

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

SECOND APPEAL NO.784 OF 2018

Sambhaji Manohar Shingare

... Versus ...

Manohar Eknath Shingare (Died) through LRs.

...

Mr. P.D. Suryawanshi, Advocate for the appellant

Mr. S.N. Lale Yelwatkar, Advocate holding for Mr. N.B. Khandare for
respondent Nos.3, 5 and 7

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07th MARCH, 2019

PER COURT :

1 Present appeal has been filed by the original plaintiff. He had filed R.C.S. No.151/2002 (old R.C.S. No.296/2000) before Civil Judge Junior Division, Dharur, Dist. Beed for partition and separate possession. He had come with the case that he as well as defendants are having agricultural land bearing Sy.Nos.1/2/E, 148/K/216, 148/K/17, 148/K/17, 148/Ko/18, 148/Kau/19, 148/Kha/20, 148/Khi/21, 245 and 624/A situated at Dharur, Tq. Dharur, Dist. Beed. It is also contended that they are having house

property bearing Municipal House No.1-294 (old) and 2-222 (new) in the same town. Some of the properties are ancestral and some are purchased by them from joint nucleus. According to him, he as well as defendants are the joint family members. Defendant Nos.1 and 2 are his parents, defendant Nos.3 to 6 are his brothers and defendant No.7 is nephew (son of defendant No.3). It is stated that the properties stood in the name of defendant Nos.3, 5 to 7 are purchased out of joint family income. He has share in the same. When he demanded his share to be separated, defendants refused. Hence the suit.

2 Defendant No.1 filed written statement at Exh.45 denying all the allegations of the plaintiff. It is stated that partition took place before about 20 years between him, plaintiff and other defendants and since then they are residing separately. He has also stated that the properties which are standing in the name of defendant Nos.3, 5 to 7 are self acquired properties of those defendants. Thereafter, defendant Nos.3, 5 to 7 filed written statement, so also separate written statement was filed by defendant No.6. All of them have stated that the properties, which are standing in the name of defendant No.3, 5 to 7 are not joint family properties, it is self acquired properties of the respective defendants.

3 Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record learned Trial court had partly decreed the suit. It is declared that plaintiff is entitled to have 1/7th share in the ancestral property. The suit in respect of properties standing in the name of defendant Nos.3, 5 to 7 was dismissed by the learned Civil Judge Junior Division, Dharur.

4 Feeling aggrieved by the said Judgment and Decree the original plaintiff approached District Court, Majalgaon, Dist. Beed by filing Regular Civil Appeal No.65/2010. It was heard by learned Adhoc District Judge-1, Majalgaon and after hearing both sides the said appeal came to be dismissed on 11.11.2016. Hence, present Second Appeal.

5 Heard learned Advocate Mr. P.D. Suryawanshi for appellant and learned Advocate Mr. S.N. Lale Yelwatkar holding for Mr. N.B. Khandare learned Advocate for respondent Nos.3, 5 and 7. It has been vehemently submitted on behalf of the appellant-plaintiff that both the Courts below have not considered that there was nucleus between the plaintiff and defendants. The factual and legal aspects have not been considered properly. When there was no partition in respect of the ancestral agricultural lands between the

parties, it ought to have been held that the properties which are standing in the name of defendant Nos.3, 5 to 7 are purchased out of joint nucleus. Therefore, substantial question of law is arising.

6 Per contra, the learned Advocate appearing for the respondent Nos.3, 5 to 7 supported the reasons given by both the Courts below. It was specifically pointed out that plaintiff has failed to prove that there was a joint nucleus when each time the property was purchased in the name of either defendant Nos.3, 5, 6 or 7.

7 Taking into consideration the rival pleadings the very narrow point that was for consideration before both the Courts, as to whether the properties which were standing in the name of defendant Nos.3, 5 to 7 are joint family properties or purchased out of joint nucleus or not ? As regards other ancestral properties are concerned, the contentions raised by defendant No.1 that there was partition about 20 years back between plaintiff and all the defendants was negated by both the Courts below. Therefore, only those properties, which were purchased in the name of defendant No.3, 5 to 7, were required to be considered as to whether they can be said to be the joint family properties. Jointness in the family cannot be presumed, but it will have to be proved by cogent evidence. Here, in this case, the plaintiff

himself has admitted that he started residing separately from the entire family since about 20 years prior to the suit and the reason was that differences arose between his mother and wife. He also admitted that defendant Nos.4 and 5 were the Government servants and therefore, they had separate income. In spite of residing separately from other family members, it was for the plaintiff to explain, as to how those properties which stood in the name of defendant Nos.3, 5 to 7 can be still said to have been purchased out of joint family income. He has not stated, as to how much he has contributed towards the purchase of those properties. Another fact, that has not been explained by the plaintiff is, as to why he allowed each time, whenever the properties were purchased in the name of defendant No.3 or 5 or 6 or 7, he had not raised any kind of objection. They all cannot be said to be the Karta of the joint family property. When defendant No.1, who is their father was still alive, then others cannot be said to be the Karta of the family. Therefore, under such circumstance, when the residence of the plaintiff was separate, earning appears to be separate, because he has not come with the case that he was giving his own contribution from his earnest to the parents, the properties cannot be termed as joint family properties.

the legal point involved in the same. Hence, no substantial question of law has been pointed out. Therefore, Second Appeal stands disposed of as “**Not admitted**”.

(Smt. Vibha Kankanwadi, J.)

agd