



Judgment

325 sa553 & 559.10

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

**SECOND APPEAL NO.553 OF 2010
WITH
SECOND APPEAL NO.559 OF 2010**

SECOND APPEAL NO.553 OF 2010

Shri Marotrao s/o Ganpatrao Gode,
aged about 79 years, occupation retired government
servant, resident of plot No.478-A, Professor
Colony, Hanuman Nagar, Nagpur-9 (dead).

Legal Heirs

1. Smt.Sushila wd/o Marotrao Gode,
aged about: 72 years, occupation housewife.
2. Mrs.Swati wd/o Rajendra Badadhe,
(daughter),
aged about : 55 years, occupation household,
r/o B-101, Kartik Kunj, D-13, Sector 44,
Noida-(UP).
3. Shri Anil s/o Marotrao Gode,
aged about 50 years, occupation service.
4. Shri Sunil s/o Marotrao Gode,
aged about 42 years, occupation household.
5. Ku.Sangita d/o Marotrao Gode,
aged about : 42 years, occupation:
household,
applicant Nos.1, 3 to 5 are
r/o plot No.478-A, Professor's

colony, Hanuman Nagar, Nagpur (M.S.). **Appellants.**

:: VERSUS ::

Shri Arjun s/o Ganpatrao Gode,
aged about 73 years, occupation:retired government
servant, resident of plot No.478-A, professor
colony Hanuman Nagar, Nagpur-9. **Respondent.**

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Ms.Mitisha Kotecha, Counsel h/f Shri Anil Kumar, Counsel for
Appellants.
Shri A.V.Bhide, Counsel for the Respondent.
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SECOND APPEAL NO.559 OF 2010

Shri Marotrao s/o Ganpatrao Gode,
aged about 79 years, occupation retired government
servant, resident of plot No.478-A, Professor
Colony, Hanuman Nagar, Nagpur-9 (dead).

Legal Heirs

1. Smt.Sushila wd/o Marotrao Gode,
aged about: 72 years, occupation housewife.
2. Mrs.Swati wd/o Rajendra Badadhe,
(daughter),
aged about : 55 years, occupation household,
r/o B-101, Kartik Kunj, D-13, Sector 44,
Noida-(UP).
3. Shri Anil s/o Marotrao Gode,
aged about 50 years, occupation service.
4. Shri Sunil s/o Marotrao Gode,

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aged about 42 years, occupation household.

5. Ku.Sangita d/o Marotrao Gode,
aged about : 42 years, occupation:
household,
applicant Nos.1, 3 to 5 are
r/o plot No.478-A, Professor's
colony, Hanuman Nagar, Nagpur (M.S.). Appellants.

:: VERSUS ::

1. Shri Arjun s/o Ganpatrao Gode,
aged about 73 years, occupation:retired government
servant, resident of plot No.478-A, professor
colony Hanuman Nagar, Nagpur-9.

2. Smt.Tulsabai w/o Krishnarao Dambhare,
aged about 85 years, occupation: household,
r/o Rangaripura, at post Bhiwapur,
district Nagpur, Dead (9.9.2010) through its legal
heirs i.e.

i) Shri Sharad s/o Krishnarao Dambhare,
aged about 55 years, occupation:
agriculture (farmer), resident of
Rangaripura, at and post: Bhiwapur,
tahsil Bhiwapur, district:Nagpur.

ii) Shri Vijay s/o Krishnarao Dambhare,
aged about: 47 years, occupation:
agriculture (Farmer), resident of
Rangaripura, at and post:Bhiwapur,
tahsil Bhiwapur, district: Nagpur.

iii) Sau.Usha w/o Devendra Nagrikar,
aged about 53 years, occupation:

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household, resident of teacher colony, near police talav, Bhandara, district: Bhandara.

iv) Smt.Vandana wd/o Ramesh (s/o Krishnarao) Dambhare, aged about 46 years, occupation: government servant, resident of Ram Nagar, behind Mata Mandir, Nagpur.

v) Smt.Madhuri w/o Anandrao Sakhale, aged about 45 years, occupation: teacher, resident of Ramnagar, behind Mata Mandir, Nagpur. **Respondents.**

