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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.916 OF 2015
WITH
CIVIL APPLICATION NO.1992 OF 2015

M/s Kanji Bhagwanji Thakkar Appellant
V/s.
Lassalgaon Vibhag Kharedi
Vikri Sangh Respondent

Mr. Girish S. Godbole, a/w Ms.Shruti Tulpule, for the Appellant
Mr. Sugandh B. Deshmukh, for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 22nd OCTOBER, 2018.

P.C. :

- 1] Heard learned counsel for the appellant and respondents.
- 2] This Second Appeal is directed against the judgment and decree dated 16.04.2015, passed by District Judge-2, Niphad, Nasik, thereby dismissing the Civil Appeal, No.140 of 2009, which was preferred against the judgment and decree dated 7.11.2009, passed by the Civil Judge Junior Division, Niphad, in Regular Civil Suit No.148 of 2004
- 3] The said suit was filed by the respondent herein, seeking eviction of the appellant from possession of the suit land. Both the trial

Court and the Appellate Court, have decreed the suit.

4] The only issue raised for consideration in the present appeal is that in the backdrop of earlier litigation, the present suit is barred by principles of *resjudicata*. It is submitted that the appellant herein has filed Civil Suit No.199 of 1992, against respondent for declaration that the respondent has no right to interfere and obstruct his possession over the suit land bearing survey No.131/1/1 admeasuring 80R. It was specifically stated therein by the appellant that he is in possession of the suit land as tenant and respondent should not dispossess him without following due process of law. The trial Court has decreed the said suit partly, holding that appellant has proved his tenancy rights in respect of 60 R of land only, and therefore to that extent only respondent herein was restrained from causing obstruction to his possession.

5] Being aggrieved thereby, the appellant had preferred Civil Appeal No.185 of 1999, against the said judgment and decree. In the said appeal, it was observed by the Appellate Court that there was no dispute as regards 60R of land which was in possession of the appellant as tenant. However, considering that the total area of the land is 80R and the possession of the appellant is proved over the entire portion of 80R and as this factual position was conceded by the learned counsel for respondent herein also, the appellate Court allowed the appeal, modifying the judgment and decree passed by the trial Court and

thereby restrained present respondent from causing any obstruction and interfering with the possession of the appellant over the entire land admeasuring 80 R and also restrained respondents, from dispossessing appellant without due process of law .

6] In the light of this judgment and decree passed by the Appellate Court, in the earlier suit, it is submitted by learned counsel for appellant that the present suit filed by the respondent for eviction of the appellant from the entire area of admeasuring 80 R of land cannot be maintainable. It is attracting the bar of *res-judicata* under Section 11 of Code of Civil Procedure. It is submitted that a specific contention was raised to that effect before the Court that as in the earlier suit, respondent has conceded and it was also proved that the appellant is in possession of the entire land of 80 R, the said eviction notice issued by the respondent being restricted to 60R land only, the said notice was not legal and valid.

7] Secondly, it was submitted that in view of the earlier decision, present suit was barred by the principle of *res-judicata*. The trial Court has in this case, framed issue as to whether the suit is barred by *res-judicata* and answered it in affirmative. When the respondent herein preferred appeal, the appellate Court, however, reversed that finding and held that earlier suit was only for declaration and injunction in which the appellant's possession over the entire area admeasuring

80 R was held to be proved, but as regards his tenancy rights over the remaining land of 20 R, out of 80R no such declaration was granted. Hence, appellant's tenancy over 80R land is not held to be proved. His tenancy rights, therefore, being proved only to the extent of 60R land. In the earlier suit, the eviction notice issued to him cannot be called as vitiated.

8] The submission of learned counsel for the appellant is that this finding of the first Appellate Court is not legal and correct and hence it is necessary to admit this appeal on the substantial question of law, as to whether the suit is barred by principle of *re-judicata*, and the eviction notice is legal and valid.

9] However, I do not find any reason to hold that this appeal raises any substantial question of law, because it is admitted fact that the earlier suit was simpliciter for injunction and in that suit, present respondent has only conceded the possession of the appellant over the suit land and that possession was also proved on record and therefore, decree of injunction was passed in respect of entire 80R land. Neither the judgment of the trial Court nor the judgment of Appellate Court in the earlier litigation go to show that, in any way respondent has accepted tenancy rights of the appellant for this remaining 20 R land out of 80 R. In such situation, Merely because respondent has accepted that appellant is in possession over the entire land admeasuring 80 R

does not mean that he has accepted tenancy rights of the appellant over the 80R land. There is no express concession given by respondent to that effect, nor there is any finding of fact recorded to that effect. The issue of his tenancy over this remaining 20 R land out of 80 R land is yet not decided. No finding of fact was recorded on that issue independently, in the earlier suit.

10] In the present case it is clearly stated that appellant's possession over 60R is that of the tenant, but so far as remaining 20R, it is that of an encroacher. Thus, the present suit stands on totally different footing, and on different rights. In view thereof, there is no question of suit being barred by *res-judicata* and notice for eviction being vitiated. The Second Appeal, thus, raises no substantial question of law to be decided and it, therefore, stands dismissed.

11] In view of dismissal of Second Appeal, pending Civil Application therein no more survives and the same is disposed off accordingly.

[DR. SHALINI PHANSALKAR-JOSHI, J.]