

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.427 OF 2010

Madhukar Krishna Gulekar,]
Age : 52 Yrs., Occupation : Service]
and Agriculturist,]
Residing at Dhokavarde,]
Tal. Alibag, Dist. Raigad.] Appellant

Versus

1. Narayan Vithal Gulekar (*Since Deceased*),]
Through Legal Heirs :-]
1/1 Savita Narayan Gulekar,]
Age : 52 Yrs., Occ. : Household,]
1/2 Pankaj Narayan Gulekar,]
Age : 28 Yrs., Occ. : Household,]
1/3 Sachin Narayan Gulekar,]
Occ. : Household.]
1/4 Vighnesh Narayan Gulekar,]
Age : 24 Yrs., Occ.: Household.]
1/5 Suchita Narayan Gurao,]
Age : 22 Yrs., Occ.: Household.]
All residing at Khandhe Building No.1,]
Room No.1, N.C. Kelkar Marg,]
Dadar, Mumbai – 400 028.]
2. Chintaman Vithal Gulekar (*Deceased*),]
3. Indirabai Krishna Gulekar (*Since Deceased*),]
Through LR :-]
3A. Anusaya Umesh Kir,]
Age : 60 Yrs.,]
R/at Matrudham Society,]

Ground Floor, "A" Wing,]
Room No.4, Samelpada,]
Nalasopara (West), Dist. Thane] Respondents

Mr. Rajiv L. Patil, with Mr. Omkar Warange, for the Appellant.

Mr. Ashok B. Tajane for Respondent Nos.1/1 to 1/5.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 17TH JULY 2018.

ORAL JUDGMENT :

1. Heard Mr. Rajiv Patil, learned counsel for the Appellant, and Mr. Ashok Tajane, learned counsel for Respondent Nos.1/1 to 1/5.

2. This Second Appeal is directed against the impugned 'Judgment and Order' of the Additional District Judge, Raigad-Alibag, in Civil Appeal No.122 of 1988 dated 26th September 1995, thereby confirming the 'Judgment and Decree' of the partition, as awarded by the Court of Joint Civil Judge, Junior Division, Alibag, in Regular Civil Suit No.98 of 1985, decided on 30th April 1988.

3. The Appellant is the Original Plaintiff and he is aggrieved by the partial 'Decree of Partition', as his claim in respect of some lands bearing

Survey Nos.127/12-C-1 and 214/6, situate at Village Dhokovade, came to be rejected by both the Courts below on the ground that, they are the self-acquired properties of Respondent Nos.1 and 2.

4. The facts of the case are not in the realm of dispute at all. The relationship between the parties is admitted. It is not disputed at all that, Dharma was the forefather and the common ancestor. He was having two sons by name Vitthal and Pandurang. The Plaintiff is the son of Pandurang; whereas the Defendants are the sons of Vitthal. It is further not disputed by the Defendants that the suit lands bearing Survey Nos.196/5 and 198/2 of Village Dhokovade are the joint family properties and, accordingly, the Trial Court and the Appellate Court have allowed the Suit for partition filed by the Appellant-Plaintiff in respect of separation of his share in the suit property. However, as regards the land bearing Survey Nos.127/12-C-1 and 214/6, a specific contention was raised by Respondent Nos.1/1 to 1/5 that, they were the self-acquired properties of their father Vitthal, who was having his own source of income, namely, the business of tailoring, and, therefore, they cannot be the subject matter of partition. As stated above, both the Trial Court and the Appellate Court have accepted the said contention and rejected the claim of the Appellant for partition of those two pieces of lands.

5. While challenging this concurrent finding of the fact, as recorded by the Trial Court and the Appellate Court, the submission of learned counsel for the Appellant is that, there is absolutely no evidence to show that the alleged partition between the brothers had taken place in the year 1925. It is submitted that, no 'Deed of Partition' is produced on record. Conversely, the evidence on record, all along, shows that, though both Vitthal and Pandurang were residing separately, the properties were continued to remain joint and that is why both the Courts below have granted the 'Decree of Partition' in respect of the two lands bearing survey Nos.196/5 and 198/2. It is further submitted that, the partition, if at all had taken place in the year 1925 itself, there was no question of granting any 'Decree of Partition' now in respect of these two lands also. Therefore, it is urged that, the case of the partition, which is put up by Respondent Nos.1/1 to 1/5-the Defendants, was not proved on record and hence, the Second Appeal was admitted on the following substantial question of law :-

- (i) *Whether the Court can arrive at the conclusion that, there was a valid partition in the family property, in the absence of documentary evidence? It is the submission of the Appellant that, unless partition of the Joint Hindu Family is proved by documentary evidence, i.e. 'Partition Deed', the presumption under the Hindu Law is in the favour of the jointness of the family.*
- (ii) *Whether mere oral evidence of the one of the member of the Joint Hindu Family, without producing any documentary evidence in support of oral evidence*

regarding the alleged oral partition, that took place about 50 years back, can be sufficient to prove the alleged partition; especially when other member, who is minor at that time and is disputing the said alleged partition?”

6. Both these substantial questions of law pertain to 'whether the Courts below can arrive at the conclusion that, there was valid partition in the joint family property, in the absence of any documentary evidence and merely on the oral evidence of members of the joint family. It is argued that, unless partition of the joint family property is proved by documentary evidence, i.e. 'Partition Deed', the presumption under the Hindu Law is in favour of the jointness of the family. Therefore, if any properties are purchased by the Respondents-Defendants while the family was joint, it has to be presumed that the said acquisition was for and on behalf of the joint family and out of the income from the joint family.

7. However, in my considered opinion, the legal position is also equally well settled that, if any acquisition is made by any individual member of the joint family, even during subsistence of the jointness of the family, then, the burden to prove that the said acquisition was from the income of the joint family lies on the person, who asserts it to be so. Here in the case, admittedly, as regards these two lands bearing Survey Nos.127/12-C-1 and 214/6, both these lands were purchased by the

father of Defendant No.1 and Defendant No.1 himself in their own names and hence, onus or burden was upon the Appellant-Plaintiff to show that they were purchased out of the income from the joint family. However, there is nothing on record to show that the income from the joint family properties, namely, the lands bearing Survey Nos.196/5 and 198/2, was sufficient to form as a nucleus to purchase these two lands. Especially in the present case, the evidence on record clearly goes to prove, as admitted by all the witnesses, that Vitthal was doing his own independent business of tailoring. Thus, when Vitthal was, admittedly, having his own independent source of income and these two lands were purchased in the names of Vitthal and Defendant No.1, then, the burden was heavy on the Appellant-Plaintiff to prove that these two lands were purchased from the income from the joint family.

8. To prove this, it was necessary first, to show that there was any income from the joint family, which could have formed as a nucleus for the subsequent acquisition. However, no such evidence is produced on record. Way back in the year 1955 itself, the lands were purchased by the Defendants from their own earnings. In such situation, in the absence of any evidence proving that these lands were purchased from the income of the joint family and joint family was having sufficient nucleus from its income to purchase these properties and in the light of the evidence that Vitthal was having his own independent source of

income, like the business of tailoring, no fault can be found in the impugned 'Judgment and Decree' of the Trial Court and the Appellate Court, when they refused the relief of partition in respect of these two lands to the Appellant-Plaintiff.

9. The question whether the partition had taken place in the year 1925 is not at all relevant. As I said earlier, assuming and accepting that the family was joint, the burden was upon the Appellant-Plaintiff to prove that these two lands were purchased out of the income of the joint family, which they failed to prove. The concurrent finding of the fact recorded by the first Appellate Court thus remains unassailable.

10. Hence, the Second Appeal stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]