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Ms.Mitisha Kotecha, Counsel h/f Shri Anil Kumar, Counsel for Appellants.
Shri A.V.Bhide, Counsel for Respondent No.1.
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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 27/11/2024
PRONOUNCED ON : 09/12/2024

COMMON JUDGMENT

1. By preferring both these appeals, the appellants have challenged common judgment and decree passed by learned District Judge-15, Nagpur in RCA Nos.411 and 412/2007 dated 22.7.2010 by which RCA No.411/2007 is allowed and the judgment and decree passed by learned Civil

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Judge Senior Division, Nagpur in Special Civil Suit No.1439/1996 is set aside and the suit is dismissed. RCA No.412/2007 is also allowed and the judgment and decree passed in Special Civil Suit No.392/1995 is set aside.

2. The parties hereinafter referred as per their original nomenclatures.

3. Brief facts of the dispute between the parties are as follows:

Shri Arjun Ganpatrao Gode and Shri Marotrao Ganpatrao Gode are real brothers and Tulsabai is their sister. Their father Ganpatrao died on 28.1.1980 and their mother died on 17.8.1988. They were holding an agricultural land to the extent of 8.68 acres situated at Navegaon (Rithi Asola) tahsil Nagpur. Arjun filed Special Civil Suit No.392/1995 for declaration, partition, and separate possession. As per his pleadings, the agricultural property was purchased by his father in the year 1955-56 from one Shri Mangaji Balkrushna

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Patil. In addition to that, his father was also holding an ancestral property situated at Sindhi, district Wardha. The land situated at Sindhi was sold on 27.4.1994 to one Shri Walke for consideration of Rs.9500/-. Out of the said consideration amount, 50% amount was given to their uncle Sampatrao Babaji Gode and 50% amount was distributed between him and his brother. No amount was given to their sister Tulsabai.

4. As per the contention of plaintiff Arjun, family was joint family and their father was “karta” of the family till his death. Their father was a vegetable vendor and all income from agriculture and vegetable business was joint family income. The income earned by him and his brother was brought in common hotchpotch. The entire family was living together at Telipura, Sitabuldi, Nagpur in a rented house. The house was obtained by his father by joint family funds on lease on installment for Rs.2400/-. As per the lease agreement, installment of Rs.480/- was to be paid per year.

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As plot is to be purchased in the name of one of family members, it was purchased in the name of Marotrao who was the elder brother. The expenses incurred to purchase the plot were joint family income. The plaintiff got job in the year 1956 and he joined services on 9.10.1956. The incomes of all joint family members were put in a common hotchpotch.

5. The plaintiff further contended that due to initiation of the plaintiff, construction of the house on NIT Plot No.478A, situated at Hanuman Nagar, was initiated and he incurred expenses upto Rs.20,000/-. After construction, they started living jointly. Subsequently, to avoid fiction, they started living separately in the same house. He was residing on the eastern side. Whereas, his brother was residing on western side of the house. They both were residing by maintaining cordial relations. The actual dispute started in the year 1988. Regarding the dispute, he lodged the report with the police station on 20.2.1988. Since the dispute was on a higher scale, he claimed partition from his brother by

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metes and bounds which was denied by his brother and, therefore, he was constrained to file suit for declaration, partition, and separate possession of 1/3rd share in the house property. The plaintiff has also claimed the share of 1/3rd on the basis of will executed in his favour by his mother.

6. Defendant Marotrao in response to the notice appeared and denied all contentions of the plaintiff. As per his contentions, plot No.478A is his self acquired property as he approached to the NIT and deposited the amount and lease deed was executed in his favour. All documents are showing his possession and title over the suit property. He has admitted the contention as to the agricultural property owned by his father and also admitted the partition in the said land. He also admitted that another property was sold and consideration amount was distributed between him and his brother and uncle. It is submitted that the plaintiff has no right to claim partition in the suit property as the suit property was obtained by him by applying for the property

