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

**SECOND APPEAL NO.194 OF 2018
WITH
CIVIL APPLICATION NO.275 OF 2018
IN
SECOND APPEAL NO.194 OF 2018**

Ganpat Trimbak Shinde (decd)
Through: Devidas Ganpat Shinde
and ors

... Appellants.

V/s.

Shashikant Narayan Shinde and
ors

... Respondents

Mr. Arvind Aswani i/by Jagdish G. Reddy (Aradwad)
for the appellants.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 4th JULY, 2018.

P.C. :

1] Heard learned counsel for the appellants.

2] This Second Appeal is preferred against the judgment and decree dated 11.12.2017, passed by District Judge-8, Nashik in Regular Civil Appeal No.46 of 2017, which was preferred against the judgment and decree of partition dated 4th May 2012, in Special Civil Suit .No.471 of 2006, passed by Civil Judge Senior Division, Nashik.

3] Respondent Nos.1 to 8 had raised specific contention that

the suit properties were already partitioned orally in the year 1968 itself. Since then, all the parties are cultivating the lands allotted to their shares and they are also having partition in respect of house properties. It was specifically contended that land bearing Gat No.279 is self acquired property of Narayan - the father of defendant Nos 1 to 3.

4] On the respective pleadings of the parties, the trial Court framed the issues and held that the appellant has failed to prove that the suit properties are the ancestral joint family properties and therefore, dismissed the suit. The first appellate Court has also confirmed the said finding which is now challenged in the Second Appeal.

5] By placing reliance on the judgment of the Apex Court, in the case of **Chinhamani Ammal -vs- Nandagopal Gounder and anr [(2007) 4 SCC 163]**, the submission of learned counsel for the appellant is that as in law there exists presumption in regard to the continuance of joint family property, the person who raises the plea of partition is required to prove the same. Even separate possession of portion of the property of the co-sharers itself, would not lead to presumption of partition as several other factors are required to be considered therefor.

6] Here in the case, according to learned counsel for the

appellant, both the trial Court and the Appellate Court have committed an error in relying upon the entries in the 7x12 extracts and holding that the parties are having separate cultivation. It is submitted that even accepting that there was partition of the house property, it was not correct on the part of trial Court and the Appellate Court to hold that all the joint family properties are partitioned by metes and bounds. The onus to disprove the presumption in favour of continuance of the joint family was upon the respondents which they have not discharged by convincing and cogent evidence on record. Despite that, both the Courts below have dismissed the appellant's suit for partition. Hence, interference is warranted in the said judgment and decree.

7] However, the perusal of the judgment of trial Court and the Appellate Court goes to show that after considering this contention of the appellant in the light of the evidence, adduced by him and also in the light of other evidence on record, it has been held that the properties are already partitioned between the parties. Not only that, since 1971 even the house properties are separated. The parties are paying the share of the their house taxes and their names are also accordingly mutated.

8] Even as regards the landed properties, documents produced on record shows that on 7.1.1979 itself parties were put in

separate possession of their respective shares and accordingly their separate khatahs were opened. Mutation entries are also made to that effect. At no point of time since 1979, the appellant had raised any contention or dispute about the suit properties still being the joint family properties.

9] The entire cause of action, for filing of the suit appears to be the amount of compensation which respondent No.1 has received in respect of the land bearing Gat No.279. However, in respect thereof also, there is Consent Deed executed by the appellant himself on 9.8.2009 itself, in which he has admitted that the said land belongs to respondent No.1 and he has no concern therewith as it was self acquired property of respondent No.1. In the said Consent Deed, he has also admitted mutual partition in respect of the other properties. As held by the both Courts below, if the appellant had any grievance about this Consent deed or the signature thereon, he should have lodged the complaint immediately or at least should have filed the suit for partition at that time itself. However, he has not done so. Neither he has made complaint nor he has filed suit immediately. He has filed this suit in the year 2010.

10] Moreover, though it was contended by him that he and respondent No.1, were cultivating this land bearing Gat No.279 turn by turn, as held by the Courts below, the entries in the 7x12 extract

do not support this contention.

11] Thus as both the Courts below have appreciated the entire evidence on record in its proper perspective and as no substantial question of law is raised, the Second Appeal holds no merit and therefore, stands dismissed.

12] It is also submitted that while awarding compensation to respondent No.1 alone, no proper enquiry was made by the Land Acquisition Officer. However, in my considered opinion, this contention cannot be raised in this proceeding. It should have been raised in the Acquisition Proceeding.

13] In view of dismissal of Appeal itself, Civil Application No.275 of 2018 becomes infructuous and the same is disposed of accordingly.

[DR.SHALINI PHANSALKAR-JOSHI, J.]