

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0106 of 2018

District : Dhule

1. Smt. Tamizbee w/o. Rafiyoddin
Musalman,
Age : 67 years,
Occupation : Household.
2. Smt. Rashidabee d/o. Rafiyoddin
Musalman,
Age : Major,
Occupation : Household.
3. Smt. Saidabee d/o. Rafiyoddin
Musalman,
Age : Major,
Occupation : Household.
4. Smt. Faridabee d/o. Rafiyoddin
Musalman,
Age : Major,
Occupation : Household.
5. Smt. Raisabee d/o. Rafiyoddin
Musalman,
Age : Major,
Occupation : Household.
6. Smt. Aabedabee d/o. Rafiyoddin
Musalman,
Age : Major,
Occupation : Household.

.. Appellants.

All R/o. C.S. No. 4373/B,
in between Lanes No.4 and 5,
Near Noorani Masjid, Deopur,
Dhule.

versus

Shri Abdul Krim Abdul Raheman,
Momin (Ansari),
Age : 59 years,
Occupation : Service,
R/o. C.S. No.4434,
Lane No.7, Deopur, Dhule.

.. Respondent.

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Mr. U.B. Bilolikar, Advocate, for the appellants.

Mr. S.P. Shah, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 05TH FEBRUARY 2019

ORAL ORDER :

01. Present appeal has been filed by the original defendants, challenging the judgment and decree passed by learned District Judge-2, Dhule, on 16-08-2017 in Regular Civil Appeal No. 095 of 2015, which was arising out of judgment and decree dated 07-07-2015, passed by learned 6th Joint Civil Judge (Junior Division), Dhule, in Regular Civil Suit No. 439 of 2012, whereby the suit for possession, compensation and mesne profits came to be partly allowed.

02. The present respondent - original plaintiff had come with a case that he is the owner of suit property i.e. house property in Survey No. 4373/B situated in Dhule city, Deopur area, Lane No.04. He had purchased the same on 06-02-1975 from late

Nuruddin Mohiyoddin Musalman. Thereafter, Nuruddin had requested him to allow him to reside in the said property as a tenant and accordingly Nuruddin was allowed to occupy the suit property as tenant. Plaintiff further contents, that Nuruddin's son Rafiyoddin, forcibly took possession of the suit property and started residing there along with family members since July 1975. The defendants are the legal representatives of said Rafiyoddin. It is contended that the plaintiff had initiated eviction proceedings against Nuruddin, which were then continued by his son Rafiyoddin. The proceedings were tried under old Rent Act before Tenancy Court. The Court had dismissed the suit declaring Rafiyoddin as trespasser. Thereafter, first appeal was preferred and then second appeal. It is stated that it was the writ petition which was filed before this Court. Ultimately, judgment of the trial Court was upheld by this Court. It is stated that Rafiyoddin was never recognized by the plaintiff as tenant. So also, due to the fact that he could not get any relief from Tenancy Court, he was constrained to file suit under the Transfer of Property Act for eviction of the defendants. The plaintiff has also prayed for compensation and mesne profits.

03. The defendants resisted the claim by filing written statement. All the contentions of the plaintiff were denied specifically. It was stated

that Rafiyoddin in the capacity as son of Nuruddin had right to stay in the said premises and after death of Rafiyoddin, his family members had right to stay in the suit house. There is also allegation that the sale deed was got executed by plaintiff fraudulently and by taking undue advantage of old age of Nuruddin. Defendants have claimed that the suit is not within limitation and is also hit by the principles of *res judicata*.

04. Taking into consideration rival contentions, issues came to be framed. Parties went to trial. Taking into consideration the evidence on record and hearing both sides, learned trial Court held that the plaintiff is the owner of the property and, therefore, he is entitled to have possession of the premises. The suit is not barred by law of limitation or hit by principles of *res judicata*. The suit was, therefore, partly decreed. Defendants were directed to hand over vacant possession of the suit property within two months from the date of passing of the order and separate enquiry in mesne profits was ordered.

