

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

**FIRST APPEAL NO. 1499 OF 2016
WITH
CIVIL APPLICATION NO. 688 OF 2014
IN
FIRST APPEAL NO. 1499 OF 2016**

Kamlashankar Lutawan RajbharAppellant
V/s.
Makhodar Dipan Rajbhar and ors.Respondents

Mr. Jitendra G. Shukla for the appellant / applicant.
Mr. Lahu S. Gaikwad for respondent nos.1 to 3.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 04th OCTOBER, 2019**

P.C.:-

. With consent of the learned counsels for the respective parties,
the appeal is heard finally at the stage of admission.

2. The appellant herein was the original defendant no.2 in the suit.
The respondent no.1 was the plaintiff and the respondent nos.2, 3 and
4 were the defendant nos.1, 3 and 4 in the suit and they shall be
hereinafter referred to as 'the plaintiff' and 'the defendants' respectively.

3. The defendant no.2 has challenged the judgment dated
06/09/2012 in Short Cause Suit No.2796 of 2008, City Civil Court,
Greater Mumbai. By the impugned judgment, the Trial Court has

decreed the suit for declaration that the plaintiff is entitled to claim 1/3rd share in the suit premises as well as in the new premises allotted in lieu of original suit premises. The City Civil Court has also directed the defendant no.4 to provide alternative accommodation to the plaintiff in the newly constructed premises in lieu of the suit premises.

4. The dispute in the present case is in respect of Room No.22, Nagrik Seva Chawl No.11, Kasturba Gandhi Nagar, Dainik Shivner Marg, Worli, Mumbai – 400018 which shall be hereinafter referred to as ‘the suit property’. The appellant claimed that the suit property was recorded in the name of Lutawan Dipan Rajbhar, husband of defendant no.1 as a karta of Joint Hindu Family. The appellant claimed that he had 1/3rd share in the suit property and that due to his illness; he was staying at his native place. The suit property was re-developed. The defendant no.4 who is the developer had entered into an agreement with the defendant nos.1 and 2 for alternative accommodation. The appellant claimed that the said agreement was entered into without his knowledge. He further claimed that the defendant nos.1 and 2 did not have exclusive right over the suit property as the suit property was jointly purchased by the three brothers. The appellant also relied upon the affidavit dated 05/08/1991 to substantiate his claim that he has

1/3rd share in the suit property. It is alleged that there has been no partition in respect of the suit premises and as such the plaintiff has right, title and interest in respect of 1/3rd share along with defendant nos.1 and 2.

5. The records indicate that the defendant had raised the issue of limitation as well as valuation of the suit. The defendants had also denied that the plaintiff is a joint tenant in respect of the suit house and had further denied the genuineness of the affidavit dated 05/08/1991. The defendants claimed that Lutwan Dipan Rajbhar had acquired the suit property from his own income. The photopass /pitch card holders card No.48764 is in the name of Lutawan Rajbhar and that he was paying rent to the Mumbai Municipal Corporation and that after his death, the defendant nos.1 and 2 continued to pay the rent.

6. The defendant nos.1 and 2 further averred that the Corporation had decided to redevelop the site of the suit premises. The Corporation had prepared a list of eligible hutment dwellers and the name of Lutawan was recorded in annexure-II. The suit premises were demolished in the year 1996 for the purpose of re-construction / re-development. The defendants being the legal representatives of Lutawan, the defendant no.4 provided temporary alternative

accommodation and further entered into an agreement for allotment of permanent alternative accommodation. The defendants claim that the Plaintiff has no right in respect of the suit premises.

7. Based on the aforesaid pleadings several issues came to be framed. The Attorney of the Plaintiff filed his affidavit-in-evidence. The Trial Court held that the said evidence has remained unchallenged. The learned Judge further held that the defendants had not stepped into the witness box to prove the pleas raised in the written statement.

8. A plain perusal of the impugned judgment indicates that the Trial Court has decreed the suit mainly on the ground that the statements made by the Attorney of the plaintiff in his affidavit-in-evidence have remained unchallenged. The Trial Court has not rendered any finding whether the Attorney was competent to depose on behalf of the plaintiff. It is also to be noted that though the defendant no.1 had raised a specific plea regarding limitation, the learned Judge had not considered the said plea and had not given any finding on the issue of limitation. Suffice it to say that the plaintiff having approached the Court was required to prove that he had 1/3rd share in the suit premises. The Trial Court was required to appreciate the evidence adduced by the plaintiff and give independent findings on the issues

raised in the suit. In the instant case, the Trial Court has not considered the merits of the matter and has decreed the suit mainly on the ground that the defendants had not contested the proceedings.

9. The impugned judgment therefore cannot be sustained. Hence, the following order:-

(a) The impugned judgment dated 06/09/2012 passed by the learned Judge, City Civil Court, Greater Mumbai is set aside.

(b) The matter is remanded to the learned Judge, City Civil Court, Greater Mumbai with direction to decide the matter afresh.

(c) Liberty is granted to the defendants to file an application to re-cast the issues and further to cross-examine the plaintiff.

10. First Appeal stands disposed of. Civil Application stands dismissed in view of disposal of the appeal.

11. Considering that the suit is of the year 2008, the City Civil Court, Greater Mumbai shall endeavour to dispose of the suit as expeditiously as possible and in any event within a period of one year from the date of receipt of this order.

**Preeti H.
Jayani**

Digitally signed by
Preeti H. Jayani
Date: 2019.10.17
17:07:03 +0530

(SMT. ANUJA PRABHUDESSAI, J.)