

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 267 OF 2018****ALONGWITH****CIVIL APPLICATION NO. 592 OF 2018****IN****SECOND APPEAL NO. 267 OF 2018**

Rajkumar Chaganlal Shah)
Age : 60 years, Occu. : Agriculture,)
R/o.Kalamb, Tal. Indapur,)
District : Solapur)

..... Appellant**VERSUS**

1. Mrs.Gunmala Chandrakant Shah)
Age : Adult, Occu : Agriculture)

2. Chelananani Vivek Shah,)
Age : Adult, Occu : Agriculture,)
Both R/at : Modnimb,)
Taluka : Madha,)
District : Solapur)

3. Jaikumar Chaganlal Shah,)
Age : Adult, Occu : Agriculture,)
R/o. Kalamb, Taluka : Indapur,)
District : Pune)

4. Prakash Basantlal Shah,)
Age : Adult, Occu : Agriculture,)

5. Abhinandan Basantlal Shah (D/H)
Age : Adult, Occu : Agriculture,)

5A. Madhuri Abhinandan Shah (D/H)
Age : Adult, Occu : Agriculture,)
R/at : Nilam Cycle Shop,)
Baramati, Dist. Pune)

5A1. Doly Abhinandan Shah,)
Age : Adult, Occu : Service,)
Re/at New Jivan Building, Talmajala,)

Near Model School, Dombiwali (East)

5A2. Ashwini Abhinandan Shah,)
Age : Adult, Occu. :)
Re/at New Jivan Building, Talmajala,))
Near Model School, Dombiwali (East)

6. Basantlal Chaganlal Shah (D/H)
Age : Adult, Occu : Agriculture,)

6A. Prakash Basantlal Shah,)
Age : Adult, Occu. : Agriculture,)
Re/at – Nilam Cycle Shop,)
Baramati, Dist. Pune)

6B. Pramila Tejpal Jain,)
Age : Adult, Occu. : Agriculture,)
Re/at – 27/24, Vinayak Bhavan,)
Pratap Tokij, Thana (West))

6C. Pranaya Dhanjay shah,)
Age : Adult, Occu : Agriculture,)
Re/at- Kohinur Planar,)
Mardeo Bangla, 3/B,)
Special Road Shejari, Aundh,)
Pune – 411 107)

6D. Dhanashri (Smita) Kisan Shah,))
Age : Adult, Occu. : Agriculture,)
Re/at – Kohinur Planar,)
Mardeo Bangla, 3/B,)
Special Road Shejari, Aundh,)
Pune – 411 107)

6E. Shiriji Sanjaykumar Bajeriya,)
Age : Adult, Occu. Agriculture,)
Re/at 102, Holy Cross Apartment,)
Parshi Panchayat Road,)
Andheri (East), Mumbai – 400 069)

6F. Prafulata Gynmal Jain,)
Age : Adult, Occu : Agriculture,)
Re/at 113, Dhansha Waragan Tower,))
Forum Maltjaval,)

Thane (West) 400 606)

7. Jaivardhan Ashokkumar Shah,)
Age : Adult, Occu : Agriculture,)

8. Prasana Ashokkumar Shah,)
Age : Adult, Occu : Agriculture,)

8A. Ashok Manikchand Shah,)
Age : Adult, Occu : Agriculture,)
Re/at – Karniknagar, Solapur,)
Dist. Solapur)

9. Sheela Chandrakant Shah,)
Age : Adult, Occu : Agriculture,)
Re/at – Karniknagar, Solapur,)
Dist. Solapur)

10. Surekha Sumtilal Shah,)
Age : Adult, Occu : Agriculture,)
Re/at – Dholkham, Tal. Shahpur,)
Dist. Thane)

11. Nalini Kailash Shah,)
Age : Adult, Occu : Agriculture,)
Re/at – Jalvidhut Prakalp Colony,)
Bhadardara, Ahmednagar,)
Dist. Ahmednagar)

12. Sunita Arvind Modi,)
Age : Adult, Occu : Agriculture,)
Re/at – Panvel, Near S.T.Stand,)
Bandekar Chawl, Dist. Raigad)

13. Sunanda Walchand Shah,)
Age : Adult, Occu : Housewife,)
Re/at – Bhajandas Chowk,)
Pandharpur, Dist. Solapur)

..... Respondents

Mr.Surel Shah for the Appellant/Applicant.

Mr.Rahul S. Kadam for the Respondent nos. 1, 2, 4, 7, 9 to 13.

CORAM : R.D. DHANUKA, J.

DATE : 16th AUGUST, 2019

ORAL JUDGMENT

Admit on the following substantial questions of law :-

(A) Whether without filing any cross objections by the respondents, the Appellate Court could grant larger relief in favour of the respondents which were not granted by the trial court ?

(B) Whether the Appellate Court could have decided the application for additional evidence before commencement of the hearing the appeal on merits or not ?

