

3 January 2024.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 125 OF 2023**

Sattar Gulab Bagwan & Ors.

....Appellants

V/s.

Bhagwan Gulabrao Deshmukh,
Since deceased, through Legal Heirs
Rajesh Bhawan Deshmukh & Ors.

...Respondents

Mr. Dhananjay Dnyaneshwar Rananaware, for the Appellants.

Mr. Sharad Chandrachud, for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Dated : 3 January 2024.

JUDGMENT :

1. By this Appeal, the Appellant challenges the Judgment and Decree dated 17 September 2022 passed by the District Judge, Satara in Regular Civil Appeal No. 228 of 2017 allowing the Appeal and setting aside the Judgment and Decree dated 28 June 2017 passed by the Civil Judge Junior Division, Khandala in Regular Civil Suit No. 96 of 2014.

2. Plaintiff had instituted Regular Civil Suit No. 96 of 2014 seeking possession of the suit property after removal of construction from the defendants, as well as for arrears of rents and mesne profits. Before

3 January 2024.

instituting Regular Civil Suit No. 96 of 2014, it appears that the Plaintiff had instituted Regular Civil Suit No. 80 of 1996 seeking same prayers for recovery of possession and mesne profits. The suit was dismissed vide Judgment and Decree dated 26 February 2014, *inter-alia*, holding that the notice issued under the provisions of Section 106 of the Transfer of Property Act to the Defendant was faulty. After dismissal of Regular Civil Suit No. 80 of 1996 on 26 February 2014, Plaintiff instituted another Suit bearing Regular Civil Suit No.96 of 2014 by issuing fresh notice under Section 106 of the Transfer of Property Act on 30 April 2014. The Trial Court proceeded to hold that dismissal of Regular Civil Suit No. 80 of 1996 filed for same prayers for recovery of possession and mesne profits operated as *res-judicata* for entertaining Regular Civil Suit No. 96 of 2014 and proceeded to dismiss the suit vide Judgment and Decree dated 28 June 2019.

3. When the Plaintiff carried the Trial Court's order in Appeal before the District Court, the first Appellate Court disagreed with the finding of the Trial Court that Regular Civil Suit No. 96 of 2014 was barred by *res-judicata*. However instead of remanding the suit for fresh trial, the first Appellate Court proceeded to consider the prayers of the Plaintiff on merits and held that the Plaintiffs are entitled to recovery of possession of the suit property by its Judgment and Order dated 17 September 2022. The Defendants are aggrieved by the Appellate Court's decision and have filed the present Appeal.

4. Mr. Ranaware, the learned counsel appearing for the Appellant would submit that Regular Civil Suit No. 96 of 2014 instituted

3 January 2024.

by the Plaintiff was clearly barred by the principles of *res-judicata* under Section 11 of the Code of Civil Procedure, 1908 since the Plaintiff's earlier suit bearing Regular Civil Suit No. 80 of 1996 seeking same prayers was dismissed by Decree dated 26 February 2014. That within few days of dismissal of Regular Civil Suit No. 80 of 1996, Plaintiff instituted very same suit for same prayers which was clearly barred by the principles of *res-judicata*. He would submit that even if it is assumed for the sake of arguments that Plaintiff's fresh suit was not barred by the principles of *res-judicata*, the lower Appellate Court ought to have remanded the suit for decision on merits. Inviting my attention to the Judgment and Decree passed by the Trial Court, Mr. Ranaware would submit that the Trial Court did not enter into the merits of the case after holding that the suit was barred by the principles of *res-judicata*. That if the Appellate Court was not agreeable with the said finding of the Trial Court, the Appellate Court ought to have remanded the suit for trial on merits. That it was not open for the lower Appellate Court to venture into the merits of the suit after holding that the suit was not barred by the principles of *res-judicata*.

5. Mr. Ranaware would further submit that the lower Appellate Court has erroneously considered the findings recorded by the Trial Court while deciding the previous Regular Civil Suit No. 80 of 1996 for the purpose of decreeing Regular Civil Suit No.96 of 2014. That except relying on the findings recorded in the Judgment and Decree dated 26 February 2014, the lower Appellate Court has not applied its mind independently to the evidence led in Regular Civil Suit No. 96 of 2014.

3 January 2024.

That the findings recorded in Decree passed in Regular Civil Suit No. 80 of 1996 could not have been relied upon by the lower Appellate Court since not only the parties to the said suit but also the property involved was totally different and distinct. He would submit that the substantial questions of law are involved in the present Appeal warranting setting aside of the Order passed by the lower Appellate Court.

6. *Per-contra*, Mr. Chandrachood would oppose the Appeal and support the Order passed by the first Appellate Court. That Regular Civil Suit No. 96 of 2014 was not barred by the principles of *res-judicata* as the same was based on fresh Notice dated 30 April 2014, which created fresh cause of action. Mr. Chandrachood would further submit that no practical purpose would be served in remanding the suit for fresh trial as the Appellants-Defendants did not file Written Statement contesting Regular Civil Suit No. 96 of 2014. That the case of the Plaintiff was proved by leading evidence and the Defendants did not bother to cross-examine the Plaintiff's witness. That in absence of any contest to the claim of Plaintiffs on merits, the lower Appellate Court has rightly decreed the suit. He would pray for dismissal of the Appeal.