on lease. The lease amount is paid by him and lease agreement was executed in his favour. The Sanad is also executed in his favour and since the date of execution i.e. from 19.3.1967 the said property is in his possession. Initially, the lease was for the period 11.1.1960 to 31.3.1990 which was subsequently renewed on the similar terms and conditions. The said lease deed was registered on 9.10.1967. He applied for the building permission. The approved plan was sanctioned and the City Survey at Nagpur issued Sanad in respect of the said plot to defendant Marotrao on 20.7.1993. He had let out the western side block to one Dr.Kadam and another tenant till 1976. Plaintiff Arjun who is real brother was residing with him prior to marriage. After marriage, he allowed him to occupy the western side block on ground floor. Subsequently, he requested him to vacate premises as he was in requirement of the same, but plaintiff Arjun has not vacated the same and, therefore, he issued notice on 19.4.1988. The notice issued was replied by his

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brother Arjun. On the similar contention, he also filed suit bearing Special Civil Suit No.1439/1996 for recovery of possession.

7. After considering the rival pleadings in both suits, the trial court framed the issues to ascertain whether the suit property is joint family property or Marotrao was exclusive owner of the said property. The necessary issue for determination was also whether the plaintiff in Special Civil Suit No.392/1995 is entitled for 1/3rd share. Common evidence was recorded by the trial court.

8. In support of the contention, plaintiff Arjun examined three witnesses namely PW1 plaintiff himself, PW2 Tulsabai @ Shakuntala Ubhare, and PW3 Vijay Krushnarao Dambhare. Whereas, the defendant has examined himself and his wife DW2 Sushila Marotrao Gode.

9. After hearing the parties and on appreciation of the evidence, learned trial court dismissed Special Civil Suit

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No.392/1995 and decreed Special Civil Suit No.1439/1996 and directed the defendant therein namely Arjun to hand over the vacant, peaceful possession of the suit property within three months to his brother Maroti and directed the enquiry for *mesne* profit.

10. Plaintiff Arjun challenged the judgment and decree passed in Special Civil Suit No.392/1995 and Special Civil Suit No.1439/1996 by preferring appeals bearing Regular Civil Appeal Nos.411 and 412/2007. The First Appellate Court by common judgment allowed both the appeals and set aside the judgment and decree passed in Special Civil Suit No.1439/1996 and also allowed the appeal and set aside the order of dismissal of suit by decreeing Special Civil Suit No.392/1995. By allowing both the appeals, it was declared that the suit property is joint family property. It was further declared that plaintiff Arjun is entitled for 1/3rd share and defendants Marotrao and Tulsabai also had 1/3rd share. It

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was further declared that the plaintiff is entitled for partition and separate possession.

11. Being aggrieved with the common judgment and decree passed by the First Appellate Court, present second appeals are preferred by raising following substantial question of law:

Despite categorical findings recorded by the trial court that there was a separate source of income available to defendant No.1 being Government Servant and further considering the value of the property, absence of evidence of joint family parties residing separately and agricultural land having had already partitioned and whether the First Appellate Court was justified in reversing the judgment and decree and whether in the light of the material placed on record is sustainable on facts and the law.

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12. Heard learned counsel Ms.Mitisha Kotecha h/f learned counsel Shri Anil Kumar for appellant Marotrao and learned counsel Shri A.V.Bhide for Arjun s/o Ganpatrao Gode.

13. It is submitted by learned counsel Ms.Mitisha Kotecha that unless and until the persons claiming that the properties are joint prove by cogent and strong evidence that the property in dispute was acquired with their contribution and also furnishes sufficient good evidence to prove that there were other joint properties and the property in dispute was purchased by joint nucleus, it cannot be held that the property is a joint property.

14. The law is well settled that burden is on the person who alleged that the property is a joint property of Hindu Undivided Family to prove the same. It is submitted that there is a presumption as to the jointness of the family, but there is no presumption as to the jointness of the property. There is no presumption that the family because it is joint possessed the joint property. A person alleging to the

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property to be joined as to establish that the family was possessed of some property with the income of which the property could have been acquired, but such presumption is a presumption of fact which can be rebutted.

