

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

SECOND APPEAL NO. 906 OF 2015

**ALONG WITH
CIVIL APPLICATION NO. 1978 OF 2015**

Shri. Jahurkha Sandu Pathan

.....Appellant

V/s.

Smt. Aliya Mehboob Pathan
and Ors.

....Respondents

Mr. Nikhil M. Pujari, Advocate for the appellant.

Mr. Nilesh M. Wable, Advocate for respondents no.1 to 8.

CORAM : SANDEEP K. SHINDE, J.

Friday, 19th March, 2021.

P.C. :

1. Heard learned Counsel for the parties.
2. Defendant no.1 in the Regular Civil Suit No.47/2003 has preferred this Appeal.

3. Respondents no.1 to 3 had filed Regular Civil Suit No.47/2003 for partition of the suit property described in para-1 of the plaint. The suit was decreed. The Appellate Court, confirmed the decree of the trial Court vide judgment dated 25th March, 2015. Feeling aggrieved, defendant no.1 has preferred the Second Appeal.

4. Heard Mr. Pujari, learned Counsel for the appellant.

FACTS AND CONTENTIONS :

5. Appellant is brother-in-law (husbands' brother) of the respondent no.1, plaintiff. Sandu Pathan, father of the appellant had left behind the suit property wherein, parties were held entitled to 2/9th share each. Bone of contention is, father of the appellant had left behind a Will, wherein he had bequeathed 1/2 share in the suit property to the appellant. Submission is "Will was in the custody of

appellants' deceased mother" and while the written statement was filed, he had no knowledge of the said Will. It is submitted that, soonafter the appellant came to know about the Will, he had filed applications before the trial Court below Exhibit-42 alongwith a copy of the Will, but it was kept out of consideration. It is submitted, in memo of First Appeal, issue concerning the Will was also raised before the Appellate Court, however, it was not dealt with. Learned Counsel for the appellant, would therefore contend that, both the Courts had committed gross irregularity in decreeing the suit, excluding the Will which had caused gross injustice and prejudice to his rights.

6. I have perused Exhibit-42 dated 14th July, 2008. Nevertheless, though a copy of the Will was filed, appellant did not seek leave to amend the Written Statement. It may be stated that, no efforts were made by the appellant to

adopt appropriate proceedings to claim his rights on the basis of the Will.

7. Whether the alleged gross irregularity committed by the Courts below while conducting the trial and the appeal has caused prejudice to appellants' rights, is the question.

. In terms of Order 8 Rule 9 (Bombay Amendment), no pleadings subsequent to the written statement of the defendant, other than by way of defence to set-off or counter-claim shall be presented, except by the leave of the court and upon such terms as the Court thinks fit. However, the Court, may at any time require the Written Statement or additional Written Statement from any of the parties and fix a time for presenting the same. Admittedly, the appellant did not make efforts to seek leave as contemplated to file additional Written Statement nor had taken recourse to the provisions of Order 8 Rule 8

of the Civil Procedure Code. Infact, appellant could have adopted appropriate proceedings and taken it to the logical end. Nevertheless, it has not been done.

8. The next contention is, the Appellate Court failed to exercise powers under Order 41 Rule 27 of the Civil Procedure Code. I do not see any substance in this argument. Simple reason is, admission of additional evidence is permissible when it is established that “such additional”, evidence could not have been adduced at the first instance with the best efforts. Thus, in consideration of the facts of the case, in my view, the Courts below had not committed irregularity, so as to cause prejudice to the rights of the appellant.

9. Appeal does not give rise to any substantial question of law. The Appeal is dismissed.

10. With dismissal of the Appeal, Civil Application No.1978 of 2015 filed for stay becomes infructuous and does not survive. The same is accordingly disposed of.

(SANDEEP K. SHINDE, J.)

Neeta S.
Sawant

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Neeta S. Sawant
Date: 2021.03.23
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