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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 887 OF 2015
WITH
CIVIL APPLICATION NO. 1946 OF 2015
IN
SECOND APPEAL NO. 887 OF 2015**

Shri Adhik Shripati Panaskar ... Appellant/Applicant

vs.

Shri Jaysing Tukaram Kadam ... Respondent

Mr. Dilip Bodake, for Appellant.

Mr. Dhananjay Rananavare for Respondent.

CORAM : GAURI GODSE, J.

DATED : 16th JULY 2024

ORDER:

1. Heard learned counsel for the parties. The plaintiff prefers this Second Appeal to challenge the judgment and decree for partition passed by the First Appellate Court. The appellant had filed a suit for partition and separate possession, which the Trial Court decreed. The Trial Court directed partition of the suit property with a direction to make an equitable partition by deducting a portion admeasuring 135 x13 feet already sold by the plaintiff to a third party. Being

aggrieved by the said decree, the defendant filed the First Appeal by contending that there had already been a partition in 1991, and the plaintiff had sold his share of the property. Hence, the property should be divided accordingly. The First Appellate Court, after considering the documentary as well as oral evidence, accepted the contentions of the defendant, allowed the appeal, and modified the decree of the Trial Court. The First Appellate Court directed that the plaintiff is entitled to claim partition and separate possession of 725 square feet left with him after he sold the property, admeasuring 135 feet X 13 feet out of the total area of the suit property admeasuring 194 ½ feet X 25 ½ feet. It further directed that the plaintiff's area, admeasuring 725 square feet, be allotted to him in the eastern portion of the suit property, admeasuring 194 ½ feet X 25 ½ feet, i.e. to the north of the property, admeasuring 135 feet X 13 feet already sold to the third parties. Thus, the first appellate court directed the appointment of a court commissioner to suggest the location of the plaintiff's 725 square feet in the eastern portion of the suit property.

2. Learned counsel for the appellant submitted that even if the plaintiff has created third party interest in a particular portion of the suit property, the plaintiff would be entitled to an equal share in the suit property by division of the entire suit property. Learned counsel

for the appellant relied upon the Trial Court's findings based on the Court Commissioner map and submitted that the Trial Court had rightly decreed the suit by granting division of the property to the extent of equal shares to both parties. Learned counsel for the appellant thus submitted that the Second Appeal would require consideration on the question of law that the First Appellate Court could not have directed the division of property in a particular manner and has wrongly reversed the preliminary decree for partition and separate possession passed by the Trial Court.

3. Learned Counsel for the respondent submitted that the plaintiff has admitted in his cross-examination that there was a partition in the year 1991, and hence, the First Appellate Court has rightly ordered the division of the property as the plaintiff had acted upon the division made in the year 1991 and sold particular portion from his share to third party. He submits that once the plaintiff has acted upon earlier partition by transferring part of his share to the third party, the plaintiff is not entitled to claim a share in the part of the property allotted to the defendant's share. He submits that since the beginning, the defendant has been in possession of the Western part of the suit, where he runs a flour mill.

4. The learned counsel for the respondent submitted that the

plaintiff had sought to claim partnership rights even in the flour mill business by filing Regular Civil Suit No. 80 of 1994. However, the said suit was dismissed by holding that the plaintiff had no partnership in the business of the flour mill of the defendant. Learned counsel for the respondent also relied upon the decree of injunction passed in Regular Civil Suit No. 111 of 2006 filed by the defendant, where the plaintiff was restrained from obstructing the defendant's exclusive possession of his share in the western portion of the suit property. Learned counsel for the respondent thus submitted that the First Appellate Court rightly considered the property's division in 1991 and modified the Trial Court's decree by directing actual partition and separate possession of the property in possession of the respective parties. He thus submitted that the Second Appeal does not raise any substantial question of law.

5. I have considered the submissions made by both the parties. I have perused the papers. It is not in dispute that the plaintiff and defendant jointly owned the suit property; thus, they had an undivided equal share in the property. It is not in dispute that separate shares at that point in time were not identified for purchasing the suit property.

6. Learned counsel for the respondent is right in relying upon

dismissal of the plaintiff's suit, claiming a share in the flour mill business carried out by the defendant in the suit property in his possession. Learned counsel for the respondent has rightly pointed out the decree passed in the defendant's suit restraining the plaintiff from obstructing the exclusive possession of the defendant on the western side of the suit property.

7. There is no dispute that the plaintiff has created third party rights in a particular separate part of the suit property, which was in the plaintiff's possession. Thus, the plaintiff has not created third party rights with respect to any undivided part of the suit property. However, a specific portion of the western side of the suit property is alienated by the plaintiff. After taking into consideration all these aspects, the First Appellate Court has further examined the oral evidence of the parties and referred to the admission given by the plaintiff that there was a partition in the year 1991, pursuant to which the plaintiff alienated part of the property allotted to his share. Thus, the conduct of the plaintiff supports the contentions of the defendant that there was a partition in the year 1991, and in fact, the plaintiff has acted upon the partition and sold part of the property allotted to his share in which he was independently in possession. The First Appellate Court has, thus, correctly examined the documentary as

well as oral evidence on record and modified the decree for partition by accepting the division of the property in the year 1991 and alienation of the part of the property in possession of the plaintiff.

8. In view of the aforesaid facts of the case, the grounds argued on behalf of the appellant would require a re-examination of the evidence on record, which is not permissible under Section 100 of the Civil Procedure Code, 1908. I do not find any illegality or perversity in the reasons recorded by the First Appellate Court. Hence, the grounds raised on behalf of the appellant would not require any consideration by this Court.

9. The second Appeal does not raise any substantial question of law. Hence, the Second Appeal is dismissed. In view of the dismissal of the Second Appeal, the pending Civil Application is dismissed as infructuous.

(GAURI GODSE, J.)