

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

SECOND APPEAL NO.106 OF 2014

1. Apparao S/o Tatyrao Gadhave,
Since deceased through L.Rs.
 - 1-A Sow. Vijabai w/o Bandu Dhekale,
Age: 58 years, Occ: Household,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad
 - 1-B Shamalbai w/o Mahadeo More,
Age: 52 years, Occ: Household,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad
 2. Kashinath S/o Tatyrao Gadhave,
Age: 74 years, Occ: Agril,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad
 3. Jyotiram S/o Apparao Gadhave,
Age: 56 years, Occ: Agril.,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad
 4. Rajendra S/o Apparao Gadhave,
Age: 46 years, Occ: Agril.,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad
- ...Appellants

VERSUS

1. Gendeo S/o Shivram Gadhave,
Age: 76 years, Occ: Labour,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad
2. Dinkar S/o Sadhu Ukrande,
Age: 50 years, Occ: Agril.,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad

3. Pandit S/o Sadhu Ukrande,
Age: 45 years, Occ: Agril.,
R/o Jawalga (Mesai), Tq. Tuljapur,
Dist. Osmanabad ...Respondents

Mr S. S. Choudhary, Advocate for appellants;
Mr K. K. Kulkarni, Advocate for respondent No. 1;
Mr M. L. Dharashive, Advocate for respondent Nos. 2 and 3

CORAM : N.W. SAMBRE, J.

**DATE OF RESERVING THE
ORDER : 5th January 2015**

**DATE OF PRONOUNCING
THE ORDER : 8th June 2015**

ORDER

1. Heard respective Counsel. With the consent, the appeal is taken up for final disposal at admission stage.
2. The present second appeal is by original defendants, who suffered a decree for partition and separate possession in Regular Civil Suit No.114 of 2002 passed by learned Civil Judge, Junior Division, Tuljapur on 23rd October 2007, confirmed in Regular Civil Appeal No.276 of 2007 by an order dated 25th April 2013 passed by Principal District Judge, Osmanabad. As such, the present second appeal.
3. Mr Choudhari, learned Counsel for the appellants has sought to raise following question of law for consideration of this Court :

“ Whether the respondents-plaintiffs have proved that they are entitled for partition and separate possession being sons of Shivram though his wife Tanibai who remarried after the death of Shivram ?”

4. For deciding the point raised before this Court, the facts as are necessary are as under:

5. Father of the plaintiff and defendants viz. Shivram and Tatyrao were real brothers and Shivram predeceased Tatya. The suit property consists of 9 hectare 17-R land out of Gat No.403/1, 9 hectare 45-R land out of Gat No.403/1, and Gram Panchayat house Nos. 180 and 181 at village Karla, Taluka Tuljapur.

6. After the death of Shivram, father of the plaintiff, though his mother Tanibai was looked after for some time by Tatyrao, father of the defendants, however, after the plaintiff attained age of about a year, both were driven out of the house. Tanibai then remarried with one Laxman Mote and started residing with him along with the plaintiff.

7. After the marriage of the plaintiff, he begotten four children, of the two were admitted in the school with surname as 'Mote' whereas other two viz. Bharat and daughter Ambubai were admitted by

original name 'Gadhav', as plaintiff belongs to Gadhav family, as was born out of wedlock of Tanibai and Shivram Gadhav.

8. The claim for partition was resisted by the defendants-appellants by simply denying the claim and relationship. The written statement by the defendants No.1, 2, 4 and 5 at Exh.28 was adopted by defendants No.3 and 6 vide pursis at Exh.27.

9. Learned trial Court framed the following issues for its consideration and answered the same accordingly:

<u>ISSUES</u>	<u>FINDINGS</u>
1. Does plaintiff prove that the suit property is the joint Hindu family property ?	In the affirmative
1A. Whether plaintiff's father Shivram was younger brother of Tatyarao? and their off-springs forms separate strips of their Hindu United Family?	In the affirmative
2. Does he further prove that he has 1/2 share in the suit property?	In the affirmative
3. Is plaintiff entitled to claim partition of the suit property and to recover the possession of his share ?	In the affirmative

4. Does he entitle to claim mesne profit from the date of filing of the suit ? In the affirmative
5. Do defendants entitle to claim compensatory cost of Rs.5,000/-? In the negative
6. What order ? As per order below
10. In support of the claim put forth by the plaintiff, he has examined himself at Exh.38, one Satyaba P.W.2 at Exh.42, who happened to be son of Mamata, sister of Tatya and Shivram, Damu – P.W.3 at Exh.43, who happened to be son of Shevantabai, sister of defendant No.1's father. Yashwant Mote – P.W.4 at Exh.47, who was known to Shivram and Tatya. The defendants, in support of their claim examined D.W.1 Apparao at Exh.50 and D.W.2 Dattu at Exh.51.
11. In support of the claim put forth by the respondent - plaintiff, he has also placed on record certified copies of the record of rights in relation to the suit property from Exh.4/1 to 4/9.
12. Learned trial Court, upon analysing the evidence of the parties, noted that the only evidence that is brought on record against the claim of plaintiff was the entry as Mote in the column of surname in the matter of admission to the school of two children out of four of the

plaintiff. The said evidence as against the plaintiff was analysed and the explanation tendered by the plaintiff was accepted by the learned trial Court in the background that the plaintiff, his mother Tanibai both were illiterate.

13. Learned trial Court has taken into account the evidence of the plaintiff's witnesses, who in their testimony, have supported the claim of the plaintiff for partition and separate possession being son of Shivram. Their relation with the plaintiff and defendants was rightly taken into account by the trial Court for decreeing the suit, as in clear terms it was brought on record that the plaintiff is the son of Shivram, brother of Tatyrao and said Tatyrao was father of defendants No.1 and 2. Learned trial Court also analysed the issue as regards marriage of Tanibai with Laxman Mote and has inferred the said relationship to the detriment of the defendants, as plaintiff was born out of wedlock of Tanibai with Shivram prior to the death of Shivram and also prior to remarriage of Tanibai with Laxman. The evidence of the defendnats' witnesses does not stand to the scrutiny and rather the support drawn by the defendants was found to be very shaky. The acquisition of land to the extent of 4.7 hectare for construction of lake, the adjustment thereof, alienation of land by defendant No.4 was also taken note of. Learned trial Court as such, decreed the suit.

14. Learned lower appellate Court, while analysing the same at the instance of the present appellants has re-appreciated the evidence brought on record by the respondent No.1-plaintiff i.e. of Satyaba at Exh.42, Damu at Exh.43 and Yashwant at Exh.47. The evidence of above referred witnesses as stand to the scrutiny of cross-examination was accepted by the lower appellate Court. Evidence of D.W.1 Dattu at Exh.51 who was father-in-law of defendant No.1 was discarded on the ground of his relationship with the defendant.

15. The above referred observations made by both the Courts below if are tested in the light of point of law as sought to be raised in the present case, it is required to be noted that the relationship between Shivram and Tanibai as husband and wife and birth of the plaintiff Gendeo out of the said wedlock was established in clear terms. The marriage of Tanibai after the death of Shivram with Laxman Mote will have hardly any adverse bearing over the claim of the plaintiff for possession.

16. In view of above, in my opinion, no substantial question of law is involved in the concurrent findings recorded by both the Courts below. The appeal as such fails, stands dismissed.

[N.W. SAMBRE, J.]