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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.180 OF 2013
WITH
CIVIL APPLICATION NO.509 OF 2013

Trambak M. Bhangare & Ors.	...Appellants
V/s.	
The State of Maharashtra & Ors.	...Respondents

Mr.Nikhil Pujari for the Appellants.

Ms.Poonam Bhosale, A.G.P. for the Respondent No.1.

Mr.R.S. Apte, Senior Counsel with Ms.Jaymala Ostwal i/b M/s.J.J. Associates for the Respondent No.2.

CORAM : R.D. DHANUKA, J.
DATE : 12TH FEBRUARY, 2016.

P.C. :-

1. By this second appeal filed under section 100 of the Code of Civil Procedure, 1908 the appellants (original plaintiffs) have impugned the judgment dated 17th January, 2013 passed by the learned District Judge-5, Nashik dismissing Regular Civil Appeal (R.C.A.) No.77 of 2011 and upholding the decree passed by the learned trial Judge thereby dismissing the suit filed by the appellants (original plaintiffs) and by allowing the counter claim of respondent

no.2 herein (original defendant no.2) for recovery of possession from the original plaintiffs. Some of the relevant facts for the purpose of deciding this second appeal are as under :

2. The original plaintiffs claim to be in possession of the suit property since 1966. There is no dispute that the State Government had granted the suit property on lease to the respondent no.2. However, in view of the default committed by the respondent no.2 of the terms and conditions of lease, the State Government resumed possession from the respondent no.2. The respondent no.2 however, paid penalty on non-agricultural assessment to the State Government and as a result on 8th April, 1989 the State Government has re-granted the suit property in favour of the respondent no.2.

3. The State Government however did not hand over possession of the suit property to respondent no.2. The respondent no.2 accordingly approached the State Government for initiating an action against the appellants (original plaintiffs) for possession. The State Government accordingly issued various notices against the appellants. The appellants filed a suit bearing Special Civil Suit (Spl.C.S.) No.207 of 1994 against the respondent no.2 *inter-alia* praying for a declaration that the appellants had become owners by adverse possession and claimed permanent injunction against the respondent no.2. The State Government was not a party to the said

proceedings.

4. The defendant no.2 resisted the said suit. The learned trial Judge passed an order and decree on 15th January, 1997 in Spl.C.S. No.207 of 1994 and rejected the claim of ownership claimed on the basis of adverse possession. The learned trial Judge however, granted a decree of permanent injunction in favour of the appellants and against the respondent no.2 thereby restraining the respondent no.2 from disturbing the possession of the appellants without due process of law. It is not in dispute that the learned trial Judge has granted interim injunction against the respondent no.2 from disturbing the possession of the appellants and the said interim relief was in force till the disposal of the said suit by the learned trial Judge. Being aggrieved by the said order refusing to grant relief of declaration of title in respect of the property, the appellants filed an appeal before the lower appellate Court. The lower appellate Court dismissed the said appeal.

5. The appellants thereafter filed a second suit initially only against the State Government, challenging the notices issued by the State Government. The defendant no.2 applied for intervention in the said suit and was impleaded as a party defendant. In the said suit, the defendant no.2 also filed a counter claim *inter-alia* praying for possession of the suit property. The said counter claim was initially

rejected by the learned trial Judge by an order dated 5th January, 2006. The said order was impugned by the defendant no.2 in this Court by filing a writ petition bearing Writ Petition No.1731 of 2006. By an order dated 17th April, 2006, this Court was pleased to set aside the said order passed by the learned trial Judge on 5th January, 2006, refusing to entertain the counter claim however, keeping the issue of limitation open.

6. The defendant no.2 thereafter preferred RTS Appeal No.191 of 1991 which was allowed on 31st March, 1994 directing to take necessary action to hand over possession to the defendant no.2 from the original plaintiffs. The original plaintiffs challenged the said order by filing an appeal and also filed recovery suit. The said appeal came to be dismissed.

7. The parties led oral evidence before the learned trial Judge. By an order and decree, the learned trial Judge dismissed the suit filed by the appellants and allowed the counter claim filed by the respondent no.2. Being aggrieved by the said order and decree, the appellants thereafter preferred Regular Civil Appeal No.77 of 2011 before the learned District Judge-5, Nashik. By an order and judgment dated 17th January, 2013, the learned District Judge-5, Nashik dismissed the said appeal filed by the appellants.

8. Learned counsel appearing for the appellants submits that

the counter claim filed by the respondent no.2 before the learned trial Judge was *ex-facie* barred by law of limitation. It is submitted that admittedly, the land was re-granted in favour of the respondent no.2 by the State Government in the year 1989. He submits that though the appellants had filed a suit *inter-alia* praying for a declaration of title by way of adverse possession and for injunction in the year 1994, the respondent no.2 did not file any suit for recovery of possession. He submits that the counter claim was admittedly filed by the respondent no.2 in the year 2006 in the suit filed by the appellants in the year 1999. He submits that the counter claim for recovery of possession was thus filed beyond the period of 12 years from the date of accrual of the cause of action. He submits that the learned trial Judge has allowed the time barred claim of the respondent no.2 for recovery of possession.

