

Sequeira

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

***SECOND APPEAL NO.611 OF 2013
Along with
CIVIL APPLICATION NO.1432 OF 2013***

Gangadhar Vitthal Pund

Since deceased through his heirs

& legal representatives

1A. Smt.Zunkabai Gangadhar

Pund and ors.

.. Appellants

Vs

The Chairman

Vividh Karyakari Society, Nashik & ors.

.. Respondents

Mr.Dilip Bodake, for Appellants / Applicants.

Mr.Sanjay Ghaisas, for Respondent Nos.1 and 2.

Mr.Yogesh Dabke – Assistant Government Pleader, for Respondent No.3.

Coram : N.M.Jamdar, J.

Date : 12 April 2017.

Oral Order :

By this Appeal, the Appellants have challenged the judgment and orders passed by the learned District Judge, Nashik dated 9 April 2013.

2. By the impugned judgment and order cross-objections of Respondent No.1 were allowed and the Suit filed by the Appellant was dismissed. The Appellants filed Regular Civil Suit No.507 of 2003 against the Respondent No.1/Respondents in respect of property No.702 situated at Janori, taluka Dindori district Nashik. According to the Appellants, the Respondent No.1 unauthorisedly encroached upon the suit property and constructed a building. In spite of the notice dated 21 April 2003, the structure was not removed and therefore, the Suit had to be filed. The Suit was partly decreed by the learned Civil Judge and it was declared that the Respondent No.1 has no concern with property Survey No.703. Rest of the relief sought for by the Appellants, were rejected.

3. The Appellants filed Civil Application No.132 of 2010 in the District Court, Nashik. Respondent No.1 filed cross-objections. By order dated 9 April 2013, the Appeal of the Appellants was dismissed and cross-objections of Respondent No.1 were allowed. The learned District Judge based the impugned order on two counts. Firstly, that the present Suit was barred by provisions of Order IX Rule 9 of Code of Civil Procedure and secondly, the Suit was not within limitation.

4. The learned counsel for the Appellants submitted that the provisions of Order IX rule 9 are not attracted in the present case as the cause of action in both the suits is different. The copy of the

plaint in both, present suit as well as Regular Civil Suit No.74 of 1988 are placed on record. In the Regular Civil Suit No.74 of 1988, the grievance of the Appellants was that inspite of the Appellants being the owners, the claim was being contested by Respondent No.1 had started constructing upon the suit property by dumping material upon the site and that Respondents be restrained. This suit was not pursued further and was dismissed for default on 3 October 1996. The cause of action of starting of the encroachment by putting material on the site in the earlier suit, was stated to have arisen on 15 May 1988. The present suit was filed on 29 October 2003.

5. As rightly observed by the learned District Judge, the test to be applied under Order 9 Rule 9 is that the cause of action in both the suits must be in substance the same not technically identical. In the present the cause of action in both the suits in substance is the same. What is in essence claimed is that the Appellant is the owner and Respondents are unauthorisedly encroaching on the suit property. Even when the earlier suit was filed as per the averment of the plaint, the material was brought on to the site and all preparation for construction had started. Having abandoned that suit by getting it dismissed for default and not getting the same restored, fresh suit complexity of the actions taken further, is clearly barred under Order IX Rule 9.

6. The learned District Judge has also held against the Appellant,

on the ground of limitation, in which there is no error. The cause of action of the encroachment, which had started in the year 1988 simply stood concluded, and therefore, the present suit filed after fifteen years was clearly barred by limitation. Though learned counsel for Appellants have sought to draw distinction between applicability of Article 113 and Article 58 of Limitation Act, the facts of the present case clearly indicate that the starting period of limitation was 15 May 1988.

7. Considering this position, the view taken by the learned District Judge, Nashik is proper. No question of law arises. Second Appeal is accordingly dismissed. Civil Application stands disposed of accordingly.

(N.M.Jamdar, J.)