

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.422 OF 2015

Mehabub Umar Jamadar

.. Appellant

Vs.

Hai Umar Jamadar & Ors.

.. Respondents

Mr.Sanskar Marathe for the appellant

CORAM : K.K.TATED, J.
DATED : 27/10/2015

PC:

1 Heard the learned counsel for the appellant.

2 The Second Appeal is preferred by plaintiff challenging the judgment and decree passed by Appellate Court dated 13.10.2014 in Regular Civil Appeal No.76 of 2009 reversing the decree dated 9.3.2009 passed by Civil Judge, Junior Division, Peth Vadagaon, Taluka Hatkanangale, District Kolhapur in Regular Civil Suit No.82 of 2000.

3 In the present proceeding, plaintiff filed suit for partition and separate possession of the suit property as described in the paragraph 1-A and 1-B of the plaint. The Trial Court by decree dated 9.3.2009 partly allowed plaintiff's suit in respect of only the property described in paragraph 1-A of the plaint and held that the plaintiff is entitled 2/9 share.

4 Being aggrieved by the said decree dated 9.3.2009 respondent defendant preferred Regular Civil Appeal No.76 of 2009 before the appellate court. In appeal defendant preferred application under Order 41 Rule 27 of the Civil Procedure Code, 1908 for production of registered sale deed dated 7.4.1997 on record. After hearing both the sides, appellate court allowed defendants application under Order 41 Rule 27 of the Civil Procedure Code, 1908. The Appellate Court by decree dated 13.10.2014 allowed Regular Civil Appeal No.76 of 2009 filed by the defendant and set aside the decree dated 9.3.2009 passed by the Trial Court. Hence, the present Second Appeal.

5 The only contention raised by the learned counsel for the appellant plaintiff is that without allowing him to cross-examine the defendant on admissibility of sale deed dated 7.4.1997, appellate court decided appeal.

6 The learned counsel for the appellant plaintiff submits that when the application filed by respondent defendant under Order 41 Rule 27 of the Code of Civil Procedure, 1908 for bringing registered sale deed dated 7th April, 1997 on record and when that application was allowed by the appellate court, the appellate court ought to have remanded the matter to the Trial Court for recording evidence and or giving permission to the plaintiff to cross-examine the defendant. Instead of remanding the matter to the Trial Court and or allowing the plaintiff to cross-examine the defendant, appellate court decided the appeal by setting aside the judgment and decree passed by Trial Court which is contrary to the law declared by Apex Court as well as our High Court. In support of this contention, the learned counsel for the plaintiff relies on the judgment in the matter of *Ramnath Bablo Umeraskar v. John*

*Carasco (since deceased), and Ors.*¹ particularly paragraph 8. He also relies on the judgment of the Apex Court in the matter of *Shyam Singh v. Daryao Singh (dead) by L.Rs. and others*² particularly paragraph 20.

7 On the basis of these submissions and the law declared by the Apex Court as well as our High Court, counsel for the plaintiff submits that the impugned decree passed by appellate court requires to be set aside.

8 I have heard the learned counsel for the appellant at length. In the present proceeding, at appellate stage, respondent defendant preferred application below Exh.14 under Order 41 Rule 27 of the Code of Civil Procedure, 1908 for placing on record registered sale deed dated 7.4.1997 in respect of the suit property as described in paragraph 1-A of the plaint. As per the registered said sale deed the deceased Umar Amin Jamadar sold the suit property mentioned in paragraph 1-A of the plaint to Firoz Illai Jamadar. Hence, that property was not available for distribution between plaintiff and defendant when the suit was filed by the plaintiff. Apart from that, the plaintiff has not brought on record any application filed by them for allowing them to cross-examine the plaintiff on said registered sale-deed.

9 It is to be noted that the appellate court after hearing both the sides allowed the application Exhibit-14 filed by defendant under Order 41 Rule 27 of the Civil Procedure Code, 1908 for bringing on record the registered sale deed dated 7.4.1997 in respect of the suit property

1 2012 (6) AIR Bom R 801

2 AIR 2004 SC 348

as described in paragraph 1-A of the plaint. The said order was not challenged by the plaintiff in higher court and accepted the same. The said sale deed dated 7.4.1997 was also referred in the Trial Court but the same was not produced. Not only that the plaintiff has not brought on record any evidence to show that thereafter he made application to the appellate court for allowing him to cross-examine the defendant on the point of production of registered sale deed dated 7.4.1997. The first time the plaintiff raised objection in this Second Appeal about not allowing him to cross-examine the defendant on the point of registered sale deed dated 7.4.1997. The same cannot be allowed in the Second Appeal. The authority relied by the plaintiff in the matter of *Ramnath Bablo Umeraskar v. John Carasco (since deceased), and Ors. (Supra)* is not applicable in the facts and circumstances of the present case. In that case, the issue was about two private documents i.e. letter addressed by the party to the concerned Municipality and assessment order issued by the Municipality of house taxes as rental premises. Hence, the High Court held that for production of private documents on record and for considering the same in evidence at the time of deciding the matter finally, it is necessary to allow the other side to cross-examine and verify the admissibility of those documents. In similar way the authority cited by the plaintiff in the matter of *Shyam Singh v. Daryao Singh (dead) by L.Rs. and others (Supra)* is not applicable in the facts and circumstances of the present case. The learned counsel for the plaintiff mainly relies on paragraph 20 of the above cited Apex Court matter which reads thus:

“20. The additional grounds urged in this appeal as

a result of subsequent legal developments of consolidation of holdings under the Act of 1953 raise issues both of fact and law. We consider it just and proper to remand the case to the trial court for deciding these additional issues arising on facts and law.”

10 Considering the submissions made by the learned counsel for the plaintiff and the above mentioned facts, I am of the opinion that the plaintiff has not made out any substantial question of law involved in the present Second Appeal to entertain the same under section 100 of the Civil Procedure Code, 1908.

11 Second Appeal stands rejected.

(K.K.TATED, J.)