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

SECOND APPEAL NO.410 OF 2013

Dnyandev Siddhu Kumbhar
and ors

... Appellants

V/s.

Dattatraya Hari Gaikwad
and ors

... Respondents

Mr. Milind Deshmukh, for the Appellants.
Mr. Kuldeep U. Nikam, for respondent No.1-D.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 24th JULY, 2018.

P.C. :

1] Heard learned counsel for the appellants and learned counsel for respondents.

2] Admit.

3] With the consent of learned counsel for both the parties, appeal is taken up for final hearing at the stage of admission itself.

4] This Second Appeal is preferred against the judgment and decree dated 22.1.2013, passed by District Judge-3 Kolhapur, in Regular Civil Appeal No.285 of 2004, which was preferred against the

judgment and decree dated 6.7.2004, passed by Jt. Civil Judge, Panhala in R.C.S.No.127 of 2001.

5] The said suit was filed by the appellants, for declaration that the decree passed in R.C.S.No.77 of 2016 is illegal, collusive and not binding on them. In the alternative, they had sought the declaration that they have become the owners by way of adverse possession and also for injunction.

6] It is the case of the appellants that the suit land was purchased by original respondent No.2 by registered sale deed dated 24.5.1966. It was his self acquired property. In the year 1974-75, respondent No.2 gave the possession of the suit property to the appellants as tenants and accordingly the names of the appellants came to be entered into the revenue record. Subsequently respondent No.2 even agreed to sell the suit property to the appellant No.1 by executing an agreement to sale dated 13.01.1975. Since then the possession of the appellants, which was initially that of the as tenants was converted to that of the owners.

7] It is further case of the appellants that thereafter original respondent No.1 had filed Special Civil Suit No.77 of 1976 against respondent No.2 for partition and separate possession of his share in the suit property. The said suit came to be decreed. Final Decree Proceeding No.19 of 1981 is also instituted in the Court.

8] The appellants came to know about the said proceeding for the first time when they received the notice of the Final Decree Proceeding from the Court. Thereafter they made enquiry and realised that it was a collusive suit in which their rights in the suit property came to be frustrated and hence they have filed this suit for declaration and injunction.

9] This suit came to be resisted by the respondents, denying that Special Civil Suit No.77 of 1976 was collusive suit or decree passed therein cannot be binding on the appellants. It was submitted that the said suit was decided on merits and final Decree Proceeding was also filed. The appellants have made every effort to contest the execution of that decree, but they failed to do so even upto the Supreme Court. Moreover, the appellants were very well aware of the pendency of the suit and during pendency, appellant No.1 had got executed the sale deed of the suit property in his favour and therefore there is bar of lis-pendence. It is submitted that the appellants have even filed application for their impleadment in the suit, which came to be dismissed. They have challenged the said order upto the Supreme Court.

10] On appreciation of the oral and documentary evidence led by the parties, both the trial Court and the Appellate Court were pleased to hold that the earlier suit bearing Special Civil Suit No.77 of

1976 cannot be called in any way as collusive. It was hotly contested by respondent No.2. It was for the partition of joint family property and it came to be decreed.

11] The sale deed alleged to be executed by respondent No.2 in favour of the appellant No.1 was executed during the pendency of the suit and therefore, it is subject to the outcome of the suit. It was held that the appellants were having knowledge of the said suit. It was for the appellants to implead themselves in the suit itself. Therefore, there is no substance in the contention raised by the appellants for challenging the said decree. Accordingly the suit came to be dismissed.

12] While challenging this concurrent finding of the fact recorded by the trial Court and confirmed by the Appellate Court, the submission of learned counsel for the appellants is that both the Courts have not considered the fact that the names of the appellants are appearing in the revenue record since year 1974-75 as tenants and that too, on the application given by respondent No.2. Moreover, it is submitted that the agreement of sale was executed by respondent No.2 in favour of appellant No.1 much prior to the institution of the earlier suit and therefore, the right of the appellants in the suit land, initially as tenants and thereafter as owners, cannot be denied. According to learned counsel for the appellants, therefore, this is a fit

case where this Court should interfere in the Second Appeal.

13] However, as rightly submitted by learned counsel for respondents, this is not as simple or as innocent as has been tried to be made out. It is pertinent to note that in the year 1976 itself earlier suit was filed for partition by respondent No.1 against respondent No.2. After it was hotly contested by respondent No.2, it was decreed on merits on 24.07.1988. When the Final Decree Proceeding was filed, the appellants had preferred an application before the Executing Court in the year 1996 to implead them as party to the said proceeding. The said application came to be rejected on 12.4.1996. Thereafter the appellants filed Writ Petition No.2653 of 1996 before this Court challenging the order dated 12.4.1996. That Writ Petition was withdrawn on 2.8.1996 with liberty to approach the District Court. Thereafter Revision Application was filed before the District Court with application for condonation of delay, challenging the original judgment and decree dated 24.7.1978. That application was rejected on 3.1.3.1997. Against the said order, the appellants preferred Writ Petition No.1953 of 1997 in this Court. It was withdrawn and Review Petition was filed. It also came to be dismissed.

14] Meanwhile the appellants preferred appeal before the District Court, challenging the order dated 12.4.1996 alongwith application for condonation of delay bearing Misc. Civil Application

No.211 of 2016. The said application came to be rejected on 15.4.1998. Then Civil Revision Application No.517 of 1998 was filed by them in this Court, which came to be dismissed by this Court on 19.7.1998. Even Special Leave Petition preferred before the Hon'ble Supreme Court against the said order also came to be dismissed.

15] Thus, this case has a checkered history of litigation which prove that the appellants were fully aware about the suit and the decree passed therein and they have agitated their so called rights of tenancy, by seeking their impleadment in all the forums and in all the proceedings upto the Hon'ble Supreme Court. Only after they could not succeed therein, they have initiated this one more round of litigation challenging the decree itself which cannot be decreed.

16] As regards the sale deed, both the Courts rightly held that their alleged sale deed was executed during pendency of the suit. Hence, it is hit by the principle of lis-pendence. As regards agreement of sale, admittedly there is judicial pronouncement to that effect in the earlier suit bearing Special Civil Suit No.77 of 1976, holding that said agreement cannot be binding on the other co-owners.

17] Thus,there is no substance in the contention of the appellants that for the first time, they came to know about the decision in suit when they received notice from the Tahsildar or they are having any right in the suit property, either by way of tenancy or

by way of adverse possession.

18] The trial Court has considered how this plea of tenancy is also not acceptable, because if the appellant No.1 was inducted as tenant, he should have applied to the Competent Authority under Bombay Tenancy and Agricultural Lands Act, for purchase of the suit land. However, appellant No.1 has not done so. He has also not filed any suit for specific performance of agreement of sale, which according to him was executed prior to the filing of Special Civil Suit No.77 of 1976. In view of these facts on record, this Court cannot interfere itself in interfering in the concurrent finding of fact recorded by both the Courts below which is based on proper appreciation of evidence on record. No substantial question of law is raised in the Second Appeal.

19] The Second Appeal, therefore, stands dismissed with costs.

[DR.SHALINI PHANSALKAR-JOSHI, J.]