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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 110 OF 2022
WITH
CIVIL APPLICATION NO. 1051 OF 2019
IN
SECOND APPEAL NO. 110 OF 2022

Pramod Ananda Mangawade ... Appellant

Vs.

Vitthal @ Prakash Balwant ... Respondents

Suryawanshi and Others

Mr. Nilesh Wable a/w. Mr. Umesh Mankapure for the Appellant.

Mr. Siddheshwar B. Kalel for Respondent no.1.

CORAM : GAURI GODSE, J.

DATE : 21st JUNE 2024

P.C.

1. This Second Appeal arises out of a final decree proceeding for partition and separate possession of the house property. The preliminary decree for partition was passed on 9th December 1966. In the final decree proceeding, the appellant, along with another heir of defendant no. 2 and defendant no. 4, filed an appeal challenging the dismissal of their objections. The appeal filed by them was dismissed. The present second appeal is filed by only one of the heirs of defendant no. 2.

2. Learned counsel for the appellant submitted that at the time of passing the preliminary decree for partition, specific directions were issued that while allotting share, the property sold by defendant no. 1 to defendant nos. 2 to 5 be put to the share of defendant no.1. He, therefore, submits that the final decree dividing the property is not in accordance with the directions issued in the preliminary decree.

3. Learned counsel for the appellant further submits that the division of the house property with regard to CTS No. 596 is not disputed by the appellant. However, the appellant has raised an objection to the division of CTS No. 37. He submits that the said house property is not part of the house property described in the suit, and it forms part of the agricultural land.

4. Learned counsel for the appellant thus submits that the final decree proceeding not being in accordance with the original preliminary decree; the question with regard to the executability of the final decree is a question of law that requires consideration.

5. I have perused the papers. Considered the submissions made on behalf of the appellant. A perusal of the operative part of the preliminary decree clearly indicates that at the time of passing the preliminary decree, the trial court had issued directions that while allotting shares of defendant no.1, the property sold by defendant

no. 1 to defendant nos. 2 to 5 should be put to the share of defendant no.1. The said direction is with regard to partition to be effected by the learned Collector for partition of the agricultural land.

6. As regards the house property, the only direction issued in the preliminary decree is granting the plaintiff half share and separate possession through the Court by getting a Court Commissioner appointed.

7. Thus, the plain reading of the operative part of the preliminary decree shows that there were no directions issued for restricting any particular share to be allotted to defendant no.1 with regard to the house property. Hence, I do not find any substance in the first argument raised on behalf of the appellant.

8. With regard to the second argument on the objection that CTS No. 37 does not form part of the house property and that forms part of the agricultural land also does not have any substance. A perusal of the papers does not indicate that any such argument was raised in the final decree proceedings. The objections raised on behalf of the appellant do not contain such objection. Hence, the second argument raised on behalf of the appellant cannot be considered for the first time in the Second Appeal. Even otherwise, the same would amount to reappreciating facts, which is not permissible

under Section 100 of the CPC.

9. There is one more argument raised on behalf of the appellant that the division of the property resulting into two parts consisting of 5.5 feet width is not a practical solution. He, therefore, submits that the said aspect ought to have been considered by the Court Commissioner. The said arguments are also concerning the facts of the case which are dealt with by the Court Commissioner as well as the executing Court while passing the final decree.

10. Both courts have considered the objections raised by the appellant, and a final decree has been passed for dividing the house property. The factual aspect regarding actual division cannot be discussed without appreciating the facts and evidence on record. The said argument also does not raise any substantial question of law.

11. Hence, the Second Appeal does not raise any substantial question of law. Hence, the Second Appeal is dismissed.

12. In view of the dismissal of the Second Appeal, Interim Application No. 1051 of 2019 is dismissed as infructuous.

[GAURI GODSE, J.]