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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.239 OF 1996.
WITH
CIVIL APPLICATION NO.734 OF 1998
IN
SECOND APPEAL NO.239 OF 1996.**

1] Ramchandra Laxman Dalvi (since deceasedd)	]	
Through His legal heirs.	]	
	]	
1/1) Smt. Sunanda Rmchandra Dalvi,	]	
Occn. Household	]	
	]	
1/2) Shashikant Ramchandra Dalvi	]	
Age : adult, Occn. Business.	]	
	]	
1/3) Prabhakar Ramchandra Dalvi	]	
Age: adult, Occn. Busines	]	
	]	
1/4) Sandip Ramchandra Dalvi	]	
Age: adult, Occn. Agriculturist	]	
	]	
1/5) Kum Sangita Rmchandra Dalvi	]	
age: adult. Occn. Household	]	
	]	
1/6) Sou. Raman Krishna Patil	]	
adult. Occn.household	]	
	]	
1/7 Sou. Surekha Suresh Dalvi	]	<u>Appellants</u>
age: adult. Occn. Household	]	Original
	]	Defendants.
1/8 Sou. Dipika Dipak Patil	]	
adult. Occn. Household	]	
	]	
Nos. 1/1 to 1/6 residing at Mandave	]	
Tal. Alibag, Dist. Raigad	]	
1/7 and 1/8 residing at Yayshet,	]	
Ral. Alibag, Dist. Raigad	]	

- 2] Shri. Harsha @ Harishcandra Dalvi
 Since deceased through his L.R.
 2/1) Smt. Sutyavavati Harischandra Dalvi
 Age: adult, Occn.Household
- 2/2 Pradip Harischandra Dalvi
 age: adult,Occn. Business
- 2/3 Pravin Harischandra Dalvi
 age: adult,Occn. Business
- 2/4 Pratap Harischandra Dalvi
 age: adult,Occn. Business
- 2/5 Sunil Harischandra Dalvi
 age: adult,Occn. Business
- 2/6 Pratibha Hanumant Patil
 Adult, Occn.household
- 2/7 Samiksha Ganesh Mokal
 adult, Occn.household
 all are residing at Dhokavade,
 Tal. Alibag, Dist.Raigad
- 3] Sitabai @ Shantabai Namdeo Mhatre
 (Since deceased through Legal heirs)
- 3A. Mahadeo Namdeo Mhatre
 age: 52 years, Occn.Agri.
 r/o village: Satavale
 Tal.Alibag, Dist.Raigad
- 3B. Sugandha Dattatray Bhagat
 age: 52 years, Occn.Agri.
 r/o village: Satavale
 Tal.Alibag, Dist.Raigad
- 3C. Shobha Narayan Naik
 age: 57 years, r/o village Parulpada
 tal.Alibag. Dist.Raigad

Appellants
 Original
 Defendants.

- 4] **Anandibai Krishna Dalvi (deleted)**]
- V/s.
- 1] Harischandr Krishna Dalvi]
age: 47 years]
- 2] Jagannath Krishna Dalvi]
(Since deceased through Legal heirs.]
- 2A. Prabhavati I.Dalvi]
adult. Occ.Household]
- 2B. Nitin J. Dalvi,]
adult, Occn. Agri.]
- 3] Gajanan Krishna Dalvi]
age:38 years]
- 4] Ms. Kusum Krishna Dalvi] Respondents.
age: 34 yrs.] respondent
all residing at Mandwa] Nos. 1 to 4
Taluka:Alibag, Dist.Raigad] Original
Plaintiffs.
- 5] Anosh Shroff]
age:44 years, Occn.Agriculturist/Advocate] Respondent
Nos. 5 to 7
- 6] Anita Shroff] subsequent
age: 33 Occn. Agriculturist] Purchasers
- 7] **Sou. Suhasini Ketu Shroff (since deceased)**]
[deleted]]
- 1 to 6 r/o Thal,. Tal. Alibag]
District: Raigad.]

Mr. G. N. Salunke a/w Mr. P.A. Pol, Mr. S.S. Suryavanshi, Mr. Rajesh Darvesh, Mr. Ranjit S. Hatkar, for the applicants.
Mr. S. Karndikar a/w Mr. Suresh Sabrad, Ms. Sonal Dabholkar, for the respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 2nd AUGUST, 2018.

