of the suit property. The defence is set up by the Appellants that they are tenants of the suit property. The discussion on this issue by the learned Civil Judge is bereft of any reasoning. The Appellants have not been able to produce any order of tenancy authorities to justify their claim of tenancy neither any document to that effect has been produced. In fact, in the Suit of 1959 where the predecessor of the Appellants were party, they had set up a title to the suit property which was negated and there was no further Appeal. Therefore, the First Appellate Court has rightly rejected the theory of tenancy.

6. As regard the mortgage deed, a deed was executed in the year 1939 and the document being 30 years old, it was taken into consideration by the First Appellate Court for collateral purpose. There is no error in this approach. The First Appellate Court has also considered the arguments regarding the registration of the mortgage deed. The First Appellate Court has held that the mortgage deed can be used for collateral purpose. The Suit of the Respondent – Plaintiff is based on

title. The Appellants have failed to demonstrate any right whatsoever in the suit property. The mortgage deed is reflected in the distribution table which was prepared during the execution proceedings in the Regular Civil Suit No. 14 of 1959 pursuant to which entries in revenue records have been made. Challenge to these entries made by the Appellants has failed.

7. In the circumstances, the Suit filed by the Respondent – Plaintiff on the basis of title for recovery of possession since the Appellants have no title in the property, has been rightly decreed by the First Appellate Court. As contended by the learned Counsel for the Respondents, based on decision of the Apex Court in the case of *Kolathoor Variath and Anr. v/s. Pairaprakottoth Cheriya Kumhahammad Haji* reported in *AIR 1974 SCC 689*, even assuming the mortgage deed is kept aside, the decree for possession based on title, need not be disturbed.

8. No question of law arises in this Second Appeal. The Second Appeal is accordingly dismissed. The Civil Application stands disposed of.

(N.M. Jamdar, J.)