

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.347 OF 2018
WITH
CIVIL APPLICATION NO.1387 OF 2017

- | | |
|--|---|
| 1. Namdeo Ganpat Jadhav (Since Deceased), |] |
| Through LRs.:- |] |
| a. Tarabai Namdeo Jadhav (Dead) |] |
| b. Bhanudas Namdeo Jadhav, |] |
| 1(b) residing at Wagholi, |] |
| Tal. Haveli, Dist. Pune. |] |
| c. Popat Namdeo Jadhav (Since Deceased), |] |
| Through LRs.:- |] |
| (a) Ranjana Popat Bhadale, |] |
| Age : Adult, Occ.: Household |] |
| (b) Atul Popat Bhadale, |] |
| Age : Adult, Occ.: Agriculturist |] |
| (c) Sitaram Popat Bhadale, |] |
| Age : Adult, Occ.: Agriculturist, |] |
| Nos.1c(a) to (c) residing at |] |
| Old Bhadale Wasti, Near Soyarik |] |
| Mangal Karyalaya, A/P Wagholi, |] |
| Tal. Haveli, Dist. Pune - 412 207. |] |
| (d) Suvarna Nilesh Gadute, |] |
| Age : Adult, Occ.: Household, |] |
| R/at Flat No.4, Kalagaurav Complex, |] |
| Pimple Gurav Road, Near Shitaladevi |] |
| Temple, Dapodi, Pune - 411 012. |] |
| 2. Balasaheb Sitaram Bhadale (Since Deceased), |] |
| Through LRs.:- |] |

- a. Kalavati Balasaheb Bhadale,]
Age : Adult, Occ.: Household]
- b. Kailas Balasaheb Bhadale,]
Age : Adult, Occ.: Agriculturist]
- c. Vilas Balasaheb Bhadale,]
Age : Adult, Occ.: Agriculturist,]
Nos.2a to 2c residing at S.No.1336,]
Padmavati Niwas, Bhadalevasti,]
Wagholi, Tal.: Haveli, Dist. Pune.]
3. Pandit Namdeo Jadhav (Bhadale)]
(Since Deceased), through LRs.:-]
- a. Mangala Pandit Jadhav (Bhadale),]
Age : Adult, Occ.: Household]
- b. Yuvraj Pandit Jadhav (Bhadale),]
Age : Adult, Occ.: Agriculturist,]
Both residing at Old Bhadalevasti,]
Near Soyarik Mangal Karyalaya,]
A/P. Wagholi, Tal. Haveli,]
Dist. Pune – 412 207.]
- c. Sushma Sachin Ranwade,]
Age : Adult, Occ.: Household,]
R/at Aundh, Tal.: Haveli, Dist. Pune.]
- d. Shailaja Dattatraya Thorve,]
Age : Adult, Occ.: Household,]
R/at Alandi, Tal. Haveli, Dist. Pune.]
- e. Shital Pramod Pathare,]
Age : Adult, Occ.: Household,]
R/at Chandan Nagar, Kharadee,]
Tal. Haveli, Dist. Pune.]
4. Amruta Namdeo Jadhav,]
Age : Adult, Occ.: Agriculture,]

R/at Wagholi, Tal. Haveli, Dist. Pune]
Through POA Suryakant Kakade] Appellants /
for all Appellants.] Applicants

Versus

1. Leelabai Sitaram Bhadale,]
Age : 68 years, Occ.: Household,]
R/at Karajawane, Tal. Shirur, Dist. Pune.]
2. Subhadra Sudam Thorve,]
R/at Charoli, Tal. Haveli, Dist. Pune.]
3. Ujjawala Shamrao Gadute,]
R/at Dapodi, Mahadev Ali, Pune - 12.] Respondents

ALONG WITH

**SECOND APPEAL NO.348 OF 2018
WITH
CIVIL APPLICATION NO.1382 OF 2017**

1. Namdeo Ganpat Jadhav (Since Deceased),]
Through LRs.:-]
A. Balasaheb Namdeo Jadhav @ Balasaheb]
Sitaram Bahadale, (Since Deceased),]
Through LRs.:- Respondent Nos.9 and 10]
B. Pandit Namdeo Jadhav (Bhadale)]
(Since Deceased), through LRs.:-]
B1. Mangala Pandit Jadhav (Bhadale),]
Age : Adult, Occ.: Housewife]
B2. Yuvraj Pandit Jadhav (Bhadale)]
Age : Adult, Occ.: Agriculture.]
B1 and B2 residing at Old Bhadale Vasti,]
Near Soyrik Mangal Karyalaya,]
A/P. Wagholi, Tal. Haveli, Dist. Pune.]
B3. Sushma Sachin Ranawade,]

Age : Adult, Occ.: Housewife,	]
R/at Aundh, Tal. Haveli, Dist. Pune.	]
B4. Shailaja Dattatray Thorve,	]
Age : Adult, Occ.: Housewife,	]
R/at Alandi, Tal. