IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.6675 OF 2015

Suresh Dadarao Suryawanshi & ors. … **PETITIONERS**

VERSUS

Babu Dadarao Suryawanshi & ors. … **RESPONDENTS**

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Mr. Umesh Mitkari, Advocate holding for
Mr. Mukul S. Kulkarni, Advocate for petitioners
Mr. B.A. Shinde, Advocate for respondent No.1.

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CORAM : SACHIN S. DESHMUKH, J.

Date of reserving order : 10th SEPTEMBER, 2026

Date of pronouncing order : 6th OCTOBER, 2026

O R D E R :

1. Leave to correct “Gat No.294” as “Survey No.294”. Amendment to be carried out within one week.

2. The Petitioners (Original Defendant No. 1 to 3) have challenged the order dated 20.04.2015 rendered by the learned Civil Judge, Junior Division, Ausa below Exh.168 in Regular Civil

Suit No.190/2009, rejecting the Petitioners' application for recasting Issue.

3. Respondent No. 1 (Original Plaintiff) instituted Regular Civil Suit No.190/2009 seeking partition and separate possession claiming 1/2 share in agricultural properties situated at Village Matola, Taluka Ausa, and Village Babhalgaon, Taluka Latur. The suit lands comprise Survey No.138/A, admeasuring 1 Hector 36 R out of 4 Hectors 06 R, Survey No.139/A, admeasuring 0 Hector 93 R out of 2 Hectors 79 R, Survey No.136/B, admeasuring 5 Acres 34 gunthas, situated at Village Matola and Survey No.294, admeasuring 3 Hectors 34 R at Village Babhalgaon. Respondent No.1 contended that, oral partition of ancestral lands was effected in 1978 among the three brothers (Dadarao, Changdeo, and Narayan) and that Survey No.136/B and Survey No.294 were subsequently purchased out of joint family income. Respondent No.1 admitted the existence of an ancestral residential house property at Village Matola, however, omitted the same from the partition suit with an assertion that same is unoccupied following the 1993 earthquake.

4. The Petitioners resisted the suit by presenting the

Written Statements (Exhs.19 & 22) contending that the petitioner No.1 Suresh joined the Police Department in 1963 and had an independent salaried income, out of which accumulated personal savings exceeding Rs.5,000/- over 10 years and purchased Survey No.136/B, admeasuring 5 Acres 34 Gunthas on 14.03.1974 in individual capacity. Similarly, Survey No.294 was purchased on 18.04.1980 in the name of his wife (Petitioner No.3) and son (Petitioner No.2) out of salaried income and private loans. The Petitioners pleaded that the ancestral lands (Survey Nos.138/A and 139/A) were dry lands yielding no surplus income or "joint family nucleus" capable of acquiring new properties. The Petitioners also raised a specific plea that the suit is bad in law for partial partition due to the deliberate exclusion of the ancestral residential house property at Matola.

5. On 20.09.2014, the Trial Court framed issues below Exh.144. Issue No.1 was framed as, “Whether the Plaintiff proves that plaintiff alongside Defendant Nos.1 to 3 reside jointly and that properties were purchased from joint family income?”. whereas the Issue No.3 was framed as under:

> "Whether Defendant Nos. 1 to 3 prove that Survey No.136/B and 294 are their self-acquired properties and whether Survey No.136/B is sold to Defendant

No.9 on 19.01.2010 ?"

6. The Petitioners filed an application below Exh.168 under Order XIV Rule 5 of the Code of Civil Procedure (CPC), requesting to recast Issue No.3, contending that, the initial onus is always on the Plaintiff to prove that the lands were purchased out of joint family funds. As such, proposed that Issue No.3 be recasted.

7. Respondent No.1 presented a say, objecting to the application. The Trial Court rejected the application, observing that the Plaintiff will have to prove Issue No.1 and thereafter the burden shifts on the Defendants to prove self-acquisition under Issue No.3.

