

JPP

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

*SECOND APPEAL NO. 400 OF 2016
with
CIVIL APPLICATION NO. 780 OF 2016*

Mr. Chandrabhan Narayan Sagar
Since deceased through Legal Heirs
1. Mr. Vishwambhar Chandrakant
Sagar & Ors.

...Appellants/Applicants.

V/s.

Dipak Audumbar Sagar
Since deceased through Legal Heirs
1B Pranali Dipak Sagar and Ors.

... Respondents.

Mr. Ajay Joshi for the Appellants/Applicants.
None for the Respondents

CORAM : N.M. Jamdar, J.

22 June, 2016.

P.C. :-

The Appellants challenge the judgments and orders passed by the Civil Judge, Junior Division, Pandharpur and the District Judge, Pandharpur decreeing the Suit of the Respondents and dismissing the Appeal of the Appellants. The Suit was decreed holding that the Respondents – Plaintiffs have $\frac{1}{4}$ share of CTS No.

1249/A, 1249/B, 1249/C and 1249/E in the Suit property and declaration of CTS No. 1249/D alongwith Defendant No.2. An Appeal was filed by the Appellants. In the Appeal, this judgment has been confirmed by the learned District Judge.

2. The learned Counsel for the Appellants submitted that once the Will sought to be relied upon by the Respondents-Plaintiffs was denied by the Appellants, which was incumbent upon the Respondents – Plaintiffs to examine the attesting witnesses as is required under Section 68 of the Evidence Act. He relied upon the decision of the Apex Court in the case of *Bhag Singh v/s. Jaskirat Singh and Ors.* reported in (2010) 2 SCC 250. He submitted relying upon the decision of the *Mohammad Laiquiddin and Anr. v/s. Kamala Devi Misra* reported in (2010) 2 SCC 407, that since this question arises from the pleading, it can be taken up in the Second Appeal.

4. The proposition of law regarding the need to examine attesting witness stressed by the learned Counsel for the Appellants, cannot be in dispute. The question is whether the facts and circumstances of the present case, the Appellants should be allowed to raise this point first time at this stage. Section 68 of Indian Evidence Act is not absolute. In certain circumstances, the requirement of attesting witnesses cannot be complied with, such as when they are not alive or traceable. The Will was exhibited in the

Trial Court. The entire trial went by without the Appellants raising any objection as to non-examination of the witnesses. During the course of argument before the Trial Court no such argument was advanced. After the decision of the Trial Court was against the Appellants, the Appellants could have taken this ground in the First Appeal. Neither in the Appeal Memo before the District Court this ground was taken neither it was argued before the District Court. Even assuming inspite of this position, the Appellants are permitted to raise this issue in the Second Appeal, the clinching factor is the stand taken by the Appellants before the District Court. The Appellants moved an amendment in the District Court and took up a plea of adverse possession, albeit for part of the property. The property for which the plea of adverse possession was taken was covered by the Will. Once plea of adverse possession was taken, the Appellants accepted the ownership of the Respondents based on the Will. Therefore, considering these peculiar facts, I am not inclined to permit the Appellants to urge this question.

5. In these circumstances, the decision relied upon by the learned Counsel for the Appellants in the case of *Mohammad Laiquiddin* does not apply. As regard the decision in the case of *Bhag Singh*, the facts were that the Trial Court had substituted a testimony of scribe as a witness and the point was advanced in the trial as well as the Appeal and therefore, it was not a position that the

question was taken up for the first time in the Second Appeal or that a party therein had set up a plea of adverse possession.

6. No other point was advanced. In the circumstances, the question of law as raised cannot be considered. Both the Courts have reached the conclusion that the properties excluding CTS No. 1249/D are liable for partition and separate possession.

7. The Second Appeal does not contain any question of law and is dismissed. Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)