

SGA

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 68 OF 2021
WITH
CIVIL APPLICATION NO. 1533 OF 2021

Kashiram Shankar Barve
and others

..Appellants

versus

Ramchandra Sonaji Barve
(Died) Through L.Rs.
Parvatibai Ramchandra Barve
and another.

..Respondents

...

Mr.P.P. More - Advocate for Appellants

Mr. M.K. Deshpande – Advocate for Respondent No.1.

....

CORAM : GAURI GODSE, J.

DATE : 13th February, 2023

PER COURT :

1. This second appeal is preferred by the defendants challenging the concurrent decree for possession. Deceased respondent had filed Regular Civil Suit No.248 of 1999 for possession on the basis of title. By judgment and decree dated 20th February, 2008, learned Joint Civil Judge, Junior Division, Hingoli decreed the suit and directed the appellants to hand over possession of the suit property. There was a counter claim filed by the defendants claiming declaration of ownership by way of adverse

possession. By the same judgment, the counter claim of appellants was dismissed. Being aggrieved by the decree of the Trial Court, the appellants had preferred Regular Civil Appeal No.33 of 2008 in the Court of District Judge-1, Hingoli. During the pendency of the appeal in the district court the original plaintiff expired and his heirs are brought on record. By judgment and decree dated 27th February, 2019, the appeal preferred by the appellants is dismissed. Hence the present Second Appeal.

2. Learned counsel appearing for the appellants submitted that since there was earlier suit being Regular Civil Suit No.3 of 1978 already filed by the respondent which was decided in respect to the same suit property, the present suit was barred under Order II Rule 2 of the Code of Civil Procedure (“CPC”). He submitted that though this question arose in the suit, neither the trial court had framed the issue nor the appellate court has dealt with the same. He, therefore, submitted that the question whether suit is barred by Order II Rule 2 of CPC is required to be considered in the present second appeal.
3. Learned counsel appearing for the appellants further submitted that it was the case of the deceased respondent/plaintiff that he

was dispossessed during the pendency of Regular Civil Suit No.3 of 1978 and hence the second suit was not maintainable. Hence, the suit is also barred by the principles of res judicata. He submitted that both the courts have failed to take into consideration the said points. Learned counsel for the appellants also submitted that the suit property was described as survey no.75, Gat No.8 admeasuring 58 Are, however, the document of title relied upon by the respondents was only with respect to 40 Are. Hence, he submitted that there is no question of granting any decree with respect to 58 Are as claimed by the respondents. He also submitted that in the earlier suit also the order of injunction was only with respect to 40 Are. The learned counsel submitted that there is mis-appreciation of evidence on record. Hence, substantial question of law is involved in the second appeal and same needs to be admitted.

4. Learned counsel appearing for the respondents submitted that except for raising prayer of adverse possession and filing of the counter claim for declaration of ownership by way of adverse possession, there is no specific pleadings in respect to the suit being barred under Order II Rule 2 of CPC. Hence, there was no issue framed by the Trial Court. With respect to the point of res

judicata, according to the learned counsel for the respondents this issue is dealt with by both the courts and the same cannot be a question of law as it would require re-appreciation of facts and evidence. Hence the second appeal is liable to be dismissed.

5. I have considered the submissions made on behalf of both the parties. I have gone through the record of the second appeal. For considering the first argument that the suit is barred by Order II Rule 2 of CPC, I have gone through the copy of the written statement. In the entire written statement, there is no pleading with respect to the suit being barred by Order II Rule 2 of CPC. Record of second appeal shows that the respondents have produced the copy of the judgment passed in Regular Civil Suit No. 3 of 1978. Both the courts have considered the judgment passed in earlier suit. The trial court has specifically recorded findings on issue no.1, which was framed and decided in Regular Civil Suit No.3 of 1978, which deals with the title of the respondents with respect to the suit land in that suit pursuant to the sale deed dated 5th October, 1976. Perusal of the impugned judgments show that the effect of the earlier proceedings has been dealt with and examined by both the courts. So far as the title of the respondents described as 58 Are

is concerned, the respondents have relied upon the consolidation scheme, which indicate the names of respondents with respect to 58 Are. The entry in the consolidation scheme is not disputed. Therefore, I do not find any merit in the submissions regarding area of the suit land.

6. The point of suit being barred by Order II Rule 2 of CPC is concerned, I do not find any merit in respect of the same. The issue of bar under Order II Rule 2 of CPC would require proper pleadings on the causes of action of both the suits being same. In absence of any specific pleadings, no issue was framed by the Trial Court. There was no ground raised in the first appellate court regarding non-framing of any such issue. The question of bar of Order II Rule 2 of CPC, can be framed and decided on the basis of the pleadings on the cause of action. Both the Courts have considered the dates of decision of earlier suit which was decreed in favour of respondents in the year 1984 and confirmed by the first appellate Court in the year 1992 and further confirmed by High Court in second appeal in the year 1993. Thus, both the Courts have held that the issue of title of ownership of the plaintiff has attained finality. Both the Courts have accepted the case of plaintiff being dispossessed six years

prior to filing of the present suit. Respondents case of perfection of title by adverse possession is disbelieved by both the Courts. Thus, I do not find that any issue of bar under Order II Rule 2 of CPC or the suit being barred by principles of resjudicata arise in the present case.

7. Both the Courts have considered the issue of title of the respondents on the basis of the sale deed produced at Exhibit-110 and revenue record at Exhibit 92 in the name of deceased plaintiff for an area of 58 Are pursuant to consolidation scheme. So far as the consolidation scheme and sale deed is concerned the same are not under challenge. The boundaries of the suit land mentioned in the sale deed are also not disputed. The counter claim filed by the appellants is with respect to claiming title by way of adverse possession. Theory of title by way of adverse possession as claimed by the appellants is disbelieved by both the Courts. Therefore, there is no merit in the submissions made on behalf of the appellants.
8. Second Appeal do not raise any substantial question of law. Hence, the second appeal is dismissed. There will be no order as to costs.

9. In view of the dismissal of the second appeal, pending civil application has become infructuous and the same is dismissed.

[GAURI GODSE, J.]