JUDGMENT :

1] Heard learned counsel for the appellants and respondents.

2] This Second Appeal is directed against the judgment and order dated 20th April, 1995, passed by the District Judge Raigad, Alibag, thereby allowing Regular Civil Appeal No.63 of 1989, preferred against the judgment and decree dated 13.3.1989, passed by the Joint Civil Judge Senior Division, Alibag, Raigad, in R.C.S. No.158 of 1987.

3] The appellants are the original defendants. The suit was filed against them by respondent Nos. 1 to 4, for partition and separate possession of their share in the suit lands, which are totally four, bearing Survey Nos.72/8, 26/1, 36/8 and 37/6, situate at village Dhokavade, Taluka Alibag.

4] As per case of respondents, their deceased father Krishna and original defendant Nos.1 and 2, namely Ramchandra and Hasha @ Harischandra were step brothers. Their father Laxman has performed two marriages. Out of the first marriage, son by name Krishna was born. Plaintiff Nos 1 to 3 are the sons and plaintiff No.4

is the daughter of Krishna. Original defendant No.4 was the wife of Krishna. Defendant Nos 1 and 2 are the sons born to Laxman from his second wife. According to the plaintiffs, defendant No.3 Sitabai, who was the daughter of Krishna, has relinquished her right in the suit property in view of her marriage.

5] It was the contention of the plaintiffs that all these suit properties were ancestral family properties of their grand father Laxman and he was in possession and cultivation of these lands as protected tenant. Hence, on the Tillers' day with effect from 1st April, 1957, Laxman has become owner thereof. On the death of Laxman, therefore, his sons viz. Krishna, the plaintiffs' father and defendant Nos.1 and 2, inherited those lands as joint family property. The plaintiffs are, therefore, having 1/3rd undivided share in the suit lands. However, defendant Nos 1 and 2 tried to enter their names alone, in the record of rights of the suit lands except for land bearing survey No.26/1 the half portion of which was given in the separate cultivation of Krishna, by his father. The plaintiffs are, hence, constrained to file this suit for partition and separate possession of their 1/3rd share in all the four suit lands.

6] This suit came to be resisted by defendant Nos. 1 and 2 denying that the suit lands were ancestral joint family properties. It was submitted that after the death of Laxman, these lands being in

cultivation of defendant Nos 1 and 2 alone, they have become absolute owners thereof. Their names were accordingly mutated in the record of rights, in view of the provisions of Section 40 Bombay Tenancy and Agricultural Lands Act, 1948. By way of additional written statement, it was contended that the land bearing Survey No.37/5 is also the joint family property, which is purposely not included by the plaintiffs in the suit, and defendants are also entitled to get their 1/3rd share in the said land.

7] In support of their case, plaintiff No.1 Harishchandra examined himself; whereas on behalf of defendants, defendant No.1 Ramchandra and witnesses by name Narayan and Jayant came to be examined.

8] On appreciation of their evidence, the trial Court was pleased to hold that out of the four suit lands, as regards the land bearing Survey No.37/6, the 7x12 extracts thereof clearly go to show that it is standing in the name of Yeshwant Pawar and the evidence of defendant No.1 goes to show that the said land is in possession of one Shridhar Rghunath Mhatre. Therefore, in the absence of any documentary evidence produced on record to show that at any time, the names of plaintiffs, the defendants or their predecessors were ever appearing, in the record of rights of the said land, the trial Court was pleased to hold that in respect of the said land, the plaintiffs

cannot have any claim for partition, as it is not belonging to the family.

9] Even as regards the land bearing survey No.37/5, it was held by the trial Court that the said land was given long back in the possession of Krishna; thereafter it came in possession and ownership of Sitaram, the eldest son of Krishna and then with his mother defendant No.4 Anandibai Krishna. Thus, the trial Court held that as partition of the joint family appeared to have been effected long ago, plaintiffs are not entitled to the share, in the remaining suit lands also which were given to share of defendant Nos. 1 and 2, and has, thus, dismissed the suit

10] When, the plaintiffs challenged this judgment and decree of the trial Court before the first Appellate Court, the first Appellate Court, was however, pleased to reverse the said judgment and decreed the suit. It was held by the first Appellate Court that tenancy rights are inheritable in view of section 40 of the Bombay Tenancy and Agricultural Lands Act, 1948 and therefore, even if 32M Certificate, is issued in the name of defendant Nos. 1 and 2, it relates back to the original tenant, their father Laxman Hari Dalvi. Therefore, the plaintiffs are having 1/3rd share in all the suit lands. Accordingly, the first Appellate Court declared that the plaintiffs and defendant No.4 together are entitled to receive 1/3rd share in the suit

lands and to get it partitioned by metes and bounds.

