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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 240 OF 2018

Mahadev Vithoba Sale

.....Appellant

Vs.

Bhau Vithoba Sale and others

.....Respondents

Mr. Dhananjayrao D. Rananaware for the appellant

CORAM : GAURI GODSE, J.

DATE : 15th OCTOBER 2024

ORDER:

1. Office remark indicates that the papers are under search. Learned counsel for the appellant has tendered the copy of the second appeal which is taken on record. Office is directed to reconstruct the second appeal.

2. Heard learned counsel for the appellant.

3. This appeal is preferred by plaintiff no. 1 challenging dismissal of his cross objections in the first appeal preferred by original defendant nos. 1 and 2. The trial Court partly decreed the suit granting share to

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the plaintiff in one of the suit properties, survey no. 202/2. Prayer for partition and separate possession in respect of survey no. 202/1 was refused by the trial Court. Hence, defendant nos. 1 and 2 preferred the first appeal to challenge the decree for partition regarding survey no. 202/2. Plaintiff no. 1 had preferred cross-objection to challenge the rejection of his prayer for partition of survey no. 202/1.

4. First Appellate Court dismissed the cross-objection and partly allowed the first appeal regarding re-determination of the share in respect of survey no. 202/2.

5. Learned counsel for the appellant submits that in the absence of any documentary proof shown that there was any partition effected in respect of survey no. 202/2, the Courts have erroneously accepted the case of defendant no. 1 that the suit property was given to the share of their father i.e. Subrao at the time of partition between Vithoba and Subrao. Vithoba is plaintiff's father. He submits that defendant nos. 1, 11 and 12 were sons of Subrao who did not file any written statement and the suit proceeded ex-parte against them. He thus submits that sons of Subrao only contended that survey no. 202/1 was anytime allotted to the share of Subrao. He thus submits that the Courts have

erred in not correctly appreciating the evidence on record, as it clearly indicates that survey no. 202/1 was never partitioned and it was jointly owned by Vithoba and Subrao. He thus submits that in the absence of any proof regarding allotment of survey no. 202/1 in the name of Subrao in the earlier partition, both the Courts erred in dismissing the suit with regard to survey no. 202/1. Learned counsel for the appellant thus submits that second appeal would require consideration on the ground that both the Courts have incorrectly appreciated the pleadings and evidence on record.

6. I have perused the impugned judgments. It appears that defendant nos. 10, 11 and 12 i.e. sons of Subrao did not appear and the dispute the plaintiff's contention that survey no. 202/1 was a joint property of Vithoba and Subrao. However, based on the documentary as well as oral evidence, both the Courts have recorded a finding of fact that survey no. 202/1 was allotted to the share of Subrao. Earlier partition between Vithoba and Subrao is not disputed by the plaintiffs. The First Appellate Court has recorded a clear finding by referring to agreement at Exhibit 120 and the admissions given by plaintiff no. 1 regarding payment of property taxes being separately paid by the respective parties i.e. Vithoba and Subrao in respect of survey nos.

202/1 and 202/2. The first Appellate Court has further even referred to the oral evidence of the witness examined by the plaintiff with reference to document at Exhibit 120. Thus, based on documentary evidence including the revenue record and the oral evidence of the parties, the first Appellate Court has recorded a finding of fact that survey no. 202/1 was allotted to Subrao in prior partition. On perusal of the reasons recorded by both the Courts, it is seen that entire documentary as well as oral evidence is exhaustively discussed by both the Courts. I do not see any illegality or perversity in the reasons recorded by both the Courts.

7. The ground argued on behalf of the appellant would amount to re-appreciation of pleadings and evidence on record which is not permissible under section 100 of Code of Civil Procedure, 1908. Though the suit was filed by two sons of Vithoba, plaintiff no. 2 has accepted the decree for partition only in respect of survey no. 202/2. Present appeal is preferred only by plaintiff no. 1.

8. The Second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed.

[GAURI GODSE, J.]