15. She submitted that as far as the evidence in the present matter is concerned, the same nowhere discloses that the property was purchased from the joint nucleus. In fact documentary evidence i.e. the lease deed Exh.70, memorandum executed by the NIT Exh.69, building permit issued by the NIT, deposit receipts, rent receipts, corporation tax receipts, and renewed lease deed, consistently show ownership of Marotrao. As far as the will is concerned, the mother of the plaintiff and defendant has no right to execute the will as property was never owned by him and no right was given to her during her life time. Moreover, the execution of the will is not proved. In view of that, the First Appellate Court illegally interfered with the findings of the trial court which were not perverse.

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In support of her contentions, she placed reliance on following decisions:

- 1. Srinivas Krishnarao Kango vs. Narayan Devji Kanto, reported in 1954 DGLS 53;**
- 2. Sahebrao Tukaram Tapkir and ors vs. Shri Baban Maruti Tapkir and ors, reported in 2006(1) BCR 124;**
- 3. D.S.Lakshmaiah vs. L.Balasubramanyam, reported in 2003 DGLS 467;**
- 4. Vishwanath Bapurao Sabale vs. Shalini Nagappa Sabale and ors, reported in 2009 DGLS 375;**
- 5. Bhagwati Prasad Sah vs. Dulhin Rameshwari Kuer, reported in 1951 DGLS 39, and**
- 6. Bhagwati Sharan vs. Purushottam and ors, reported in 2020 LawSuit Sc 322.**

16. *Per contra*, learned counsel Shri A.V.Bhide for Arjun s/o Ganpatrao Gode supported the judgment of the First Appellate Court and submitted that the suit property was purchased from the joint nucleus. The evidence adduced by the plaintiff is corroborated by PW2 Tulsabai and the will executed in his favour sufficiently shows that the property

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was a joint family property and purchased from the joint nucleus. The First Appellate Court rightly considered that the plaintiff has specifically admitted that his father was earning from his business and also getting income from his agricultural property. The plot in question was in the name of defendant No.1 purchased from the joint family property. The circumstances on record sufficiently show that property is a joint family property and in absence of the positive evidence, it is difficult to accept that defendant No.1 has purchased the plot from his own income and carried out the construction of his house from his own earning and own income. He submitted that scope for interference is restricted when the finding is neither perverse and nor based on no evidence. He submitted that scope for interference in findings of fact at the stage of hearing of the second appeal is very limited. The scope for interference is restricted when the finding is either perverse or based on no evidence and unless there exists a sufficient and cogent reason, the First

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Appellate Court has to re-valuate and examine the entire evidence and pass the judgment and decree on the basis of the evidence. The execution of the will is also supported by the material evidence. In view of that, the appeals are devoid of merits and the same be dismissed.

17. In support of his contentions, learned counsel Shri Bhide has placed reliance on following decisions:

1. C.Doddanarayana Reddy (dead) by LRs vs. C.Jayarama Reddy (dead) by LRs and ors, reported in 2021(2) Mh.L.J. 6;

2. Santosh Raghu Raikar and anr vs. Sitabai Ramchandra Azgaonkar and ors, reported in 2021(6) Mh.L.J. 518, and

3. Poona Ram vs. Moti Ram (D) th.LRs and ors, reported in 2020(91) Mh.L.J. 183.

18. The substantial questions of law involved in the present appeals are that despite categorical findings recorded by the trial court whether the First Appellate Court was justified in reversing the judgment and decree in absence of evidence of joint family properties.

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19. The subject-matter of both the suits filed by plaintiff Arjun in Special Civil Suit No.392/1995 and Special Civil Suit No.1439/1996 filed by the plaintiff therein Marotrao Gode is the owner of plot No.478A, Professor Colony, Hanuman Nagar, Nagpur. The contention raised in Special Civil Suit No.392/1995 is that property purchased is from the joint family nucleus and, therefore, plaintiff Arjun, his sister Tulsabai and defendant Marotrao all have 1/3rd share and claimed declaration. On the contrary, Special Civil Suit No.1439/1996 by Marotrao was filed for recovery of possession on the ground that the suit property is allotted to him by the NIT on lease. The amount of lease was deposited by him and the said lease was subsequently renewed. Thus, he is the owner of the suit property and it is his self acquired property. He allowed his brother Arjun to stay in the said property on the ground floor till construction of his own house and, therefore, he claimed recovery of possession from Arjun, his brother.

