

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

927 WRIT PETITION NO.35 OF 2019

1. Munja S/o Gyanba Dukare,
Age : 72 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
 2. Dagdoba S/o Gyanba Dukare,
Age : 81 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
- ... **Petitioners.**
(Ori.Def.Nos.1 & 2)

Versus

1. Santabai W/o Dhondiba Awachar,
Age : 71 years, Occu : Agri. & Household,
R/o Nanalpeth, Parbhani,
Taluka and District Parbhani.
 2. Madhav S/o Dagdoba Dukare,
Age : 61 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
 3. Sakharam S/o Gyanba Dukare,
Age : 69 years, Occu : Agriculture,
R/o Beleshwar Nagar, Parbhani,
Taluka and District Parbhani.
 4. Padmakar S/o Sahebrao Dukare,
Age : 40 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
 5. Damodhar S/o Nivrutti Dukare,
Age : 61 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
- ... (ori. Plaintiff)

6. Dattarao S/o Bapurao Dukare,
Age : 56 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
7. Rangnath S/o Dashrathrao Dukare,
Age : 56 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
8. Bhagwat S/o Manikrao Dukare,
Age : 31 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.
9. Ganesh S/o Pandurang Raner,
Age : 46 years, Occu : Agriculture,
R/o Dharangaon,
Taluka and District Parbhani.

... **Respondents-**
(R.Nos.2 to 9 are ori.
def.Nos.3 to 10)

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Advocate for Petitioners : Mr. P. N. Kalani.
Advocate for Respondent No.1 : Mr. M.M.Patil (Beedkar).
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CORAM : V. K. JADHAV, J.
DATE : 08.01.2020

PER COURT :-

1. Heard finally at admission stage by consent.
2. The petitioners / original defendant Nos.1 and 2 filed an application Exh.163 for exhibiting the sale deeds filed along with the list Exh.144. The learned Joint Civil Judge Senior

Division, Parbhani by order dated 21.09.2018 below Exh.163 in Regular Civil Suit No.255 of 2011 rejected the application with costs and further directed the defendant to adduce further evidence for proving those documents.

3. The learned counsel for the petitioners / original defendant Nos.1 and 2 submits that the respondent / plaintiff has instituted the suit bearing Regular Civil Suit No.255 of 2011 for declaration of ownership and perpetual injunction in respect of the land Gut No.121 total admeasuring 1 H. 93 R. to the extent of 80 R. with further declaration to the effect that decree passed in Regular Civil Suit No.150 of 2004 is not binding upon the plaintiff. The learned counsel submits that in paragraph No.6 of the plaint it has been specifically pleaded by the respondent / plaintiff that the family of the defendants had also time to time purchased the land arising out of the joint family funds and ancestral property income and purchased the properties from various persons in the name of head of the joint family member and the details are given in the table wherein at Serial Nos.5 and 6 the property purchased from one Vishwanath out of the land Gut No.121 has been mentioned in detail. The learned counsel submits that in paragraph No.7, it

has been specifically pleaded that the family of defendants out of their joint need sold their ancestral as well as the joint family property and the family was joint upto 1994-1995 and as per the record available, the defendants got separated by way of oral partition at the time of *Gudhipadwa* 1994. The learned counsel submits that in paragraph No.8 Clause 'C' of the plaint it has been specifically pleaded that so far as the land Gut No.121 is concerned, initially it was owned by one Vishwanath and out of his land initially the land admeasuring 1 H.12 R. was purchased in the name of defendant Munja under the sale deed dated 24.03.1990 and the said land was purchased arising out of the joint nucleus and funds from the joint and ancestral property. Subsequently the remaining area of 80.94 R. have been purchased from the said Vishwanath in the name of son of Dagadu namely Madhav (defendant No.3) from the joint nucleus. It has been specifically contended in the said paragraph that in pursuance of the sale deed, entire land Gut No.121 become the joint family property and it was joint possession. The learned counsel submits that in terms of the said pleadings, the execution of the said sale deeds has not been disputed. On the other hand, those sale deeds should

have been filed by the respondent / plaintiff, however, the petitioners / defendant Nos.1 and 2 have produced the same along with the list Exh.144. The learned Judge of the Trial Court has rejected the application Exh.163 only for the reason that defendant No.2, who is neither the executant nor witness of the said sale deed and by way of his oral evidence the documents could not be exhibited. The learned counsel submits that the approach of the court below is not proper, correct and legal. Thus, this Writ Petition deserves to be allowed.

4. The learned counsel for the respondent / plaintiff submits that defendant No.2, who is neither the executant nor the witness on the said sale deeds has merely produced the said sale deeds as per the list Exh.144 and insisted the Court by filing an application Exh.163 to exhibit the same. The learned counsel submits that merely by producing the documents on record, the documents cannot be admitted as evidence. The learned Judge of the Trial Court has rightly rejected the application Exh.163. There is no substance in the Writ Petition and Writ Petition thus liable to be dismissed.

5. On careful perusal of the pleadings of the respondent / plaintiff, particularly paragraph No.6 and paragraph No.8-C of the plaint, it appears that the respondent / plaintiff has not disputed the execution of the said sale deeds and the immovable property purchased under the said sale deeds. It further appears that the respondent / plaintiff has only raised the issue that so far as the purchase of the said property under those sale deeds is concerned, it was from the joint nucleus funds and from the ancestral property. The learned counsel appearing for the respondent / plaintiff also admits that the burden to prove the same lies on the respondent / plaintiff and he has to discharge the said burden by adducing the independent evidence, in the light of the said pleadings. There is no reason for the Trial Court to reject the application Exh.163 filed by the petitioner herein for exhibiting the said sale deeds. On the other hand, nobody has disputed the execution of the said sale deeds and it would be a mere formality to examine the witnesses on the said sale deeds to prove the same. The respondent / plaintiff has to prove and substantiate his pleadings by adducing the independent, oral and documentary evidence, if available, to demonstrate that

the property has been purchased out of the joint nucleus and funds from the joint and ancestral property and for that purpose he cannot expect from the other side to examine the witnesses so as to enable the respondent / plaintiff to substantiate his case by way of cross-examination to those witnesses.

6. In view of the same, I find that the learned Judge of the Trial Court has committed error in rejecting the application Exh.163. Hence I proceed to pass the following order :

ORDER

- (I) Writ Petition is hereby allowed.
- (II) The impugned order dated 21.09.2018 below Exh.163 in Regular Civil Suit No.255 of 2011 is hereby quashed and set aside.
- (III) The Application Exh.163 is allowed in terms of its prayer clause.
- (IV) Writ Petition is accordingly disposed off.

(V. K. JADHAV, J.)

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vmk/-