

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 527 OF 2017
WITH
CIVIL APPLICATION NO. 973 OF 2017
WITH
CIVIL APPLICATION NO. 705 OF 2018
WITH
CIVIL APPLICATION NO. 1444 OF 2018
IN
SECOND APPEAL NO. 527 OF 2017

Mr. Hari Dattatray Shitole ... Appellant/Applicant

V/s.

Dattatray Ganpat Shitole (Deceased) ... Respondent

Mr. Ashutosh M. Kulkarni a/w. Mr. Akshay Kulkarni a/w. Mr. Hari Shitole for the applicant/appellant.

Mr. G.S. Godbole I.by Mr. Arvind D. Aswani for the Respondent.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 5th December, 2019.

P.C. :

. The appellant/applicant herein questioned the impugns the judgment and order passed passed by Ad-hoc District Judge, Pune in Reg. Civil Appeal No. 55 of 2015 dated 11th April 2017 upholding the judgment delivered by Civil Judge, Junior Division, Pune in Reg. Civil Suit No. 891 of 2001 dated 7th January 2015.

2. The appellant herein happens to be the original plaintiff. He had filed a suit against the defendants who happened to be his parents and step brother wherein the defendant no.1 happens to be the

father of the plaintiff. Defendant no. 2 is the step mother and defendant nos. 3 and 4 are the step brothers of the plaintiff.

3. The suit is for simplicitor injunction. That, half of the suit property was sold to added defendants who are the purchasers of the suit property and are contesting defendants as on today.

4. The original plaintiff had pleaded that the suit property happens to be his ancestral property. It appears that the defendant nos. 1, 3 and 4 had not filed written say in the said suit. The subsequent purchasers had got themselves impleaded. However, they had failed to file their written say. The learned counsel for the appellant submits that after framing of issues and in the course of adducing evidence, the plaintiff had filed certain documents which are at Exhibit-157. It appears that it was a compilation of documents. Exhibit-141 was the 7/12 extract of the suit property and other documents were permissibly proved in some other proceedings. However, that was not the subject matter of the present suit. The learned counsel submits that the original defendants i.e. defendant no.1, defendant no.3 and defendant no.4 had brought it to the notice of the Court that the said documents are photocopies and not original documents neither certified documents nor registered documents. However, they had admitted the same. It is pertinent to note that there is no admission by the contesting defendants i.e. subsequent purchasers.

5. It is the contention of the learned counsel for the appellant that as contemplated under Order VIII Rule 5 read with Order 8 Rule 10 of Code of Civil Procedure, it was incumbent upon the Court to hold

that since there is no specific denial the documents are admitted and therefore, it was incumbent upon the Court to not only place implicit reliance upon the said documents to pass a decree in favour of plaintiff. Order VIII Rule 5 of Code of Civil Procedure reads as follows:-

5. Specific denial.

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

Order VIII Rule 10 of Code of Civil Procedure reads as follows:-

10. Procedure when party fails to present written statement called for by Court- When any party from whom a written statement is required under Rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

6. The learned counsel for the respondent submits that the language of Order VIII Rule 5 would clearly indicate that it is the discretion of the Court as it deems fit in accordance with law especially when the facts which were tried to be demonstrated by placing reliance upon the documents have not been proved by the plaintiff in accordance with law. At this stage, it would be relevant to refer to Section 64 of the Indian Evidence Act, 1872, which contemplates as follows:-

64. Proof of documents by primary evidence.—Documents must be proved by primary evidence except in the cases hereinafter mentioned.

7. It is an admitted position that the said documents were not covered in the exception clause. Exhibiting a document by itself is not the proof of the document as it does not mean that the contents of the document are proved. It was incumbent upon the plaintiff to prove the said documents in accordance with law especially when there were no specific pleadings in accordance with or on the basis of the documents which were submitted after framing of issues. No issue was framed. The issues that were framed in the said suit were as to whether the plaintiff has proved that the defendant has caused any obstruction in the peaceful possession of the plaintiff and whether they are entitled to the relief that is the claim.

8. This Court cannot be oblivious of the fact that this is an appeal under Section 100 of the Code of Civil Procedure and the factual position need not be taken into consideration. The only substantial question of law would be as to whether the documents which were filed on record after framing of issues were proved in accordance with law as is contemplated under Section 61 and 64 of the law of evidence. Hence, issues are answered in the negative. Substantial questions of law has not been carved out. Hence, the second appeal deserves to be dismissed.

9. In view of this, all Civil Applications are disposed of.

10. At this stage, the learned counsel for the appellant seeks stay of this order and seeks continuation of relief. However, taking into

consideration the fact that the original suit is of the year 2001 and after 19 years, this Court after dismissal of the second appeal is not inclined to accede to the prayer. Hence, prayer is rejected.

(SMT. SADHANA S. JADHAV, J)