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20. To substantiate the said contentions, common evidence is recorded in Special Civil Suit No.392/1995. The plaintiff therein Arjun Gode examined himself vide Exh.45 and reiterated the pleadings as it is. The sum and substance of his evidence is that he and his brother Marotrao were staying in a suit property jointly till 1976. His father has obtained lease of the said property in 1955 i.e. on 31.12.1955 on installment basis. His father has obtained the said lease in the name of defendant Marotrao being he is the elder son. He has incurred the expenses for construction of the said house. There was an oral agreement to have a partition of the said house between the two. The said plot was purchased from the joint family nucleus. His evidence further shows that in 1970 he joined the service in Central Railway, whereas defendant was serving in the Government Printing Press. He is staying in the western portion of the plot since 1976. His father died on 1980 and the mother died in 1988. His evidence further shows that his father was

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holding agricultural land 8.68 acres and also working as vegetable vendor. Out of the agriculture income and business as a vegetable vendor, his father has purchased the plot and, therefore, he is having 1/3rd share. The cross examination shows that after lapse of seven years from the date of death of his mother, the suit is filed. He further admitted that the business income of his father as vegetable vendor was sufficient to maintain the family only. He further admitted that his brother defendant No.1 was serving in the Government Printing Press. The NIT allotted the plot i.e. the suit property to his brother and the lease deed is in the name of his brother. The sanction map and building permit are in the name of his brother. The name of the defendant was recorded in the Corporation as well as in the City Survey Record as to the suit house. The tax receipt paid to the NMC is also in the name of his brother. His further evidence shows that as per the partition regarding the agricultural property, they are cultivating their agricultural land. He further

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admitted that he has not paid the corporation taxes of the suit house. His evidence further shows that on 9.5.1988 his mother has executed registered will in his favour. To substantiate the contentions, he has also examined defendant Tulsabai, who is his sister, vide Exh.55, who has also deposed to show that the suit property is joint family property purchased from joint nucleus. Her evidence further shows that her mother has executed will in favour of the plaintiff on 9.5.1988. She and one Bhaiyyaji Pachmor were attesting witnesses on the said will. Her evidence is shattered during the cross examination as she specifically stated that she does not remember who was appointed as Advocate. She has visited her Advocate along with the plaintiff. She has not claimed any share in the house property. She appears to be interested witness as her cross examination shows that she is residing with plaintiff Arjun.

21. Bhojraj Parate examined as witness No.3 is only to the extent of registration of will in the Registrar's office. His

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evidence is to the extent that at the relevant time, he was working in the Sub Registrar Office and the said will was registered in his office at Sr.No.4845.

The evidence of Vijay Dambhare is only to the extent that his mother acted as attesting witness on will. The said will bears his signature also. His mother is unable to see and he identified the signature of his mother on will. He further admitted that there is an account of his mother in the bank and he had no occasion to deal with her account. This cross examination is to ascertain the credibility of the witness.

22. As far as defendant Marotrao is concerned, he specifically came with a case that he had constructed a house on plot No.478-A allotted to him on 8.1.960 by NIT. He approached to the NIT on 30.12.1959 and, thereafter, the said plot on depositing the money was allotted to him. He has also obtained the building permit on 4.4.1966, compound wall was constructed by him in the year 1994 and first floor in the year April 1995. He referred various

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documents in his depositions. His evidence also shows that the suit house is his self acquired property. He further stated that his mother was illiterate and plaintiff Arjun got executed the said will after notice was served upon on 19.4.1988 issued by him. He further stated that his brother was in possession of the western side of the plot which is a permissive possession as he requested to allow him to stay till his house is constructed. He specifically relied upon memorandum of lease Exh.69, lease deed Exh.70, Aakhiv Patrika Exhs.71 and 72, Original Sanad Exh.73, building permit issued by the NIT Exh.74, deposit receipts Exhs.75 to 78, rent receipts Exhs.79 to 82, tax receipts Exhs.83 to 92, water tax receipts and electric bill Exhs.93, renewal lease deed Exh.94 etc.

