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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 812 OF 2019**

Subhash Devappa Pawar ... Appellant

vs.

Dadu Bapu Yedge ... Respondents
(since deceased) through LRs
Pandurang Dadu Yedge and Others

Mr. Pratap Patil for the Appellant.

CORAM: GAURI GODSE, J.

RESERVED ON: 30th AUGUST 2024

PRONOUNCED ON: 25th OCTOBER 2024

ORDER:

1. This appeal is preferred by original defendant no. 2 to challenge the concurrent judgments and decrees accepting the plaintiffs' title over the suit property described as property 'A'. The trial court had partly decreed the suit restraining the defendants from causing any obstruction to the plaintiffs' possession over the suit property 'A' excluding suit property 'B' without following due process of law.

2. The property 'B' described in the plaint refers to the encroachment alleged by the plaintiffs on property described as

property 'A'. The trial court's decree was challenged by defendant no. 2. The plaintiffs had filed a cross objection for challenging the refusal of the prayer for the removal of encroachment and possession of the encroached area. Defendant no. 2's first appeal was dismissed, and the plaintiffs' cross objections were allowed. The First Appellate Court accepted the plaintiffs' title over the suit property 'A' and directed defendant no. 2 to remove his encroachment described as property 'B' in the plaint. The First Appellate Court also passed a decree for an injunction restraining all the defendants from obstructing plaintiffs' possession over property 'A' except property 'B'. Hence, the Second Appeal by defendant no. 2.

3. Learned counsel for the appellant submits that the plaintiffs had filed a similar suit in the year 1981, which was dismissed in default. He submits that the present suit filed on the same cause of action for removal of encroachment is thus barred by law of limitation. He submits that both the courts erred in not correctly appreciating that the cause of action in the earlier suit and the present suit was the same, and thus, the present suit would not be maintainable in view of the earlier suit being dismissed in default.

Learned counsel for the appellant thus submits that the Second Appeal would require consideration on the said grounds of limitation and maintainability of the suit, which raises substantial questions of law.

4. The trial court's judgment refers to the plaintiffs' contention that after the dismissal of Regular Civil Suit No. 381 of 1981, the defendants, by incorrect interpretation of the dismissal of the suit, got a resolution passed from the Gram Panchayat. The trial court referred to the admissions given by defendant no. 1 in his cross-examination, admitting that the suit was dismissed in default, and based on such dismissal, the suit property 'A' was merged into properties belonging to defendant nos. 1 to 7. The trial court also referred to the admissions of defendant no.1 in his cross-examination, where he admitted that in the absence of any order passed by any court permitting the merging suit property 'A' in their property, a resolution was passed by the Gram Panchayat.

5. A copy of the plaint in Regular Civil Suit No. 317 of 1981 was produced on record at Exhibit 61, indicating that the suit was dismissed in default. Thus, the trial court, by referring to the order of dismissal, observed that there were no directions in the said order

for rectification of any mutation entry or any assessment record. Thus, the trial court refused to accept the defendant's contention regarding ownership of suit property 'A'.

6. The reasons recorded by the trial court indicate that for want of any documents regarding assessment extracts prior to 1976, the trial court refused to grant any relief of declaration based on the assessment extracts relied upon by the plaintiffs. However, the defendant's claim of ownership of the suit property is based on the resolution passed by the Gram Panchayat after the dismissal of the earlier suit of the year 1981, which indicates that the plaintiffs' name was deleted only due to merger of the suit property 'A' with the properties belonging to defendant nos. 1 to 7. Thus, the trial court refused the prayer for declaration; however, granted an injunction restraining the defendants from obstructing the plaintiffs' possession over the suit property 'A' by accepting the plaintiffs' possession over suit property 'A' excluding suit property 'B', which was the encroached area. The said injunction was granted by the trial court restraining defendants from obstructing plaintiffs' possession without following due process of law.

7. The First Appellate Court accepted the plaintiffs' title over the

suit property 'A' as well as the encroachment shown in property 'B'. The defendant's claim of ownership with respect to the property 'A' was disbelieved by both courts. The effect of the dismissal of Regular Civil Suit No. 371 of 1981 was considered by the First Appellate Court. Thus, by accepting the plaintiffs' title over the suit property 'A', the First Appellate Court passed a decree of declaration in favour of the plaintiffs, holding them owners of property 'A' and directed defendant no. 2 to remove his encroachment described as property 'B' in the plaint.

8. The ground raised on behalf of the appellant regarding the suit being barred by limitation or the suit not maintainable in view of dismissal of the earlier suit is discussed by the First Appellate Court. The First Appellate Court, in detail, referred to the cause of action of the earlier suit, which was based on the defendants putting up a shed (Mandav) in the summer season behind the plaintiffs' house.

9. Thus, on examining the pleadings of the earlier suit, the First Appellate Court observed that in 1981, the plaintiffs had filed a suit as defendant no. 2 was making encroachment and putting up fencing and that when plaintiff no. 1 tried to construct a bathroom in the open portion, defendant nos. 1 to 7 obstructed the same. The

First Appellate Court referred to the removal of the plaintiffs' bathroom during the pendency of the earlier suit.

10. The First Appellate Court further discussed the cause of action pleaded in the present suit. After the dismissal of the earlier suit, Gram Panchayat passed a resolution merging plaintiffs' property 'A' with the property of defendant nos. 1 to 7. Thus, the First Appellate Court observed that the present suit was filed on a different cause of action.

11. The reasons recorded by the First Appellate Court indicate that the pleadings in both the suits are in detail examined by the First Appellate Court for holding that the dismissal of the earlier suit would have no effect on the present suit as the plaintiffs filed the present suit for challenging the Gram Panchayat resolution and for claiming ownership based on earlier documents. By referring to the Gram Panchayat record of the year 1976, the First Appellate Court held that there was no dispute between the parties on the title and the plaintiffs' names were recorded in the Gram Panchayat record and the properties of the parties were separately numbered. The defendants never challenged the record in the name of plaintiffs with respect to suit property 'A'. Thus, the First Appellate Court

refused to accept the defendant's contention of ownership based on the merger of property 'A' into the properties of defendant nos. 1 to 7 based on the Gram Panchayat resolution, passed after the dismissal of the suit of 1981.

12. The defendants had raised an alternate plea of perfection of title by adverse possession; however, the observations in the judgment of the First Appellate Court indicate that the defendants gave up the alternative plea of adverse possession. The reasons recorded by the First Appellate Court also indicate that in the earlier suit, no prayer was made for any declaration of title. Thus, the First Appellate Court held that the present suit was filed after the Gram Panchayat resolution was passed after the dismissal of the earlier suit. Thus, dismissal of the earlier suit was held that would not have any effect on the present suit, which was based on a different cause of action.

13. The First Appellate Court, being the last fact-finding court, has thoroughly examined the pleadings and evidence on record and recorded that the cause of action in both the suits is different. Once the cause of action of both suits is accepted as a different cause of action, the suit cannot be held barred by limitation. For the same

reasons, the suit also cannot be held as not maintainable as it is for a different relief based on a different cause of action.

14. The grounds raised on behalf of the appellant by relying upon the dismissal of the earlier suit of the year 1981 are based on factual aspects and thus would require re-appreciation of the facts and evidence on record, which is not permissible under Section 100 of the Code of Civil Procedure 1908. In view of the findings of facts recorded by the First Appellate Court, the grounds raised on behalf of the appellants would not require any consideration by this court as the same does not raise any question of law.

15. The Second Appeal does not raise any question of law. Hence the Second Appeal is dismissed.

[GAURI GODSE, J.]