8. Mr. Mitkari, the learned Counsel for the Petitioners submitted that, the initial burden entirely rests on Plaintiff to establish, before the burden shifts to the Petitioners i.e. the suit properties (Survey No.136/B and Survey No.294) were purchased using joint family funds and the ancestral property (Survey Nos.138/A and 139/A) was an income-yielding asset capable of generating a surplus financial nucleus to purchase new lands. While framing Issue No.3, the learned Trial Court committed a error of law. It casts burden upon the Petitioners to prove a negative,

exonerating the Plaintiff from discharging the primary onus of establishing case.

9. The learned counsel for petitioners further submitted that, the application under Order XIV Rule 5 of the CPC seeks to align the issues with substantive law. The issue essentially must be whether the Plaintiff proves the joint acquisition. Only upon the cogent evidence by the Plaintiff, the onus would shift on Defendant/ Petitioner No.1 to demonstrate the independent salary, savings and private loans. As such, prayed to allow the petition.

10. Mr. Shinde, the learned Counsel for Respondent No.1 supported the impugned order, submitting that the Petitioners' grievance that the entire onus of proof has been shifted upon Petitioners them, is unfounded. The learned Trial Court has framed Issue No.1, which requires the Plaintiff to prove that the Plaintiff and Defendant Nos.1 to 3 reside jointly and that the suit properties were purchased from joint family income. Once Respondent No.1 discharges the initial burden under Issue No.1 while indicating the existence of a joint family and an ancestral nucleus, the onus shifts to the Petitioners to prove the special plea of self-acquired land. As such, there is no reason to interfere in the order under challenge.

As such, prayed to dismiss the petition.

11. Having heard the learned counsel for litigating sides and perusing the material on record, the issue that falls for consideration before this Court is whether the Trial Court, while framing Issue No.3, is justified while placing the burden of proof regarding the character of the suit properties upon Defendant.

12. The initial burden of proof always rests on the party asserting the joint nature of the property, in the present case, that burden rests on respondent No.1 (Plaintiff). Before the burden shifts upon the defendants to prove separate self-acquired property, the Plaintiff must conclusively establish (i) the family possessed a joint ancestral nucleus; (ii) such a nucleus was income-yielding and sufficient enough to leave a financial surplus capable of acquiring the subsequent properties.

13. While framing Issue No.3 as, "Whether Defendant Nos.1 to 3 prove that Survey Nos.136/B and 294 are their self-acquired properties.....", the Trial Court has reversed the arrangement. The same compels the Petitioners to discharge onus without first requiring the Plaintiff to cross the evidentiary threshold.

14. The Hon'ble Supreme Court in the case of ***D.S. Lakshmaiah v. L. Balasubramanyam*** **[(2003) 10 SCC 310],** after an exhaustive review of authorities, laid down the law in Paragraph 18 as under :

> **"18. <u>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.</u> 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 that was available."**

15. Although the Trial Court noted in order dated 20.04.2015 that the burden shifts to the Defendants after the Plaintiff proves Issue No.1, the text of Original Issue No.3 contains no such prerequisite. Leaving Original Issue No.3 as a separate issue creates an inherent conflict with Issue No.1 and risks penalizing the Defendants, in the event the Plaintiff fails to establish an ancestral nucleus.

16. In view of the above, the impugned Order dated 20.04.2015 rendered by the learned Civil Judge, Junior Division, Ausa below Exh.168 warrants interference. The issues framed below Exh.144 require recasting.

17. Resultantly, Writ Petition is allowed.

18. The impugned Order dated 20.04.2015 passed by the learned Civil Judge, Junior Division, Ausa below Exh.168 in Regular Civil Suit No.190/2009 is hereby quashed and set aside and application below Exh.168 presented by the Petitioners stands allowed.

19. The learned Trial Court is requested to proceed with the trial in Regular Civil Suit No.190/2009 on the basis of the recasted issue and decide the suit expeditiously in accordance with law, in any case within a period of one year from today.

(SACHIN S. DESHMUKH, J.)

fmp/-