23. The cross examination shows that he was serving in the Government Printing Press. He started residing separately in 1951. He started residing in the constructed house in the plot since 1971 and plaintiff Arjun came to

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reside in his house since 1976 and stayed there. First time, he issued the notice on 28.4.1988. In support of his contentions, he examined his wife Sushila Marotrao Gode who supported the contention that the suit property is self acquired property of defendant Marotrao i.e. her husband.

24. Perusal of the documents reveals that the memorandum issued by the NIT in favour of defendant Marotrao is dated 8.1.1960. The lease deed was executed in his favour on 19.9.1967. The Original Sanad is also in the name of defendant Exh.73. Building permit is obtained by the defendant on 5.4.1966 which is at Exh.74. Exhs.75, 76 and 77 are deposits and rent receipts. The tax receipts and rents receipts are also placed on record. The renewal of the lease deed is dated 3.8.1996 which is at Exh.94. The plaintiff came with a case that his father has obtained the lease of the suit property in the year 1955 i.e. on 31.12.1955. Admittedly, there is no documentary evidence to show that the lease was granted in favour of defendant No.1 on

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31.12.1955. The evidence of the plaintiff that they stayed together along with defendant Marotrao in the said house till 1976 is also not supported by any documentary evidence. As far as this aspect is concerned, in the light of the documentary evidence it shows that building permit was granted on 5.4.1966 and, thereafter, the house was constructed. As far as the contention of the plaintiff that he stayed jointly with the defendant in the said suit house is concerned, the same is not supported by either oral evidence or by the documentary evidence.

25. *Per contra*, the documentary evidence shows that the approval of allotment of the plot No.478 of Medical College Layout was granted in favour of defendant Marotrao on 8.1.1960. There is a reference of application of defendant Marotrao in the said memorandum which shows that the application was received by them from defendant Marotrao on 30.12.1959.

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26. Thus, the contention of the plaintiff that the suit property obtained by his father on lease in 1955 itself is falsified by the documentary evidence.

27. It is vehemently submitted by learned counsel representing original plaintiff Arjun that the evidence on record shows that family was residing jointly and suit property was purchased by the joint family nucleus. It is well settled that until and unless persons claiming that properties are joint acquisition proved by strong and cogent evidence that the property in dispute was acquired with their contribution and there were other joint properties created by them that the property was purchased by joint income or some part of the sale and consideration was paid by contribution and the property was acquired as such and enjoyed by them with the other family members then and then only the person who claims that property is joint family property is said to be proved. In other words, persons contributing may not be termed as co-sharer, but he might be

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advancing consideration and, therefore, has to prove that by contribution, he has provided certain funds for purchase of the property by the person in his name. Mere bare statement is not sufficient to prove the same. The law is well settled that the burden is on the person who alleges that the property is a joint property of Hindu Undivided Family to prove the same. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus.

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28. Thus, the initial burden is always on the person who asserts that the property is joint family property. As observed earlier, there is a presumption of the jointness of the family, but there is no presumption that the properties possessed by the members are joint.

29. In the light of the above well settled legal provisions, if the pleading of the plaintiff is considered, he claimed that his father was holding the agricultural land to the extent of 8.68 acres situated at Navegaon tahsil, Nagpur and 56R land at Sindhi, district Wardha. This land of Sindhi was sold on 27.5.1994 for the consideration of Rs.9500/- and the same was distributed between him and his brother and uncle Sampatrao. His pleading further shows that the agricultural property situated at Nagpur was partitioned between him and his brothers and they were cultivating respective share since long. As far as joint family nucleus is concerned, his cross examination shows that the income of his father was sufficient to maintain the family only. He further admitted