9. It is submitted by the learned counsel for the appellants that the lower appellate Court also over looked this crucial aspect in the impugned order and has upheld the findings of the learned trial Judge erroneously. He submits that the cause of action for filing the counter claim could not have commenced when the decree was passed in favour of the appellants by the learned trial Judge in the first suit.

10. In his alternate submission it is submitted that the counter

claim was even otherwise not maintainable under Order 8 Rule 6-A of the Code of Civil Procedure in view of the alleged cause of action having arisen after filing of the written statement by the respondent no.2. In support of this submission, learned counsel placed reliance upon the judgment of the Supreme Court in case of **Bollepanda P. Poonacha & Anr. vs. K.M. Madapa, AIR 2008, S.C. 2003.**

11. Insofar as the notices issued by the State Government is concerned, it is submitted by the learned counsel that the respondent no.2 could not have invoked machinery of the State Government for recovery of possession.

12. Mr.Apte, learned senior counsel for the respondent no.2 on the other hand invited my attention to the findings recorded by the learned trial Judge as well as by the lower appellate Court. He submits that the suit land had been re-granted in favour of the respondent no.2 by the State Government only in the year 1989. He submits that admittedly there was an injunction granted against the respondent no.2 in the suit filed by the appellants in the year 1994. The said injunction continued till the final decree of possession granted by the learned trial Judge in the year 1996 i.e. on 21st December, 1996. He submits that it was for the first time declared that the respondent no.2 can file a suit for possession by following due process of law against the appellants. He submits that thus the

cause of action for recovery of possession arose when the said order and decree was passed by the learned trial Judge on 21st December, 1996 making it clear that the injunction was granted against the respondent no.2 without due process of law. He submits that admittedly the counter claim was filed within 12 years from the date of the said judgment and decree dated 21st December, 1996.

13. Insofar as the judgment of the Supreme Court in case of **Bollepanda P. Poonacha & Anr. vs. K.M. Madapa**, (supra) relied upon by learned counsel for the appellants in support of his submission that the counter claim thus was not maintainable is concerned, the Supreme Court in the said judgment held that the cause of action for filing the counter claim must accrue either before or after the filing of the suit but before the defendant has raised his defence. In my view, this judgment will not assist the appellants for the reason that in this case the appellants had raised the plea of limitation against the respondent no.2 on the ground that cause of action had arisen prior to the date of the appellants filing the second suit and the respondent no.2 filing the written statement. The reliance placed by the learned counsel for the appellants on the said judgment is thus totally misplaced.

14. A perusal of the proceedings and the order passed by two Courts below clearly indicates that there was no dispute that the land

was re-granted in favour of the respondent no.2 by the State Government some time in year 1989. The State Government however, did not hand over possession of the suit property to the respondent no.2. The respondent no.2 therefore, made a representation to the State Government for recovery of possession. The State Government had accordingly issued a notice to the appellants for recovery of possession. In the suit filed in the year 1994 by the appellants, the State Government was not a party to the said suit. The suit was for a declaration that the appellants became the owners by adverse possession and for permanent injunction against the respondent no.2. Admittedly, an injunction was granted by the learned trial Judge in favour of the appellants and against the respondent no.2. The said temporary injunction was in force till the disposal of the said suit filed by the appellants.

15. The learned trial Judge passed a judgment and decree only on 21st December, 1996 granting permanent injunction in favour of the appellants and against the respondent no.2 from disturbing the possession without due process of law. In my view, it is thus clear that till the said injunction was in force in favour of the appellants and against the respondent no.2 and from disturbing the possession of the appellants, the respondent no.2 could not have filed the suit for recovery of possession without due process of law.

16. In my view, the cause of action for recovery of possession thus arose only on the date of the judgment and decree passed by the learned trial Judge on 21st December, 1996. The limitation for recovery of possession is 12 years. Admittedly the counter claim was filed within 12 years from the date of the said judgment and decree dated 21st December, 1996. The learned trial Judge, in my view, has rightly considered the date of the order and decree dated 21st December, 1996 as the date of commencement of the cause of action for the purpose of filing the counter claim. The lower appellate Court also has taken an independent view and rendered a fresh findings of fact on limitation. I am thus not inclined to accept the submission of learned counsel for the appellants that the cause of action for filing the suit and/or counter claim for recovery of possession commenced in the year 1989 when the land was re-granted in favour of the respondent no.2 by the State Government.

17. In my view, both the Courts below have rendered a finding of fact on the issue of limitation which is a mixed question of fact and law and the findings being concurrent findings and being not perverse, this Court cannot interfere with such concurrent findings of fact under section 100 of the Code of Civil Procedure, 1908. In my view, there is no substantial question of law having arisen in this second appeal. The appeal is devoid of merits and is accordingly

dismissed.

18. In view of the dismissal of the second appeal, the civil application does not survive and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)