

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 619 OF 2018
ALONGWITH
CIVIL APPLICATION NO. 57 OF 2019
IN
SECOND APPEAL NO. 619 OF 2018****Suresh Tirathdas Soni****..... Appellant/
Applicant****VERSUS****Ramesh T. Soni & Ors.****..... Respondents**

Mr.Vinod Tayade, a/w. Mr.Jay Vora for the Appellant/Applicant.

Ms.Gauri Godse for the Respondent no. 1.

CORAM : R.D. DHANUKA, J.**DATE : 16th AUGUST, 2019****P.C.**

By this second appeal filed under section 100 of the Code of Civil Procedure, the appellant (original defendant no.9) has impugned the judgment and decree dated 30th June, 2017 passed in Regular Civil Appeal No. 13 of 2014 passed by the learned District Judge and also the order passed by the learned trial judge passing an order for partition of the suit property in respect of the immoveable property.

2. The respondent no.1 had filed a suit for partition *inter alia* praying for 1/10 share in the suit property along with the defendants in the suit. The defendant nos. 1 to 4 supported the case of the plaintiff.

3. Some of the defendants including the defendant nos. 8 and 9

opposed the suit of partition filed by the original plaintiff. The trial court framed nine issues for determination. The plaintiff filed his affidavit in lieu of examination in chief. The defendant no.8 and defendant no.9 examined themselves by filing affidavit in lieu of examination in chief. The learned trial judge passed a judgment and decree on 16th November, 2013 holding that the plaintiff and the defendant nos. 3, 5, 8 to 10 being legal heirs of the deceased Mr.Tirathdas were entitled to 1/10th share each (per capita) and defendant no.1/1 to 1/5 are jointly entitled for 1/10th share being legal heirs of the original defendant no.1. It is held that the defendant no.2/1 to 2/5 are jointly entitled for 1/10th share being legal heirs of the defendant no.2 and the defendant nos. 4/2 and 4/3 are jointly entitled for 1/10th share being legal heirs of defendant no.4. The defendant nos. 6 and 7 are jointly entitled for 1/10th share being widow and daughter of deceased Manoj in the suit property.

4. Insofar as the moveable properties are concerned, the trial court rendered a finding that the plaintiff had failed to prove that those properties were the properties of the father Mr.Tirathdas. The appeal preferred by the appellant (original defendant no.9) came to be dismissed by the judgment and decree passed by the learned District Judge – Kalyan on 30th June, 2017.

5. It is submitted by the learned counsel for the appellant that except filing an affidavit in lieu of examination in chief which was replica of the plaint filed by the responded no.1 (original plaintiff), the plaintiff did not produce any document in support of the plea that the suit property was self acquired property of the father Mr.Tirathdas. He submits that though the trial court rendered a finding that the plaintiff

had not produced any documentary evidence to prove that the suit property was owned by the predecessor Mr.Tirathdas and had failed to establish the said fact, in ignorance of sections 101 and 102 of the Indian Evidence Act, the learned trial judge rendered perverse finding that the plaintiff had proved that the immoveable property was owned by Mr.Tirathdas.

6. The next submission of the learned counsel for the appellant is that though the trial court ought to have passed a preliminary decree in a partition suit and ought to have appointed a court commissioner for effecting partition and only thereafter could have passed a final decree, the trial court has passed a final decree and not a preliminary decree as contemplated under Order 20 Rule 18 of the Code of Civil Procedure.

7. Insofar as the first submission of the learned counsel for the appellant that the impugned decree passed by the trial court is in ignorance of the sections 101 and 102 of the Evidence Act is concerned, it is not in dispute that the plaintiff had entered the witness box and had filed affidavit in lieu of examination in chief. A perusal of the judgment and decree passed by the trial court indicates that there was no dispute that the suit property was standing in the name of Mr.Tirathdas who was father of the plaintiff, the defendant no.9 and few others. The defendant no.9 himself had produced a copy of the letter dated 21st June, 2012 below Ex.111 issued by the office of the Sub-Divisional Officer which clearly indicates that the suit property bearing Block No.26 was standing in the name of the deceased Mr.Tirathdas at the time of his death and till the date of passing the said judgment and decree by the trial court. In my view the trial court has rightly held that the burden of proof was shifted on the shoulder of

the defendant nos. 8 and 9 to show that the suit property had been purchased by them in the name of the deceased father and that they had contributed for the same.

8. The learned trial judge also considered the relevant fact that the said Mr.Tirathdas had retired from the service in 1974 and had received gratuity and funds and a pension of Rs.130/- per month. This fact was not disputed by the defendants. Insofar as defendant no.9 is concerned, defendant no.9 has joined service in Municipal Council in the year 1976 and was made permanent in the year 1982 and till 1982, he was earning daily wages of Rs.8/- per day. These facts are not disputed by the defendant no.9.

9. In these circumstances, the learned trial judge rightly held that the plaintiff had proved that the suit immoveable property which was standing in the name of Mr.Tirathdas was acquired by him and there was no contribution made by the defendant no.9 for purchase of the said property.

10. I am thus not inclined to accept the submission of the learned counsel for the defendant no.9 that the impugned judgment and decree passed by the learned trial judge and confirmed by the learned District Judge was in ignorance of sections 101 and 102 of the Evidence Act and thus warrant any interference by this court.

11. Insofar as the submission of the learned counsel for the appellant that the learned trial judge ought to have passed a preliminary decree under Order 20 Rule 18 and could not have passed the final decree at the first instance is concerned, a perusal of the decree passed by the

learned trial judge and more particularly in paragraphs 3 to 5 clearly indicates that the learned trial judge has not directed the learned court commissioner to handover possession of the property by metes and bounds. The plaintiff has already filed an execution application before the executing court and for appointment of the court commissioner. It is thus clear that as and when the court commissioner effects the actual partition of the suit property by metes and bounds, an appropriate order for handing over possession can be passed by the executing court.

12. A perusal of the order passed by the appellate court clearly indicates that the appellate court has applied its mind to the evidence led by both the parties and have also rendered various findings of fact on appreciation of evidence. Findings of the two courts below being not perverse, cannot be interfered with by this court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908. No substantial question of law arises in this second appeal. Second appeal is devoid of merits and is accordingly dismissed.

13. In view of the dismissal of the second appeal, civil application does not survive and is accordingly disposed of. No order as to costs.

[R.D.DHANUKA, J.]