05. Defendants preferred appeal before District Court, Dhule. The appeal bearing Regular Civil Appeal No. 95 of 2015 was heard and learned District Judge-2, Dhule and it was dismissed on 16-08-2017. The said judgment and decree is under challenge

before this Court.

06. Heard learned Advocate Mr. U.B. Bilolikar appearing for the appellants and learned Advocate Mr. S.P. Shah appearing for the respondent.

07. Learned Advocate appearing for the appellants submitted the background of the previous litigation and submitted that Regular Civil Suit No. 193 of 1976 was filed against Nuruddin as well as Rafiyoddin. Nuruddin was contended to be the tenant and Rafiyoddin was treated as trespasser. But the suit was filed under the Rent Act. The suit was dismissed on 31-12-1981. Though Nuruddin had expired during pendency of the suit, appeal continued and said appeal bearing First Appeal No 131 of 1982 was allowed. The judgment and decree passed by the trial Court was set aside and the defendant - respondent was directed to hand over possession of the suit property to the plaintiff - appellant. Thereafter, said order was challenged in Writ Petition No. 1239 of 1984 (Bombay) i.e. Writ Petition No. 2889 of 1997 (Aurangabad). The said writ petition was decided by this Court on 18-08-2005. The writ petition was allowed. The judgment and decree passed by the first appellate Court was set aside, thereby judgment of the trial Court was restored / confirmed. Based on these facts, it was submitted on behalf of the appellant, that the earlier suit was also for

possession and, therefore, present suit was hit by the principles of *res judicata*. He has also harped upon the fact that the learned trial Court has given unnecessary advantage or benefit of Section 14 of the Limitation Act to the plaintiff. When, in fact, plaintiff had every knowledge and plaintiff himself had come with a case that Rafiyoddin was a trespasser, he had knowledge about the date of dispossession. Under this circumstance, provisions of Article 64 of the Limitation Act would be applicable. Admittedly, even as per pleadings in the plaint, plaintiff was dispossessed in July 1975. Therefore, Regular Civil Suit No. 439 of 2012, which was filed on 04-05-2012 was clearly beyond the period of limitation. Both the courts below have not appreciated the said point properly and, therefore, substantial question of law is involved.

08. Per contra, learned Advocate appearing for the respondent supported the reasons given by both the courts below in holding that the suit is within limitation and not hit by the doctrine of *res judicata*.

09. As regards factual aspects are concerned, they are not much in dispute. It can be seen that there was a chequered history. Initially, Regular Civil Suit No. 193 of 1976 was filed. It was admittedly under the Bombay Rent Act, which was then

applicable for the city of Dhule. Perusal of judgments in the earlier round of litigation would show that Rafiyoddin was not considered as tenant in the suit property and, therefore, the court which was under the Rent Control Act or in other words, the suit was filed before the Rent Court, that Court was of the opinion that it has no jurisdiction to adjudicate the dispute in which a trespasser is involved. Though the first appellate Court allowed the appeal, This Court, in writ petition, set aside that judgment and decree, confirmed the findings and decree passed by the trial Court. That means, when that suit was filed under Section 28 of the Bombay Rent Act, it was held that the first appellate Court failed to consider that the appeal was filed under Section 29 of the Rent Act and, therefore, it was not competent to pass eviction decree against a trespasser.

10. Section 14 of the Limitation Act, 1963, provides for '*exclusion of time of proceeding bona fide in Court without jurisdiction*'. It provides, that "*In computing the period of limitation for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a*

Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it." Therefore, it is to be seen that plaintiff was prosecuting Regular Civil Suit No. 193 of 1976 *bona fide*ly and ultimately it has been held by this Court, that the said Court was without jurisdiction. The writ petition came to be decided on 18-08-2005 and Regular Civil Suit No. 439 of 2012 has been filed on 04-05-2012. Under such circumstance, it is within 12 years. Though as per the pleadings of the plaint, Rafiyoddin had entered the suit property forcibly in July 1975, yet, when plaintiff was prosecuting his cause and was praying for eviction and getting peaceful possession since 1976, the period that has been consumed till the dispute attained finality i.e. 18-08-2005, this period will have to be excluded. Benefit of Section 14 of the Limitation Act is definitely required to be given to the plaintiff. Under such circumstance, both the courts have rightly held that the suit is not barred by limitation.

