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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 60 OF 2020
WITH
CIVIL APPLICATION NO. 44 OF 2020
IN
SECOND APPEAL NO. 60 OF 2020**

Dhananjay Shivaji Sapkal

.....Appellant

Vs.

State of Maharashtra (Through
Collector) Pune and others

.....Respondent

Mr. Sudhir V. Sadavarte Advocate for the Appellant.
None for the Respondent.

CORAM : GAURI GODSE, J.

DATE : 26th JUNE, 2023

P.C.

1. Heard Mr. Sadavarte learned counsel for the Appellant. This Appeal is filed to challenge the concurrent Judgment and Decree dated 28th October 2014 passed by Civil Judge Senior Division, Baramati in Special Civil Suit No. 41 of 2011 and Judgment and Order dated 14th July 2017 passed by District Judge-2, Baramati in Civil Appeal No. 135 of 2014.

2. The Appellant had filed a Suit for challenging the entries in the revenue record with respect to the Suit property and prayed for possession of the Suit

property after removal of encroachment allegedly made by Respondent No. 4. The Trial Court dismissed the Suit by disbelieving the submissions of the Appellant on the revenue entry in the name of Respondent Nos. 2 and 4. The Trial Court after examining the documentary as well as oral evidence on record has recorded a specific finding of fact that the Appellant failed to prove the alleged encroachment by Respondent No. 4. The Trial Court has referred to the evidence of Cadestral Surveyor and has recorded a finding of fact that there was nothing on record to show that there was any encroachment made by the appellant, as alleged by the appellant.

3. The First Appellate Court has also re-appreciated the oral as well as documentary evidence on record and has confirmed the findings of fact recorded by the Trial Court, and has confirmed the dismissal of the Suit by the Trial Court.

4. Mr. Sadavarte, learned counsel for the Appellant, submitted that the Trial Court has recorded a finding that the Suit was barred by the principles of *Res Judicata* without framing any issue with respect to the same. He further submitted that fresh measurement and report of the Cadestral Surveyor supported by the evidence of the Cadestral Surveyor would show that there was no encroachment carried out by Respondent No. 4. He further submitted that there was no dispute that Suit property - land Gat No. 57 belonged to the Plaintiff. Hence, on the basis

of evidence of Cadastral Surveyor and the fresh measurement, both the Courts ought to have decreed the Suit as prayed by the Appellant.

5. Learned counsel for the Appellant further submitted that though the First Appellate Court framed an issue with respect to the Suit being barred by the principles of *Res Judicata*, the evidence recorded by the First Appellate Court on the said issue is not sustainable in as much as the earlier Suit did not decide the issue involved in the present Suit and hence, there was no reason to dismiss the Suit by holding that the same was barred by principles of *Res Judicata*. With respect to prayer for removal of encroachment by Respondent No. 2 is concerned, he submitted that the evidence on record clearly showed that as per fresh measurement, Respondent No. 4 had carried out encroachment on the Appellant's land, and hence, the Appellant was entitled a Decree as prayed.

6. Learned counsel thus submitted that Second Appeal raises two substantial questions of law with respect to the Suit being wrongly dismissed as barred by the principles of *Res Judicata* and non-appreciation of the evidence on record with respect to the fresh measurement and the evidence of Cadastral Surveyor which shows that there was encroachment by Respondent No. 4 as pleaded by the Appellant. He, therefore, submitted that the Second Appeal raises substantial questions of law and thus requires consideration.

7. I have perused the record of the Second Appeal. Considered the submissions made on behalf of the Appellant. A perusal of the Judgments passed by both Courts shows that a specific finding of fact is recorded by both the Courts on the basis of evidence on record that; the land Gat No. 57 is divided by a canal. The First Appellate Court, after re-appreciating the evidence on record has come to a conclusion that undisputedly, in the village Panchayat record of Respondent No. 3, Suit property is shown as belonging to the village Panchayat and Respondent No. 4 is shown as an occupant. Nothing is shown to me that any proceedings were initiated with respect to the village Panchayat record except for making a prayer in the present Suit.

8. So far as the submission on the Suit being barred by principles of *Res Judicata* is concerned, though the Trial Court had not framed any specific issue, the Trial Court as well as the Appellate Court, after appreciating the evidence on record, has come to a conclusion that the present Suit is barred by principles of *Res Judicata* in view of the dismissal of earlier Suit where the issue was with respect to ownership of the Suit property. It is not disputed by the Appellant that in the earlier Suit, there was an issue framed with respect to the title of the appellant over the Suit property, which was answered against the Appellant. It is also not in dispute that the Suit property in the earlier Suit and the present Suit is one and the same. With such facts and evidence and the findings recorded by both the Courts, I do not see any question of law with respect to the Suit being barred by principles

of *Res Judicata*. The arguments made on behalf of the Appellant would require re-appreciation of facts and evidence.

9. With respect to submissions made on appreciation of evidence regarding the fresh survey and evidence of the Cadestral Surveyor is concerned, both the Courts have concurrently held that there was nothing on record to show that the Suit property as pleaded and described by the Plaintiff belongs to the Plaintiff and that Respondent No. 4 has carried out any encroachment as pleaded by the Appellant. Thus, both the submissions made on behalf of the Appellant would require re-appreciation of facts and evidence, which is not permissible under Section 100 of the Code of Civil Procedure, 1908. Learned counsel for the Appellant in support of his submissions has relied upon the decision of the Hon'ble Supreme Court in the case of *The Jamia Masjid Vs. Sri K. V. Rudrappa (Since Dead) By Lrs. & Ors.*¹ And, in particular, paragraph 17 of the said decision. There cannot be a debate with respect to the principles of law laid down in the said decision; however, in the facts and circumstances of the present case, the said decision is of no assistance to the submissions of the Appellant. I do not find that the Second Appeal raises any question of law, and hence, the same is dismissed.

10. In view of the dismissal of the Second Appeal, Civil Application is dismissed

¹ [2021] 0 AIR(SC) 4523

as infructuous.

11. At this stage, learned counsel for the Appellant submits that during the pendency of the First Appeal, there was an order passed on 2nd May 2015, thereby restraining Respondent No. 4 from carrying out any construction in permanent nature in the Suit property till the decision of the Appeal. He, therefore, submits that the said order of 2nd May 2015 be extended for a limited period.

12. I have perused the said order dated 2nd May 2015. The said order was only during the pendency of the Civil Appeal No. 135 of 2014, which was dismissed on 14th July 2017. There is no order of any interim protection after the dismissal of the Appeal. I do not find any reason to continue the said order at this stage. Hence, the prayer for an extension of the said order is rejected.

[GAURI GODSE, J.]