

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.70 OF 2021
WITH
CIVIL APPLICATION NO.10 OF 2021
WITH
INTERIM APPLICATION NO.1914 OF 2021
IN
SECOND APPEAL NO.70 OF 2021

Sanjay Rama Dambale @ Koli and Anr. ...Appellants

Versus

Jagannath Arjun Dambale @ Koli and
Ors. ...Respondents

....

Mr. G.R. Agrawal with Ms Naiana P. Boraste for the Respondents.
Mr. Nikhil Pujari for the Appellant.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED: 1st NOVEMBER, 2023.

P.C.:-

1. The Appellants herein have challenged the judgment and order dated 08/08/2017 passed by the learned District Judge-8, Nashik in Regular Civil Appeal No.40 of 2015. By the impugned judgment the first Appellate Court dismissed the appeal and confirmed the judgment and decree passed by the learned Civil Judge, Junior Division, Nashik in a suit for partition in Regular Civil Suit No.54 of 2003 and the counter claim filed therein.

2. The Appellants are the original Defendant Nos.2 and 3 and shall be hereinafter referred to as the Defendants. The Respondents are the original Plaintiffs and shall be hereinafter referred to as the Plaintiffs.

3. The dispute is in respect of an agricultural land, Gat No.45 admeasuring 4H 62 R, more particularly described in para 2A of the plaint. The said property shall be hereinafter referred to as the 'suit property'. The suit property was owned by Mahadeo Trimbak Yardi and was tenanted to Arjun, who is the father of the Plaintiff, the original Defendant No.1 and 4 and the grandfather of Defendant Nos.2, 3A and 5. It is the case of the Plaintiff that the suit property was purchased in the name of Defendant No.1 in the capacity as a Manager of the joint family and not in his personal capacity. It is further stated that the purchase price was paid from the income of the suit property. Whereas the Defendant Nos.1 to 3 claim that the property was purchased by Defendant No.1 in his personal capacity under certificate under Section 32(M) of the Bombay Tenancy and Agricultural Lands Act.

4. The learned Trial Court and the first Appellate Court while considering the question whether the land was purchased by Defendant No.1 in his personal capacity or as a manager of joint family property, have taken note of the mutation entry No.1300 at Exhibit 83 and observed that the mutation entry clearly shows that the name of the deceased Defendant-Rama was entered in the revenue record in the capacity of the manager of the joint family and not in his personal capacity. It is observed that the Defendants have not challenged the correctness of the said entry. Moreover, Defendant No.2 admitted in his cross examination that Rama did not have any independent source of income and purchase price was paid from the income of the suit property, which is the tenanted property of Arjun. On the basis of the mutation entry, survey records as well as clear and categorical admission of the Defendants both the courts have rendered concurrent findings that the suit property is not a self acquired property of Rama (original Defendant No.1) and that it was a tenanted property of Arjun and purchased in the name of Rama as a manager of Hindu joint family. The findings recorded by the Trial Court as well as the Appellate Court are based on evidence on record

and are neither perverse nor against the principle of law. Though it is sought to be contended that the the suit was not maintainable, no such defence was raised before the Trial Court or the first Appellate Court.

5. As regards the application for leave to produce additional documents viz. purchase proceedings under Order 41 Rule 27 of CPC, the application does not spell out reasons for the delay in producing the documents. The very defence that the suit property is the self acquired property of Rama (original Defendant No.1) was based on purchase proceedings. Hence, the contention that the Defendants were not aware of the said proceedings cannot be countenanced.

6. In *Union of India vs. Ibrahim Uddin and Anr. (2012) 8 SCC 148* the Apex Court has observed as under:-

“Order XLI Rule 27 C.P.C.

36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC

enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide: K.Venkataramiah v. A. Seetharama Reddy and Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham and Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwarlal and Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy and Ors., AIR 1979 SC 553).

- 37. The appellate court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case,*

pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd.S.K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co. AIR 1978 SC 798).

38. *Under Order XLI , Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].*

39. *It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence*

should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. *The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.*

41. *The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a*

satisfactory judgment.

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48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.”

7. In the instant case, the documents are sought to be produced after more than 20 years from the date of the institution of the suit. No explanation is offered for belated production of documents. Even otherwise, the endorsement below purchase order indicates that the Plaintiff and other brothers had given no objection for purchase of the property in the name of Defendant No.1 as the head of the joint family. Hence, the said documents would not lead to any other inference and are not relevant to remove any lacuna and to pronounce the judgment.

8. No case is made out to interfere with concurrent findings of the courts below. The appeal does not involve any substantial question of law. Hence the appeal is dismissed.

9. In view of the dismissal of the Appeal, the applications do not survive and hence stand disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)