2. Mr.Kadam, learned counsel for the respondent nos. 1, 2, 4, 7, 9 to 13, the contesting respondents waives service. By consent of parties, second appeal is heard finally.

3. The respondent nos. 1 and 2 had filed a suit *inter alia* praying for declaration and partition against the appellant and some of the other respondents in respect of the ancestral properties. The learned trial judge framed four issues. It was the case of the defendant no.2 that there the suit properties were already partitioned by a partition deed dated 15th February, 1959. It was also the case of the defendant no.2 that the suit properties bearing nos. 133/8, 133/9 and 34 were self acquired properties.

4. It was the case of the plaintiff that the plaintiff and defendant nos. 3 to 9 were entitled to share in the property. Both the parties led

oral and documentary evidence before the learned trial judge. Insofar the issue as to whether the defendant no.2 proved that on 15th February, 1959 there was a partition is concerned, the said issue was answered in negative. The trial court also answered the issue whether the defendant no.2 had proved that the suit properties were self acquired properties or not in negative. The trial court held that the plaintiff and the defendant nos. 3 to 9 are entitled to share in the 1/3rd share of their father in the suit properties. It is further held that the defendant nos. 3 to 9 are entitled to get their share on payment of court fees.

5. Being aggrieved by the said judgment and decree dated 12th April, 2002, the appellant (original defendant no.2) preferred an appeal being Regular Civil Appeal No.130 of 2002 before the learned District Judge. The learned District Judge framed six points for determination. Before the Appellate Court, the appellant filed an application on 23rd September, 2016 for permission to allow the appellant to produce the additional documents on record. The said application filed under Order 41 Rule 27 was resisted by the original plaintiff. By an order dated 4th November, 2016, the learned District Judge rejected the said application filed by the appellant at the threshold.

6. The Appellate Court thereafter proceeded with the hearing of the appeal and passed a judgment and decree dated 14th December, 2016 thereby allowing the appeal filed by the appellant herein partly. The Appellate Court was pleased to set aside the directions given by the learned trial judge to prepare a preliminary decree and modified the decree as mentioned in clauses (i) and (ii) in later part of the order. The Appellate Court declared that the original plaintiff and the defendant nos. 3 to 9 and/or their legal representatives had 1/22th share

each in the suit property and the defendant nos. 1 and 2 had 13/44th share each in the suit property.

7. Mr.Shah, learned counsel for the appellant invited my attention to the findings rendered by the two courts below and also the application filed by his client under Order 41 Rule 27 of the Code of Civil Procedure. He submits that it was the specific case of his client before the trial court that the suit properties were already partitioned on 15th February, 1959. The appellant had filed an application under Order 41 Rule 27 of the Code of Civil Procedure before the Appellate Court. He submits that the said application under Order 41 Rule 27 ought to have been decided by the Appellate Court at the stage of final hearing. The Appellate Court having rejected the said application before commencement of the hearing the appeal filed by his clients, the entire judgment and decree passed by the first Appellate Court deserves to be set aside on that ground itself. Learned counsel placed reliance on the judgment of Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148.***

8. The next submission of the learned counsel is that the trial court in the impugned judgment and decree had granted relief in favour of the original plaintiff to the extent of 1/3rd share in their father's share in the suit property. He submits that the plaintiff as well as the defendant nos. 3 to 9 did not file any cross objections in the appeal preferred by his clients against the said judgment and decree dated 12th April, 2002. The Appellate Court however in the impugned judgment and decree dated 14th December,2016 has enhanced the share in favour of the plaintiff and the defendant nos. 3 to 9 and more particularly in paragraph (17) of the judgment and decree dated 14th December,2016.

In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of ***Biswajit Sukul vs. Deo Chand Sarda and others, (2018) 10 SCC 584*** and in particular paragraphs 13 and 14.

9. Mr.Kadam, learned counsel for some of the respondents on the other hand invited my attention to the application filed by the defendant no.2 under Order 41 Rule 27 of the Code of Civil Procedure and would submit that no case was made out by the defendant no.2 before the Appellate Court under Order 41 Rule 27 of the Code of Civil Procedure and thus the Appellate Court was justified in dismissing the said application at the threshold. He strongly placed reliance on paragraphs 39 and 40 of the judgment of Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another (supra)*** relied upon by Mr. Shah, learned counsel for the defendant no.2 and would submit that even if the said application filed under Order 41 Rule 27 of the Code of Civil Procedure filed by the defendant no.2 would have been heard at the stage of final hearing of the said appeal, since the defendant no.2 had not furnished any satisfactory reasons for non production of the evidence before the trial court, no prejudice would have been caused to the defendant no.2 merely because the application under Order 41 Rule 27 of the Code of Civil Procedure was rejected at the threshold.

