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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 526 OF 2017
WITH
CIVIL APPLICATION NO. 50 OF 2017

Shri Govind Rama Narkar and Others ... Appellants

Vs.

Shri Vasant Waman Patwardhan ... Respondent

(Through POA Shri Narhari Shankar
Patwardhan)

Mr. Sanjiv Sawant a/w. Mr. Samir Suryawanshi and Ms. Bhakti Wast
for the Appellants.

Mr. S. A. Rajeshirke for the Respondents.

CORAM : GAURI GODSE, J.

DATE : 19th JUNE 2024

ORDER:

1. The original defendants filed the second appeal challenging the concurrent judgments and decrees granting an injunction restraining the appellants from disturbing the plaintiff's possession of the suit property.

2. Learned counsel for the appellants submitted that the suit was filed by the respondent through his power of attorney holder who was residing in the State of Uttar Pradesh. He submitted that the power of attorney relied upon by the plaintiff was executed after

filing of the suit. Thus, the suit was liable to be dismissed on that ground itself. He further submitted that the appellants were agricultural tenants, and hence, their possession was protected. Since the appellants were agricultural tenants, they were cultivating land, and hence, the plaintiff was never in possession of the suit property.

3. He further submitted that the plaintiff had filed Regular Civil Suit No. 150 of 1987 for similar relief. The application for an interim injunction seeking to protect the plaintiff's possession was dismissed, and the dismissal was confirmed by the High Court. He further submitted that once in an earlier suit, the plaintiff's possession was not accepted; the present suit was barred on the principles of res judicata.

4. Learned counsel for the appellants submitted that the plaintiff's ownership over the suit property was erroneously accepted by relying upon Section 58 of the Indian Evidence Act. He submitted that the plaintiff was not found to be in possession, and the title of the plaintiff was also disputed. Hence, the provision of Section 58 of the Indian Evidence Act was not applicable to the present case. He further submitted that the appellants had raised objection to the plaintiff's title, which amounts to creating a cloud on

the plaintiff's title. Hence, the plaintiff was required to file a suit for declaration of title and possession in view of the legal principles settled by the Hon'ble Supreme Court in the case of ***Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs and Others***¹.

5. Learned counsel thus submitted that the suit was erroneously decreed, which was filed through a constituted attorney based on a power of attorney executed on a subsequent date. Hence, the very authority to institute the suit itself was doubted. Hence, the second appeal would require consideration of the aforesaid questions of law with regard to reliance placed on Section 58 of the Indian Evidence Act and the legal principles laid down in the case of ***Anathula Sudhakar***.

6. Learned counsel for the respondent submitted that the appellants' claim of tenancy has been rejected by the Tenancy Court, and the rejection is confirmed by the High Court. He submitted that the appellants are not concerned with the suit property, and in view of the dismissal of their tenancy claim, they are not entitled to claim any right in respect of the suit property. He submitted that the rejection of the appellants' tenancy claim is sufficient proof that they were never in possession of the suit

¹ (2008) 4 SCC 594

property and were not concerned with the suit property. He submitted that the power of attorney is never disputed by the plaintiff, and the appellants had no authority to dispute the same. Execution of power of attorney after the filing of the suit will not invalidate the constituted attorney's authority to institute the suit.

7. I have perused the papers. Considered the submissions made by the parties. Both the Courts, after examining documentary as well as oral evidence, have recorded findings of fact on the title and possession of the plaintiff. The plaintiff's title of the suit property is disputed only on the grounds of tenancy rights. Once the tenancy claim has been rejected by the competent court, there is no question of the appellants claiming to be in possession of the suit property. Thus, the appellants' claim on the tenancy rights cannot be said to be raising any cloud on the plaintiff's title. The issues with regard to the tenancy claim and the tenancy proceedings are dealt with by the appellate court and have referred to the rejection of the appellants' tenancy claim.

8. The reliance placed by the learned counsel for the appellants on the orders passed on the interim application in the earlier Regular Civil Suit No. 150 of 1987 would not amount to the present suit being barred by the principles of res judicata. It is well well-

established principle of law that for a suit to be barred by the principles of res judicata, a similar issue is required to be raised, tried, heard and decided by the Competent Court. The appellants are relying upon the order passed in the interim application in the earlier suit to argue that the suit was hit by the principles of res judicata. The final decision in the suit is not on record. Learned counsel for the appellants pointed out that as per the grounds of appeal in the present second appeal, the earlier suit was withdrawn by the plaintiff. Thus, it is clear that the earlier suit was never adjudicated finally, and hence, there is no question of the applicability of the principles of res judicata. Even otherwise, admittedly, the earlier suit was with respect to only one of the suit properties.

9. The legal principles settled by the Hon'ble Supreme Court in the case of **Anathula Sudhakar** are not applicable to the facts of the present case. The present suit was filed based on title; the defendants did not suspect the ownership of the plaintiff but have raised their claim based on their tenancy rights. The tenancy rights of the appellants have been rejected by the Competent Court, and the rejection of the tenancy claim has been confirmed by this Court. Hence, none of the legal principles settled in the decision of

Anathula Sudhakar will be applicable to the facts of the present case.

10. Once the appellants' claim to be in possession only based on tenancy rights stands rejected, there are no other documents to show that they were ever in possession of the suit property. There is also no substance in the objection raised on behalf of the appellants on the subsequent execution of the power of attorney, in as much as the same will not invalidate the authority of the plaintiff's constituted attorney to institute the suit.

11. Both Courts have recorded positive findings in favour of the plaintiff, who is found to be in possession of the suit property. I do not see any fault in the reasons recorded by both courts. The question of law raised on behalf of the appellant would not require any consideration in view of the findings of facts recorded by both the Courts.

12. The second appeal, therefore, does not raise any substantial question of law. Hence, the Second Appeal is dismissed.

13. In view of the dismissal of the Second Appeal, pending Civil Application No. 50 of 2017 is dismissed as infructuous.