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that the lease was granted in the name of his brother, defendant No.1 and the entire documents that is construction permission, sanad, and tax receipts all are in the name of the defendant. Thus, there is absolutely no evidence to show that what income the plaintiff and his father were getting from the agricultural property and in what manner he was contributing for the family. Though it is contended by the plaintiff that his father was earning by selling vegetable and and out of that income he paid the installments to NIT, but his cross examination shows that income of his father was sufficient to maintain the family. It was further contended that he joined the services in the year 1955 and, thereafter, he contributed, but not a single receipt or document is placed on record to show that in what manner he has contributed in construction of the house. Even, there is no whisper as to his income in the 1955 or the income of his father as a vegetable vendor or from the agricultural land. There is no evidence that what salary he was drawing and contributing in the joint

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family funds. Thus, there is no whisper as to how he contributed for the maintenance of his joint family.

30. As far as income from the agricultural land is concerned, there is no evidence adduced to show that how much income they were getting from the said agricultural land.

31. It is pertinent to note that the plaintiff and defendant No.1 partitioned their agricultural land and at the relevant time the plaintiff has not claimed any share in the suit property. The entire record of the suit property is in the name of the defendant since 1960 till today. He is the lease holder of the plot and owner and the house thereon. Thus, as far as the contention is concerned, that the property is purchased from the joint nucleus, the plaintiff miserably failed to prove the same.

32. Though learned counsel for the plaintiff placed reliance on the decision of the Hon'ble Apex Court in the case

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of **Surendra Kumar vs. Phoolchand (dead) thr. LRs and anr,** reported in (1996)2 SCC 491, it is held that there is no presumption that a family because it is joint possessed joint property and therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been required. Such presumption is to be rebutted.

33. Learned counsel Ms.Kotecha placed reliance on the decision of the Hon'ble Apex Court in the case of **Srinivas Krishnarao Kango** *supra* wherein it is held that the Hindu Law upon the aspect of the case is well settled. Proof of the existence of a Hindu joint family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon any one asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question

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may have been acquired the burden shifts to the party alleging self-acquisition.

34. The similar observations are in the decisions, as relied upon by learned counsel Ms.Kotecha, in the cases of **G.Narayana Raju vs. G.Chamaraju**, reported in 1968 DGLS 70; **Bhagwati Prasad Sah** *supra*; and **Chattanatha Karayalar vs. Framachandra Iyer**, reported in 1955 DGLS 59.

35. Thus, as far as the contention of the plaintiff that the suit property is purchased from the joint nucleus is not proved by the plaintiff by the cogent and strong evidence. In fact, the evidence as to the contribution in purchasing the suit property by all family members is not proved by the plaintiff by cogent and strong evidence. On the contrary, the documentary evidence sufficiently shows that suit property is allotted to defendant by the NIT on his application on depositing the amount and on paying the rent on installment basis. Therefore, the plaintiff has not succeeded as far as contentions to prove that the suit property is a joint family

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property. The proof of existence of the joint family does not lead to the presumption that the property held by any members of the family is joint and burden rests upon anyone asserting that any time the property was joint to establish the fact. Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him to establish that there was adequate nucleus out of which acquisition could have been is one of facts depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. However, in the occupation of the members of a family- and yielding no income could not be a nucleus out of which acquisitions' could be made, even though it might be of considerable value. The evidence adduced by the plaintiff absolutely falls short to establish that the suit property was purchased from the joint family family nucleus.

36. The another point raised by the plaintiff is that the suit property was allotted to him by his mother by executing

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a will in his favour. There is no dispute that the Will is registered Will. The said Will allegedly executed in presence of two attesting witnesses Bhaiyya Pachbol and Tulsabai @ Shakuntalabai. Said Tulsabai was examined, but, admittedly, her eye sight is weak and, therefore, she could not state about attestation on the Will. Another attesting witness is not alive.

37. First and foremost thing is that whether mother of the plaintiff namely Bainabai has acquired any right to execute Will in favour of the plaintiff. None of documents shows that at any point of time she was owner of the said property or has acquired any right in the said property. The documentary evidence shows that the suit property is allotted to the defendant on lease. The allotment letter, lease deed, renewal of the lease deed and the original sanad are in the name of defendant Marotrao. Thus, as far as the mother of the plaintiff is concerned, she has not acquired any right by way of any documents to execute the said Will. To prove the said

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Will, the plaintiff has examined Tulsabai who could not prove the attestation and, therefore, the plaintiff examined her son. He merely identified the signature.