10. Insofar as submission of the learned counsel for the defendant no.2 that since there was no cross objection filed by the plaintiff, the Appellate Court could not have enhanced the reliefs or could not have been granted additional relief which is not granted by the trial court is concerned, it is submitted by the learned counsel that in a partition suit,

all parties are to be treated as plaintiff and thus merely because no cross objection was filed by his clients, the Appellate Court could still grant larger relief in the suit for partition.

11. A perusal of the record clearly indicates that before the trial court, it was the case of the defendant no.2 that the suit properties were already partitioned as far back as on 15th February, 1959. The defendant no.2 did not produce any document before the trial court in support of this plea. The trial court disbelieved the case of the defendant no.2 and passed a decree in favour of the plaintiff and the defendant nos. 3 to 9 for equal share in the 1/3rd share of their father.

12. A perusal of the order passed by the first Appellate Court on 4th November, 2016 on the application filed by the defendant no.2 under Order 41 Rule 27 indicates that the said application is rejected on the ground that the defendant no.2 had not exercised due diligence and had not satisfied the conditions prescribed under Order 41 Rule 27 of the Code of Civil Procedure. The fact remains that the Appellate Court rejected the said application at the threshold and not while hearing the appeal filed by the defendant no.2 finally. The Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another*** (supra) has considered this issue and has held that the application filed under Order 41 Rule 27 has to be decided at the stage of final hearing and at that stage, if the Appellate Court comes to the conclusion that the case under Order 41 Rule 27 of Code of Civil Procedure was made out, the appeal court permit the appellant to produce the additional evidence documents. In my view, the order passed by the Appellate Court on 4th November, 2016 rejecting the application filed by the defendant no.2 under Order 41 Rule 27 at the threshold is contrary to the principles of

law laid down by the Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another (supra)*** and thus deserves to be set aside.

13. I am not inclined to accept the submissions of Mr.Kadam, learned counsel for the original plaintiff that even though the said application filed under Order 41 Rule 27 filed by the defendant no.2 was rejected at the threshold, no prejudice was caused to the appellant.

14. A perusal of the order passed by the trial court indicates that the decree came to be passed in favour of the plaintiff and defendant nos. 3 to 9 to the extent of equal share in the 1/3rd share of their father. Admittedly the plaintiffs as well as the defendant nos. 3 to 9 did not file any cross objection or separate appeal impugning part of the said decree dated 12th April, 2002. Only the defendant no.2 had preferred an appeal against the said decree being Regular Civil Appeal No.130 of 2002. A perusal of the judgment and decree passed by the Appellate Court clearly indicates that the first Appellate Court has granted larger relief in favour of the plaintiff and defendant nos. 3 to 9 than the reliefs granted by the trial court.

15. In my view Mr.Shah, learned counsel for the defendant no.2 is right in his submission that if that his client would not have filed an appeal against the judgment and decree passed by the trial court, in that event, the shares given by the trial court to the plaintiff and defendant nos. 3 to 9 could not have enhanced. This is not the case of the finding rendered against the plaintiff while passing a decree for which no cross objection was filed which could be attacked at the hearing of appeal by the other side but is the case of the reliefs which were not granted by the trial court but having been allowed by the first Appellate

Court without filing cross appeal or cross objection. The judgment of the Supreme Court in case of ***Biswajit Sukul*** (supra) relied upon by the learned counsel for the defendant no.2 would clearly apply to the facts of this case. In my view, the first Appellate Court thus could not have granted larger relief in favour of the plaintiff and defendant nos. 3 to 9 in absence of any cross appeal or cross objection.

16. I, therefore, pass the following order :-

(a) The substantial question of law nos.A and B are answered in negative.

(b) Application filed by the defendant no.2 (Ex.59) in Regular Civil Appeal No.130 of 2002 as well as Regular Civil Appeal No.120 of 2002 are restored to file before the District Judge – 2, Baramati for deciding the said application as well as the said appeal afresh.

(c) The learned District Judge shall decide the application under Order 41 Rule 27 filed by the defendant no.2 along with the Regular Civil Appeal No.130 of 2002 expeditiously. The Appellate Court shall make an endeavour to dispose of the said application as well as the said appeal not later than four months from the date of the communication of this order.

(d) It is made clear that this court has not expressed any views on the issue whether the defendant no.2 had made out a case under Order 41 Rule 27 of the Code of

Civil Procedure, 1908 or not.

(e) This court has also not expressed any view on the merit whether the plaintiff and the defendant nos. 3 to 9 were entitled to any larger relief in the suit property or not.

(f) The plaintiff would be at liberty to file cross objection against the judgment and decree passed by the trial court.

(g) If any such cross objection is filed, the same would be considered on its own merit including the issue of delay, if any.

(h) Second appeal is disposed of on the aforesaid terms. No order as to costs.

(i) The parties as well as the Appellate Court to act on the authenticated copy of this order.

[R.D.DHANUKA, J.]