11] Being aggrieved thereby, the original plaintiffs have approached this Court. This appeal is admitted on the ground Nos. 2 and 3 as set out in the Appeal Memo, which are as follows :-

“2. Whether the first Appellate Court has not properly construed the provisions of Section 40 of the Bombay Tenancy and Agricultural Lands Act, 1948; and committed an error in allowing the tenanted property to go to the benefit of all the legal heirs, irrespective of whether they are willing or otherwise?

3. What is the effect and true interpretation of Section 40 of the Bombay tenancy and Agricultural Lands Act, 1948?”

12] Thus, both these grounds pertain to the applicability of Section 40 of the Bombay Tenancy and Agricultural Lands Act, 1948.

13] Here in the case, the submission of learned counsel for the appellants, is that the appellants have no grievance about the partition of the land bearing Survey No.26/1. It was admittedly the tenanted property of their grand father and after his death, all his legal heirs become entitled to inherit the same. However, as regards

the land bearing Survey No.37/6, it is submitted by learned counsel for the appellants that the trial Court has held that the land bearing survey No.36/6 is not at all belonging to the family of plaintiffs and defendants and it is standing in the name of Yeshwant Pawar. Therefore, the said land cannot be the subject matter of the partition as none of the party has produced on record evidence to prove that they are having any concern therewith. It is urged that the trial Court has accordingly rejected the partition in respect of this land. However, the Appellate Court has, without considering this aspect, allowed the entire appeal and granted partition in respect of this land also. In my considered opinion there is much substance in this submission and the judgment of the Appellate Court needs to be quashed and set aside to this extent.

14] As regards the remaining three suit lands, bearing Survey No.72/8, 26/1 and 36/8, admittedly, they were in cultivation and possession of Laxman, Krishna's father, as tenant. He died on 6.2.1961 that is after the Tillers' day 15.4.1957. Therefore, as on the Tillers' day, ownership of the lands vested in the name of Laxman, as a result of legal fiction. Laxman has died without executing a will, therefore, along with the defendant Nos. 1 and 2 being his sons, who were entitled to inherit those lands, similarly the plaintiffs being the grand-sons of Laxman, they were also entitled to get their shares in

the said lands as they had also inherited the tenancy. There is nothing on record to show that defendant Nos. 1 and 2 had purchased these lands or 32 M certificate under Bombay Agricultural Lands and Tribunal Act, 1948, was issued in their individual capacity. Mere cultivation of the suit lands by defendant Nos. 1 and 2, after the death of Laxman, cannot be sufficient to hold that plaintiffs were unwilling heirs and therefore, to deprive the plaintiffs' from their share in the said lands. Hence, it has to be held that they have acquired the rights over the said lands under Section 40 of the Bombay Tenancy and Agricultural Lands Act. There is nothing on record to show that the plaintiffs or their father Krishna, had at any time shown their unwillingness to continue the tenancy or to remain in possession thereof. In the circumstances, plaintiffs cannot be deprived from their share in the suit lands. Therefore, the first Appellate Court has rightly decreed the suit of the plaintiffs to the extent of these three lands, namely Survey Nos.26/1, 72/8 and 36/8.

15] As regards land survey No.37/6, I have already held that plaintiffs and defendants have no concern therewith and hence that land is required to be excluded from the consideration. The judgment and decree of the Appellate Court is required to be set aside to that extent only.

16] Accordingly, the Second Appeal is partly allowed.

17] The impugned order passed by the First Appellate Court is confirmed in respect of partition of suit lands bearing survey No.72/8, 36/8 and 26/1.

18] The impugned order passed by the First Appellate Court, decreeing the suit in respect of survey No.37/6 stands quashed and set aside.

19] In view of disposal of Second Appeal, Civil Application No.734 of 1998 stands disposed off in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]