11. Learned Advocate appearing for the appellants has relied on the decision of the Hon'ble Apex Court in *Ramiah Vs. N. Narayana Reddy (Dead)* by L.Rs. [2004 AIR (SC) 4261], wherein it has been held that *Section 14 of the Limitation Act, 1963, cannot be invoked by the appellant as the appellant therein had never challenged the findings on possession recorded by the Principal Munsiff vide decree dated 07-04-1971. Although the appellant had right to recover possession for N.*

Narayana Reddy to the extent of 1 acre 21 gunthas in accordance with law, the appellant therein did not take any steps to sue for possession till 08-05-1984. Consequently, the appellant was not entitled for the benefit of Section 14 of the Limitation Act. It was specifically held that if the suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed, then he must show possession within 12 years under Article 142 (now Article 64) of the Limitation Act. The facts of this case, which have been relied on by the learned Advocate for the appellants, are different from the facts in the present case. That distinguishing fact is required to be considered. In that case, the appellant therein had never challenged the findings on possession recorded by the competent court. However, in this case, the judgment and decree in Regular Civil Suit No. 193/1976 was challenged by the plaintiff in appeal. Thereafter, said appeal came to be allowed and ultimately this Court had set aside the judgment and decree passed by the first appellate Court. As regards Ramiah's case (supra), when the appellant therein had never challenged the findings on possession, the findings given by the concerned court had become final in the year 1971 itself. Under those circumstances, his subsequent suit in 1984 was held to be barred by law of limitation. It will not be out of place to mention here, that though those findings were never challenged by the appellant, the ultimate decision of the suit was that it was partly decreed and then the other side had

preferred appeal and after dismissal of the first appeal, the defendant had approached the High Court also. But as regards findings in respect of possession was concerned, those findings had achieved finality when it was not challenged by the appellant. Here, there was challenge to all the findings recorded in Regular Civil Suit No. 193 of 1976. Therefore, the said ratio is not applicable here.

12. Another point that has been vehemently argued is in respect of *res judicata*. Section 11 of the Code of Civil Procedure, 1908. Section 11 of the Code of Civil Procedure prescribes, that "*No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, **litigating under the same title, in a Court competent to try such subsequent suit** or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*" Though the earlier suit i.e. Regular Civil Suit No. 193 of 1976 was for possession, yet, it is to be noted that it was under Section 28 of the Rent Act. The Court before whom the suit was tried was the Court established under the Rent Act. However, the trial Court as well as this Court in writ petition held that the said Court is not a competent court to grant the decree of

eviction taking into consideration the relationship between the parties as canvassed i.e. 'owner' and 'trespasser'. Therefore, though basic title of the parties was stated to be the same as they are in this suit, yet, competency of the court is also required to be considered. Now, since the said decision has achieved finality, the plaintiff has come with a case that he was constrained to bring the suit under Transfer of Property Act. In this case, the title or status of the plaintiff is that of owner and Rafiyoddin or his legal representatives as trespasser, whereas in Regular Civil Suit No. 193 of 1976, plaintiff claimed to be the landlord of the property. Therefore, the suit was not bad or hit by principles of *res judicata*. Both the courts below have dealt with the legal point properly. Under such circumstance, no substantial question of law arises for consideration.

13. In the result, the second appeal fails and the same is hereby dismissed.

14. At this stage, learned Advocate for the appellants submits that appellant no.01 is a senior citizen and, therefore, time be given to vacate the premises.

15. Taking into consideration the fact that appellant no.01 is a senior citizen, time of four

months from today is granted to vacate the suit premises. The appellants to hand over vacant possession of the suit property to the respondent within a period of four months from today. Undertaking to that effect be filed by the appellant in this Court, within 15 (fifteen) days from today.

(Smt. Vibha Kankanwadi)
JUDGE

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