

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(Civil Appellate Jurisdiction)

SECOND APPEAL NO. 375 of 1993

Rajaram Gopal Govekar,
since deceased through his heirs
and legal representatives

- A] Sumati Rajaram Govekar,
aged 50, Occ. Household,
- B] Gopal Rajaram Govekar,
aged 30, Occ. Service,
R/o. Bombay.
- C] Rushikesh Rajaram Govekar,
aged 28, Occ. Service,
R/o. Bombay.
- D] Nivruti Rajaram Govekar,
aged 26, Occ. Service,
R/o. Kolhapur.
- E] Laxman Rajaram Govekar,
aged 28, Occ. Agriculture,
R/o. Jambhavade, Tal. Kudal.
- F] Ravindra Rajaram Govekar,
aged 20, Occ. Household,
R/o. Jambhavade, Tal. Kudal.
- G] Ramchandra Rajaram Govekar,
aged 22, Occ. Service,
R/o. Vevali, Ambele, Tal. Malwan
- H] Maruti Rajaram Govekar,
aged 18, Occ. Studying
R/o. Jambhavade, Tal. Kudal
- I] Sau. Sunanda Baburao Dhaval,
aged 32, Occ. Household,

R/o.Naradave, Tal.Kankavali,
Distt. Sindhudurg ..

APPELLANTS
Org. Defts.

.. **Versus** ..

Arjun Gopal Govekar,
Agriculturist, R/o. Village
Jambhavade (Bhatwadi)
Tal. Kundal, Distt. Sindhudurg ..

RESPONDENT
Org. Pltff.

...

Mr. S.M.Kamble, Advocate, for appellants.
Mr. P.B.Paranjape, Advocate I/b Ms.Seema Sarnaik, Advocate for
Respondent

CORAM : R.K.Deshpande, J.
DATED : 25th JUNE, 2015.

ORAL JUDGMENT

1] The dispute before the trial Court in Regular Civil Suit No. 45 of 1979 pertains to Survey Nos. 134, 135 and 137. The plaintiff and defendant are real brothers and the claim was for partition and separate possession to the extent of half share of the plaintiff in the suit property. The trial Court recorded the finding that there was already a partition effected of Survey Nos. 134 and 135 between the plaintiff and the defendant on 02.11.1970, which is the document at Exh.40. Hence, the claim for partition and separate possession in respect of this

was rejected. The trial Court found that Survey No. 137 was not covered by this document at Exh.40 and therefore, passed a decree for partition and separate possession in respect of it on 25.04.1985. This was the subject matter of challenge in Regular Civil Appeal No. 144 of 1989 preferred by the original defendant and Civil Appeal No. 150 of 1985 preferred by the plaintiff. Both these appeals were heard together and the lower appellate Court passed a decree for partition and separate possession in respect of Survey Nos. 134 and 135 and maintained the decree passed by the trial Court for partition in respect of Survey No. 137 by its judgment and order dated 27.04.1993. The original defendant is, therefore, before this Court in this second appeal.

2] The appeal was admitted on 02.08.1993 on the substantial questions of law framed in ground Nos. (iii), (iv) and (v) which are reproduced below.

- (iii) That the substantial question of law in the instant case would be as to the interpretation whether the document at Exhibit '40' is a partition deed or it is a memo of partition. In this behalf it ought to be appreciated that the Trial Court had interpreted the said document as being a partition deed, whereas the Appellate Court has treated it as a Memo of Partition. In this behalf it ought to be appreciated that the language of Exhibit

'40' if properly construed is unambiguous and in terms records that partition was effected.

- (iv) Another substantial question of law in the instant case would be as to whether merely because tenanted lands have been purchased under Section 32G the Civil Court will have jurisdiction to entertain a suit for partition where the question as to whether the defendant was the sole tenant or not is to be determined. Especially when the Lower Appellate Court has in the cross Appeal filed by the Appellants in respect of Survey No. 137 which continues to be a tenanted land set aside the decree and remanded the matter to the Trial Court with a further direction to frame an issue regarding tenancy and refer the same to the tenancy authority.
- (v) Another substantial question of law in the instant case would be as to whether the Lower Appellate Court has correctly construed the pleadings of the parties especially the written statement while coming to the conclusion that the right of the Respondent to a share in the suit properties has not been denied by the predecessors of the Appellants, especially when there is a specific denial on record in the written statement that the tenancy rights were not ancestral.

