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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.859 OF 2015
WITH
CIVIL APPLICATION NO.1861 OF 2015

Narayan D. Sawant	...Appellant
V/s.	
Deepak G. Kakade(Kothawale) & Ors.	...Respondents

Mr.Rshikesh Barge for the Appellant.

Mr.Vaibhav Gaikwad for the Respondent No.2.

CORAM : R.D. DHANUKA, J.
DATE : 13TH JANUARY, 2016.

P.C. :-

1. By this second appeal the appellant (original defendant) has impugned the order passed by the lower appellate Court dismissing Regular Civil appeal No.66 of 2008 filed by the appellant thereby impugning the judgment and decree dated 7th January, 2008 passed by the learned Civil Judge, Junior Division, Koregaon in Regular Civil Suit No.44 of 2004. There is no dispute that there was a deed of mortgage executed by and between the parties by which the original applicant had mortgaged the property in favour of the defendant on 18th March, 1985. The period of redemption under the mortgage deed was 10 years. The parties thereafter entered into

second deed of mortgage on 4th November, 1986. The period of redemption mentioned in the said mortgage deed was extended to 15 years. Before expiry of 15 years, the original plaintiff issued a notice for redemption and filed a suit before the learned trial Judge. The said suit was decreed in favour of the original plaintiff. The appellant herein filed an appeal before the lower appellate Court which appeal was allowed on the ground that the suit filed by the original plaintiff was pre-mature.

2. The original plaintiff thereafter issued a fresh notice for redemption of mortgage. The appellant herein refused to comply with the said notice, which resulted in filing of the second suit by the original plaintiff (R.C.S. No.44 of 2004) before the learned trial Court.

3. The learned trial Judge decreed the said suit in favour of the original plaintiff which was impugned by the appellant herein by filing an appeal (R.C.A. no.66 of 2008) before the learned Principal District Judge, Satara. By an order and judgment delivered by the lower appellate Court on 27th May, 2015, the lower appellate Court has dismissed the said appeal.

4. Learned counsel appearing for the appellant submits that actually there was no mortgage created in favour of the original plaintiff by the appellant in respect of northern side of the property and the possession was given to the appellant by the original plaintiff

in respect of the property falling on southern side. He submits that the learned trial Judge as well as the lower appellate Court could not have passed any decree against the appellant in respect of the northern side of the property. He submits that the original plaintiff has already sold the said property situated on the southern side in favour of other party.

5. The next submission of learned counsel for the appellant is that though the finding was recorded in favour of the appellant in the first suit filed by the original plaintiff, which finding had attained finality, the learned trial Judge in the second suit did not consider such finding though the same was binding on both the parties being barred by *res-judicata* under section 11 of the Code of Civil Procedure, 1908.

6. Learned counsel for the respondents (original plaintiffs) on the other hand submits that insofar as the first submission of learned counsel for the appellant that the mortgage was created not in respect of northern side property is concerned, the said argument has already been rejected by both the Courts below and the finding of fact is rendered. He submits that the concurrent finding of fact rendered by the Courts below cannot be interfered with by this court under section 100 of the Code of Civil Procedure.

7. Insofar as the second submission of the learned counsel

for the appellant that the second suit was barred by the principles of res-judicata under section 11 of the Code of Civil Procedure is concerned, it is submitted by learned counsel that since the first suit was rejected on the ground that the same was pre-mature and not on merits, the finding rendered in the first suit would not be binding on the parties as well as with the learned trial Judge in the suit on the ground of *res-judicata*. In support of this submission, learned counsel for the respondent placed reliance on the judgment of the Supreme Court in case of **Sheodan Singh vs. Daryao Kunwar, AIR 1966 SC 1332**, and in particular paragraph 13.

8. The Supreme Court in case of **Sheodan Singh** (supra) has held that if the decision in the earlier proceedings filed between the parties was not on merits but on the ground that the same was pre-mature, such finding or conclusion drawn by the learned trial Court in the earlier proceedings would not bind as *res-judicata* in subsequent proceedings. In my view, the judgment of the Supreme Court in case of **Sheodan Singh** (supra) would squarely apply to the facts of this case. The plea raised by the learned counsel for the appellant is contrary to the law laid down by the Supreme Court in the said judgment. I am respectfully bound by the judgment of the Supreme Court.

9. Since the findings rendered are concurrent findings against

the appellant, which findings are not perverse, the same cannot be interfered with by this Court under section 100 of the Code of Civil Procedure, 1908. The appeal is devoid of merits and is accordingly dismissed.

10. 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.)