

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.42 OF 2016

Ganesh s/o Shamrao Talankar and ors.

-vs-

Anil s/o Janrao Tayade and ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri Mahesh Rai, Advocate for appellants.

Shri S. M. Pande, Advocate for respondent Nos.1 to 5.

CORAM : A.S.CHANDURKAR, J.

DATE : APRIL 25, 2016

The appellants are the original defendants who are aggrieved by the decree for possession of field survey No.242/3 and declaration that the decree passed in R.C.S. No.46 of 1995 was not binding on the plaintiffs. The decree passed by the trial Court has been confirmed by the appellate Court.

It is the case of the respondents that field survey No.242/3 admeasuring 1H 88R was granted to Janrao, their father being Class II occupancy land. Possession of the said land was handed over to Janrao on 04/06/1959. On 08/09/1979 said Janrao executed a document in favour of the predecessor of appellants Shamrao. The possession of the said field was handed over to Shamrao for the period

from 1980-81 to 1994-95. When the aforesaid period came to an end, the legal representatives of Shamrao filed R.C.S. No.46 of 1995 for permanent injunction. In that suit, the legal representatives of Janrao filed a counter-claim for possession. Said proceedings were settled and in the year 1999, the possession was handed over to the legal representatives of Janrao. However, subsequently the legal heirs of Shamrao prosecuted the suit and the same was decreed *exparte*. The legal heirs of Janrao Came to be dispossessed in the execution proceedings. On 21/07/2007, the present plaintiffs filed a suit for declaration that the proceedings R.C.S. No.46 of 1995 which was decided on 12/01/2000 were not binding on them and also for possession of the property in question. This suit came to be decreed by the trial Court and the appeal filed by the defendants came to be dismissed.

Shri M. Rai, the learned counsel for the appellants submitted that the suit was barred by limitation inasmuch as R.C.S. No.46 of 1995 was decreed on 12/01/2000 and the present suit came to be filed on 21/07/2007. He submitted that the plaintiffs had filed a counter-claim for possession in the earlier proceedings and therefore the findings therein would operate as *res-judicata*. He therefore submitted that both the Courts were not justified in holding against the

present appellants.

Shri S. M. Pande, the learned counsel for the respondents supported the impugned judgment and submitted that the proceedings in R.C.S. No.46 of 1995 were decided in the absence of the plaintiffs. The said proceedings had been earlier settled and the plaintiffs were under the impression that the matter had come to an end and had not participated in the same. He submitted that the present suit for possession was filed within limitation and as the earlier suit was not decided on merits, the question of *res-judicata* would not apply.

I have perused the impugned judgment and heard the learned counsel for the parties at length. It is not in dispute that the suit field was initially allotted to the predecessor of the plaintiffs, Janrao. It is further not in dispute that by virtue of a document executed in favour of the defendants on 08/09/1979, they came into possession. In the said document, it was specifically stated that the possession was for a limited period in the year 1995. The defendants herein had filed R.C.S. No.46 of 1995 for permanent injunction for protecting their possession. During pendency of those proceedings, the matter was settled between the parties and possession was handed over to Janrao. The record further reveals that subsequently R.C.S. No.46 of 1995 was

prosecuted by the present defendants and the suit came to be decreed *ex parte*. On the basis of said decree, the defendants came back in possession by executing the decree. It is to be noted that in the present proceedings, an issue of tenancy was framed and it was referred to the Tahsildar for adjudication. By order dated 31/05/2011 it was held that the defendants were not the tenants of Janrao.

In so far as the aspect of *res-judicata* is concerned, it is to be noted that the earlier proceedings were decided *ex parte*. Though the present plaintiffs has filed a counter-claim, the same was not adjudicated on merits. Once it was found that the defendants herein were not the tenants, the subsequent suit for possession on the basis of title was maintainable. The subsequent proceedings were not barred by *res-judicata*.

It is to be noted that the possession of the suit field had been handed over to Janrao in the year 1999. R.C.S. No.46 of 1995 was subsequently decreed in the year 2000 and the possession was again obtained by executing the decree. As the plaintiffs were seeking possession on the basis of title, the suit filed on 21/07/2007 could not be said to be barred by limitation in view of provision of Article 64 of the Limitation Act, 1963. These aspects were considered by the trial Court as well as the Appellate Court after which the suit

came to be decreed and the defendants' appeal came to be dismissed.

The findings on aforesaid aspects have been recorded on the basis of the evidence on record. These findings cannot be said to be perverse. The second appeal does not give rise to any substantial question of law. The same is therefore dismissed with no order as to costs.

JUDGE