3] The basic question pertains to the Document at Exh.40, dated 02.11.1970, whether this is to be construed as a deed of partition or a family arrangement. Undisputedly, the document divides the shares of parties in Survey Nos. 134 and 135 only. Though much arguments were advanced before the

Courts below and the trial Court has considered it to be the family arrangement, the appellate Court has considered it to be a partition deed. In the absence of registration as required by Section 17 of the Registration Act, the appellate Court has held that the document is not admissible in evidence, though the trial Court acted upon it and recorded the finding that the partition has already taken place.

4] With the assistance of the learned counsels appearing for the parties, I have gone through the document at Exh.40, dated 02.11.1970. It divides the properties Survey Nos. 134 and 135. It is the case of the plaintiff that this was the arrangement agreed upon between the parties on 02.11.1970, but he has raised certain objections regarding unequitable distribution of the properties. In view of this, the lower appellate Court has committed an error in holding that the document is required to be treated as partition deed, which was required to be registered under Section 17 of the Registration Act. If the document is to be treated as a family arrangement, which is borne out from the pleadings in the plaint as well as contents of the document itself, then it requires no registration and the trial Court had rightly, therefore, accepted the same and rejected the claim of the

plaintiff for partition and separate possession in respect of Survey Nos. 134 and 135. In view of this, the substantial questions of law at Sr.No. (iii) and (v) are answered accordingly.

5] Coming to the property which is Survey No. 137, undisputedly, this was a tenanted land and it does not find place in the deed of family settlement dated 02.11.1970 at Exh.40. According to the plaintiff, the funds to purchase the property was provided by him, though certificate under Section 32M stands in the name of the defendant. He submits that it was in his capacity as a Manager/Karta of the joint family. In such circumstances, the trial Court ought to have framed an issue as to whether the plaintiff has established his tenancy right in respect of the land Survey No. 137 and such an issue was required to be referred to the decision by the Tenancy Court as required by Section 70B of the Bombay Tenancy and Agricultural Lands Act. The trial Court, instead of framing such an issue and referring it to the decision of the Tenancy Court, has decided that the plaintiff has established his tenancy right in respect of Survey No. 137. Such a finding is without jurisdiction and the same will have to be set aside. Consequently, the suit will remain pending in respect of the

claim over Survey No. 137. The trial Court will frame the issue of tenancy and refer it to the Tenancy Court for the decision in accordance with law and after receipt of the finding from the Competent Authority, the suit can proceed further on its own merits.

6] In the result, the second appeal is partly allowed. The judgment and decree passed by the lower appellate Court on 27.04.1993 in Civil Appeal No. 150 of 1985 is hereby quashed and set aside and the Regular Civil Suit No. 45 of 1979 filed by the plaintiff to claim partition and separate possession in respect of Survey Nos. 134 and 135 is hereby dismissed and the judgment and decree passed by the trial Court to that extent is maintained..

The judgment and decree passed by the trial Court in Regular Civil Suit No. 45 of 1979 in respect of Survey No. 137 is hereby quashed and set aside. The matter is remitted back to the trial Court to decide the said suit afresh only in relation to Survey No. 137, keeping in view the observations made by this Court.

The parties to appear before the trial Court on 20th July, 2015.

Since both the parties agree that the mutation is

required to be done on the basis of family arrangement dated 02.11.1970 at Exh. 40, they are at liberty to approach the Revenue Authority to carry out such mutation and the Revenue Authority shall treat no objection of both the parties for recording mutation in accordance with the family arrangement. No order as to cost.

(R.K.Deshpande, J.)

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Rvjalit/P.A.