

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

**SECOND APPEAL NO. 837 OF 2017
WITH
CIVIL APPLICATION NO. 1383 OF 2017
AND
CIVIL APPLICATION NO. 1384 OF 2017**

Shri Keshavrao Shivpuri Gosavi	...Appellant
vs.	
Madhavpuri Shivpuri Gosavi & Anr.	...Respondents

Mr.Sachin Gite for Appellant.
Mr.Rameshwar N. Gite for Respondents.

CORAM : S.C. GUPTE, J.

DATE : 2 DECEMBER 2019

PC. :

This second appeal challenges concurrent judgments and decrees passed by two courts below in a suit for declaration and perpetual injunction filed by Respondent No.1 (original plaintiff). The plaintiff's suit was on the footing that there was partition of properties as between the plaintiff and defendant No.1 (who is the Appellant before this court) and the predecessor of defendant No.2, all three being real brothers entitled to the suit property. In the present appeal, we are particularly concerned with Gat No.177. It appears that there was an oral partition between the brothers, which was later confirmed by a document, being Agreement dated 11 March 2004, duly signed between the brothers. Under this partition, 57 R land out of Gat No.177 admeasuring about 1 hectre 27 R, on the southern side of the plot, was given to Bhimpuri Gosavi, brother of the parties, who has since transferred the same in favour of defendant

No.2. Defendant No.2 does not contest the suit. Under this partition, another portion of Gat No.177, admeasuring 57 R, was to be given to defendant No.1, whilst 15 R (i.e. 13 R cultivable land and 2R pot-kharaba) was to be given to the plaintiff. Based on the oral partition and also taking into account the agreement of 11 March 2004 (Exhibit 56 before the courts below), the lower appellate court decreed the plaintiff's suit for possession of his share and a perpetual injunction against the defendants from interfering with such possession. The main difficulty in the matter is that whereas the oral partition as well as the written affirmation of such partition in the form of Exhibit 56 has been proved at the trial, there is nothing to indicate whether any physical partition on the basis of the oral partition followed up by Exhibit 56 actually took place and on the basis of which the parties could claim to be in peaceful physical possession of their respective portions. The courts below do not appear to have applied their mind to this vital aspect of the matter. Whereas the trial court has not considered Exhibit 56 at all, the lower appellate court, despite considering Exhibit 56, has not considered this particular aspect. Exhibit 56 itself indicates that physical partition on the basis of what was agreed between the parties, and what was reflected in Exhibit 56, was to happen at a later date. The question is whether that did happen or not. It is agreed between learned Counsel for the parties that for considering this particular aspect, the matter may be remitted to the lower appellate court for a decision in accordance with law and in the meantime, the second appeal may be kept pending.

2 Accordingly, the impugned orders of the lower appellate court and the trial court are stayed pending hearing of this second appeal. Regular Civil Appeal No.12/2011 is remitted to the District Court at Niphad

for framing of an issue on existence or otherwise of physical partition of Gat No.177 and hearing the parties and passing an order on the same. This order is passed under Order 41 Rule 25 of the Code of Civil Procedure. Since the parties respectively claim possession of the suit property, though different portions out of the same gat number, which are as noted above, yet unidentified at least on record, the stay of the impugned judgments and decrees is subject to the condition that neither of the parties shall create third party rights in respect of the suit property or portions of Gat No.177 respectively claimed to be in their possession.

3 Considering the fact that this is an old matter, the District Court is requested to dispose of the appeal on remand as expeditiously as possible and preferably within a period of six months from today. Either party may bring this order to the notice of the District Court by producing an authenticated copy of this order, whereupon a schedule of hearings may be fixed by the Court.

4 In view of the order passed herein, the civil applications are disposed of. The Appellant will, however, be at liberty to take out suitable application/s in case, after disposal of the regular civil appeal in accordance with this order, the second appeal herein requires further consideration. The second appeal will be heard, after papers are received from the District Court after deciding the matter in accordance with this order.

5 All concerned to act on the authenticated copy of this order.

(S.C. GUPTE, J.)