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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.34 OF 2017
WITH
CIVIL APPLICATION NO.61 OF 2017

Shri. Mataprasad Chhanguram Jaiswal and Anr. ... Appellants
Vs.
Smt. Geeta Malikram Jaiswal and Ors. ... Respondents

Mr. Sandesh Patil a/w Ms. Anusha Amin i/b. Triyama Legal for the
Appellants/ Applicants.
Mr. Jitendra Shukla for the Respondents.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 15th JANUARY 2020.

P.C.:

1 Heard the respective counsel for the parties. The appellant herein happens to be the defendant in Special Civil Suit No.139 of 2008 filed by the respondent herein seeking partition and possession of the joint family property. The suit was decreed vide judgment and order dated 31st July 2013. The present appellant had filed Regular Civil Appeal No.222 of 2013 which was dismissed by an order dated 31st August 2016. Hence, this appeal under section 100 of the Civil Procedure Code. The substantial question of law as framed by the appellant are as follows :

- “(J) What is the effect of the suit of the Plaintiff being filed for declaration without filing a separate suit for partition?
- (K) What is the effect of all the properties of the parties not being put in common hotchpotch for the purpose of the partition?”

2 The learned counsel for the appellant has vehemently submitted that the description of the property as stated by the plaintiff had undergone a change. That the defendant had carried out reconstruction and refurnishing of the said suit property and that the respondent had surrendered his share for a consideration of Rs.75,000/-.

3 According to the plaintiff, the suit was based upon the registered sale deed dated 5th April 1989 executed between the original owner Radhesham Gupta and others in favour of husband of the plaintiff and the appellants who happen to be brothers of late Shri Malikram through whom the plaintiff was claiming a right of partition and possession. It is vehemently argued that since the property described is not the same there cannot be an effective partition of the suit property. At this stage, the learned counsel for the respondent has drawn attention of the Court to paragraph 1 of the written statement wherein the description of

the suit property has been admitted by the appellant. Needless to say that the facts which are specifically admitted need not be proved as per section 58 of the Indian Evidence Act, 1872.

4 The learned counsel for the appellant has also submitted that the Court Commissioner appointed by the Court had also submitted that the property has undergone a change. It is a matter of record that the appellant has not filed any registered document to indicate that late Malikram had surrendered his share in favour of the appellant for a consideration of Rs.75,000/-. It is also clear that there is no contention by the appellant that there was an oral partition amongst the brothers during the lifetime of Malikram or thereafter. In view of this, both the issues as framed by the appellant need to be answered in the negative and the appeal deserves to be dismissed. The second appeal is dismissed and disposed of accordingly.

(SMT. SADHANA S. JADHAV, J.)