7. Rival contentions of the parties now fall for my consideration.

8. Since there are conflicting judgments of the Trial Court and the lower Appellate Court, this Court has conducted slightly deeper scrutiny of both the judgments with a view to examine whether the present Appeal deserves admission on a substantial question of law. In the present case, the Trial Court has proceeded to dismiss the suit by recording a

3 January 2024.

solitary finding that the suit was barred by the principles of *res-judicata*. On account of its finding that the suit was barred by *res-judicata*, the Trial Court felt it unnecessary to answer the issue as to whether Defendant No.1 is his tenant and whether Defendant No.1 has carried out unauthorized constructed or has unauthorisedly kept a sub-tenant. The Trial Court has therefore not answered Issues No.1 and 3A since it felt that the suit itself was barred by *res-judicata*. The lower Appellate Court has reversed the finding of the Trial Court on applicability of principles of *res-judicata*. In my view, the Trial Court had clearly erred in holding that Regular Civil Suit No.96 of 2014 was barred by *res-judicata*. The fresh suit was instituted after serving Notice dated 30 April 2014 which created a fresh cause of action for seeking Defendant's eviction. The earlier suit was dismissed on the ground that the Notice was found to be faulty as the same was not signed either by Plaintiff or his Advocate. No defect is found in the fresh Notice dated 30 April 2014. Since Regular Civil Suit No.96 of 2014 has been filed on a fresh cause of action after serving a fresh Notice, it cannot be said that the fresh suit is barred by *res-judicata*. I am therefore in agreement with the finding recorded by the first Appellate Court that Regular Civil Suit No.96 of 2014 is not barred by principles of *res-judicata*.

9. Once it is held that Regular Civil Suit No.96 of 2014 is not barred by *res-judicata*, the next issue is whether it was open for the lower Appellate Court to decide other issue on merits or whether the proper course of action for the lower Appellate Court was to remand the suit for answering Issue Nos.1 and 3A. At its first blush, the submission of Mr.

3 January 2024.

Ranaware that remand of the suit was warranted appears to be attractive. However, the Appellants-Defendants did not file Written Statement nor conducted cross-examination of Plaintiff's witness. Thus, there is no valid defence on the part of the Appellants-Defendants to the suit instituted by the Plaintiffs. In my view therefore, no practical purpose would be served by subjecting the parties to another round of litigation on technical ground of failure on the part of the Trial Court to answer Issue Nos.1 and 3A.

10. The findings recorded by the lower Appellate Court would indicate that the Plaintiff has proved that Defendant No.1 has caused unauthorized construction in the suit premises and he has sublet the same to Defendant Nos.2 and 3. There is no contest to this position on the part of the Defendant No. 1. Defendant No.1 is also in arrears of rent and he has failed to deposit the arrears of rent in Court. Plaintiff had led evidence on this aspect in the suit, which is not contested by the Defendants in any manner. In my view, therefore the lower Appellate Court has rightly decreed the suit.

11. Mr. Ranaware's contention that the lower Appellate Court has squarely relied upon the findings recorded by the Trial Court in previous suit bearing Regular Civil Suit No.88 of 19976 would also not cut any ice. It is true that the lower Appellate Court has referred to the findings recorded while deciding Regular Civil Suit No.88 of 1996 which was contested by the Defendants. This is apparently done on account of non-contest on the part of the Defendants to Regular Civil Suit No. 96 of 2014. However, since Regular Civil Suit No. 88 of 1996 was contested

3 January 2024.

by the Defendants, the lower Appellate Court appears to have been swayed by some of the findings recorded by the Trial Court while filing Regular Civil Suit No. 88 of 1996. This appears to have been done more to benefit the Appellants than to cause any harm to them. In my view, it was actually not necessary for the lower Appellate Court to refer to any findings recorded by the Trial Court while deciding Regular Civil Suit No.88 of 1996. The evidence led by the Plaintiff in Regular Civil Suit No.96 of 2014, which remained uncontested, was sufficient for decreeing the said suit. Therefore, even if the findings of the lower Appellate Court with regard to Regular Civil Suit No.80 of 1996 are to be totally ignored, still no palpable error can be found in the Order of the first Appellate Court in decreeing the suit.

12. In my view, no substantial question of law is involved in the present Appeal. Remanding the suit for fresh trial would be an exercise in futility since the Defendant has neither filed Written Statement nor conducted cross-examination of Plaintiff's witness. I do not find any merit in the Second Appeal. The Second Appeal is accordingly **dismissed** with no order as to costs. With dismissal of the Appeal, Interim Application does not survive. The same also stands disposed of.

SANDEEP V. MARNE, J.

NEETA
SHAILESH
SAWANT

Digitally
signed by
NEETA
SHAILESH
SAWANT
Date:
2024.01.06
16:37:02
+0530