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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 930 OF 2016
WITH
CIVIL APPLICATION NO. 3275 OF 2017
IN
SECOND APPEAL NO. 930 OF 2016**

1. Shivling s/o Vithoba Kamble,
Died, through his L.Rs.
- 1/1. Lahubai Shivling Kamble,
Age: 72 years, Occu: Household
- 1/2. Vithabai Bhawan Gaikwad,
Age: 52 years, Occu: Household
- 1/3. Chayabai Shesherao Kamble,
Age: 52 years, Occu: Household
- 1/4. Satish s/o Shivling Kamble,
Age: 47 years, Occu: Labour
- 1/5. Gendabai Pralhad Kamble,
Age: 44 years, Occu: Household
- 1/6. Mayabai Tukaram Suryawanshi,
Age: 42 years, Occu: Household
- 1/7. Nageenbai Ranjit Kamble,
Age: 39 years, Occu: Household
- 1/8. Shakuntalabai Netaji Kamble,
Age: 36 years, Occu: Household
- 1/9. Yogesh Shivling Kamble,
Age: 31 years, Occu: Agri.,

All R/o. Kharosa, Taluka AUSA,
Dist. Latur, now at Ashok-Nagar,
Nilanga, Taluka Nilanga,
Dist. Latur

..APPELLANTS

VERSUS

1. Kashinath s/o Vithoba Kamble,
Age: 75 years, Occu: Agriculture,

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R/o Kharosa, Taluka Ausa,
District Latur

* Rawan S/o Vithoba Kamble,
(dead)

..RESPONDENTS

Mr M. L. Dharashive, Advocate for appellants

CORAM : N.W. SAMBRE, J.

DATE : 8th June, 2017

ORAL ORDER

The appellant-original plaintiff filed Regular Civil Suit No.363 of 2007 contending that he along with defendant no.1 Kashinath went to Dubai and came back in 1977 and out of the income earned at Dubai, jointly purchased the agricultural land Gat No.182, ad measuring 2 Hectares and 65 R and as such suit for partition of joint family property by metes and bounds was brought in action. The partition of the ancestral house was also sought.

2. Another brother Rawan was added as defendant No.2, who had not filed written statement and after whose death, the legal representatives were not brought on record in the proceedings. The suit came to be decreed by judgment and order dated 26th September, 2016 passed by learned Civil Judge Junior Division, Ausa. Feeling aggrieved thereby, respondent-defendant No. 1 preferred appeal being Regular Civil Appeal No. 205 of 2011 in the Court of District Judge, Latur by which time the original plaintiff died and his legal representatives were brought on record. The said appeal came to be allowed and the judgment and decree passed

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in Regular Civil Suit No. 363 of 2007 came to be set aside and the suit of the plaintiff came to be dismissed. Thus, the present second appeal.

3. Heard Mr Dharashive, learned Counsel appearing on behalf of appellants -plaintiffs. According to him, in the aforesaid backdrop, if the claim of the present appellants-plaintiffs of existence of joint family and common nucleus is appreciated, in view of presumption in favour of the appellants, burden was on the defendant, i.e. respondent herein to prove that the suit properties were his self acquired properties. In addition, he would place reliance upon certain factual matrix so as to submit that both the brothers, i.e. appellant and defendant No.1 since were working at Dubai and when the agricultural property was purchased in the name of defendant No.1 after the appellant parted with the amount, the probability as is inferred by the Trial Court appears to be just and proper. He would then try to prevail upon the Court to demonstrate that even if the amount of consideration for purchase of property was shown to have been withdrawn by defendant No.1 from his bank account, there is no material to demonstrate that the said amount withdrawn in cash was used for the purpose of consideration towards purchase of the agricultural land in question. According to him, this Court in the aforesaid background should frame a substantial question of law and answer the same in favour of the appellants.

4. None appears on behalf of the respondent.

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5. With the assistance of Mr Dharashive, I have perused the original record and proceedings and also the findings recorded by the Courts below. In a suit for partition and separate possession, when a plea to above effect is raised, the burden is on plaintiff who comes before the Court with a claim that the property is a joint family property which was purchased out of the joint family income and there was a common nucleus. Appropriate support to that effect could be withdrawn from the judgment of this Court in the matter of **Ku. Suman Vishnu Pathak & Ors. Vs. Smt. Usha W/o Prbhakar Rao Kolapkar & Ors.**, reported in **2013 (2) Mh.L.J. 268**. In addition, from the aforesaid judgment it could be noted that the burden was on the appellants-plaintiffs to prove that the suit property was purchased out of joint family income. The appellants have neither established nor proved that the nucleus was the respondent No.1 i.e. Defendant No.1 to the proceedings and it is he who had withdrawn the amount or parted with the consideration for purchase of the land in the name of defendant No.1. Apart from above, the evidence reflects that defendant No.1 had withdrawn the amount from his bank account on 31st March, 1997, when the sale deed (Exh.65) was executed in his favour. Apart from above, it is required to be noted that defendant No.1 through his cogent evidence has established the fact as regards purchase of the property for valuable consideration of Rs.9,000/- from out of his own income.

6. Although the Trial Court had recorded the issues at Exh.42, yet proceeded to decide the issue as regards status of the agricultural land as

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an ancestral property purchased from the joint family funds on the basis of only probabilities. Once there was evidence available on record to infer that the amount was parted by respondent No.1-defendant for purchase of the property, the lower appellate Court, in my opinion, has rightly brushed aside said observations made by the Trial Court and dismissed the suit of the plaintiff for partition.

7. As stated earlier, the judgment of this Court in the matter of Suman (supra), in my opinion, squarely governs the case in hand as the appellants-plaintiffs have neither discharged their burden nor proved their case on preponderance of probabilities for seeking partition of the property, as neither the nucleus nor the jointness of the property was proved.

8. As a result, the second appeal does not involve any substantial question of law and stands dismissed accordingly. In the circumstances there shall be no order as to costs. In view of dismissal of the second appeal, Civil Application No.3275 of 2017 does not survive and stands disposed of accordingly.

(N.W. SAMBRE, J.)

amj