

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Second Appeal No. 315 of 2016
[Sonabai Harichandra Chauhan & others Vs. Bhagirathabai Dewaji Chauhan (dead) through her legal heirs]

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

Court's or Judge's orders

Mr. N. V. Fulzele, Adv., for the appellants.
Mr. M.M. Agnihotri, Adv., for respondent nos. 1 to 4.

- - - -
CORAM : A. S. CHANDURKAR, J.

DATE : 11th September, 2017

The appellants are the original defendants who are aggrieved by the decree for possession passed by the first appellate Court.

The respondents are the original plaintiffs. It is their case that one Dewaji was the owner of the suit property. After his death, his widow and their children succeeded to the property. One Harichandra Chauhan had filed a Civil Suit against Bhaiyalal Sahu on the ground that he was his tenant. In the proceedings filed before the Rent Controller, such permission was granted. Thereafter, suit came to be filed by Harichandra - being Regular Civil Suit No. 3 of 1981, for possession. In that suit, the plaintiffs had moved an application for being

joined under provisions of Order-I, Rule 10 of the Civil Procedure Code, 1908. This application was, however, rejected. The plaintiffs then filed a suit for declaration that they were the owners of the suit property. Regular Civil Suit No. 195 of 1984 was decreed on 03rd April, 2000 and this decree was maintained by this Court. The defendants, in the meanwhile, filed execution proceedings pursuant to the decree in Regular Civil Suit No. 3 of 1981 and obtained possession of the suit property. Thereafter, the plaintiffs filed the present suit for possession on the basis of their ownership. The trial Court dismissed the suit holding the same to be barred by limitation. The trial Court further held the suit to be barred under provisions of Order-II, Rule 2 of the Code. The appellate Court has reversed this judgment and decree.

Shri N. V. Fulzele, learned counsel for the appellants, submitted that the proceedings in Special Civil Suit No. 50 of 2008 were barred by provisions of Order-II, Rule 2 of the Code on the ground that in the earlier suit – being Regular Civil Suit No. 195 of 1984, possession of the suit property could have been sought. He submitted that both the parties had admitted the filing of the earlier proceedings and on the basis of the material on record, it could be inferred that the relief of possession could have been sought in that suit and hence the subsequent suit was not maintainable. He further submitted that the present suit was barred by

limitation, inasmuch as it was filed only on 26th February, 2008. Despite being declared as owners of the suit property, the plaintiffs did not agitate their rights with regard to possession within limitation.

Shri M.M. Agnihotri, learned counsel for the respondents, supported the impugned judgment. According to him, the bar under provisions of Order-II, Rule 2 of the Code would not apply as the pleadings of the earlier proceedings were not placed on record. In that regard, he placed reliance on the decision in **M/s. Bengal Waterproof Ltd. Vs. Bombay Waterproof Manufacturing Company & another** [AIR 1997 SC 1398]. He further submitted that the suit as filed was within limitation in view of the fact that the defendants came in possession on 18th July, 2006 when the warrant of possession was executed. He, therefore, submitted that the judgment did not call for any interference.

After hearing the respective counsel for the parties and after perusing the documents on record, I find that the appellate Court has rightly decreed the suit. For the purposes of attracting the bar under provisions of Order-II, Rule 2 of the Code, it is necessary that the pleadings in the earlier suit are placed on record. This has been so held in **S. Nazeer Ahmed Vs. State Bank of Mysore** [(2007) 11 SCC 75]. Admittedly, neither the plaint nor Written Statement in Regular Civil Suit No.195 of 1984 have been placed on record in the present

proceedings. Hence, the basic ingredient for urging the applicability of the aforesaid bar is not available on record. This position is also clear from the decision relied upon by the learned counsel for the respondents.

In so far as the aspect of limitation is concerned, the warrant of possession was executed by the defendants and they came in possession on 18th July, 2006. The plaintiffs filed Special Civil Suit No. 50 of 2008 for possession on 26th February, 2008. On that count, therefore, it was rightly held by the first appellate Court that the suit was filed within limitation.

In view of aforesaid, I do not find any case made out to interfere with the impugned judgment. The appeal is, therefore, dismissed. No costs. Consequently, Civil Application No.997 of 2017 also does not survive.

The decree passed in favour of the respondents shall not be executed for a period of four weeks from today.

Judge