38. As far as proof of the Will is concerned, it is settled that the Will has to be proved like any other document. The test we applied being the usual test of the satisfaction of the prudent mind in such matters. Section 63 of the Succession Act is reproduced as follows:

(2) Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

39. A will is a solemn document. By it, a dead man entrusts to the living to carry out his wishes. It is an instrument by which a person makes a disposition of his property to take effect after his death. Will obstructs natural

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inheritance and, therefore, while examining the Will, the court is required to see whether the testator signed the Will, whether he understands the nature and effect of disposition of the Will, condition of the mind of the testator, his mental capacity as well as whether the testator was in a sound mind.

40. Thus, there should be a compliance in view of Section 68 of the Indian Evidence Act. The Will has to be proved in view of Section 68 of the said Act.

41. Learned counsel Shri Bhide, vehemently submitted that the scope for interference is restricted when the finding is either perverse or based on no evidence and unless there exists a sufficient and cogent reasons, a finding of fact arrived at by the court below or binding on the High Court and the High Court would refuse to exercise its appellate powers and place reliance on the decisions in the cases of **Santosh Raghu Raikar and anr** *supra* and **C.Doddanarayana Reddy (dead) by LRs** *supra*.

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42. The power of this court to interfere in the second appeals, admittedly, is limited solely to decide substantial questions of law, if at all the same arises in the case. It is also settled that concurrent findings of the trial court and the First Appellate Court cannot be interfered with by the High Court in exercise of its jurisdiction. It can be interfered when the findings are perverse or based on no evidence.

43. I have already dealt with the evidence adduced by the plaintiff as well as the defendant. Perusal of the entire evidence shows that in the light of the settled principles of law, burden was on the plaintiff to prove that the suit property was joint acquisition by cogent and strong evidence which was not proved. In fact, the evidence of the plaintiff nowhere shows what was the contribution contributed either by him or by his family or by his other family members or what was the income family has received from other properties and the said income was used to purchase the said properties. Thus, unless and until it is proved that the

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property was joint acquisition by cogent and strong evidence, it cannot be held that it was a joint property and, therefore, I am of the opinion that the First Appellate Court committed substantial error of law in holding that the property in dispute is by joint acquisition and joint property of the plaintiff and defendants. Bare statement is not sufficient to prove the same.

44. In the present case, there is no cogent evidence except the bare statements. On the contrary, the evidence adduced by the defendant is more probable and proves that it was he who applied for allotment of plot by way of lease and the NIT has after accepting the legal fees and other charges, allotted the said plot to him. The doctrine of burden plays a very important role. The plaintiff failed to discharge burden and, therefore, the observation of the First Appellate Court as to the jointness of the property is erroneous and illegal. That being the position, in my opinion, the First Appellate Court committed an error in allowing the plaintiff's first appeal and

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decreeing the plaintiff's suit. In view of that, both appeals deserve to be allowed. Hence, I proceed to pass following order:

ORDER

(1) Both Second Appeals are **allowed**.

(2) The common judgment and decree passed by learned District Judge-15, Nagpur in RCA Nos.411 and 412/2007 dated 22.7.2010 is hereby set aside.

(3) The judgment and decree dated 26.6.2007 passed by learned Civil Judge Senior Division, Nagpur in Special Civil Suit No.392/1995 is maintained and the suit is dismissed.

(4) The judgment and decree passed by learned Civil Judge Senior Division, Nagpur in Special Civil Suit No.1439/1996 is maintained and the suit is decreed.

(5) The defendant in Special Civil Suit No.1439/1996 is hereby directed to vacate the suit premises and hand over the

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vacant and peaceful possession to the plaintiff therein namely Marotrao Gode within three months from the date of this order.

(6) The order passed by the trial court directing separate enquiry for damages to be held under Order XX Rule 12(1) (c) of the CPC to determine damages and *mesne* profit or the suit premises in Special Civil Suit No.1439/1996 is maintained.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!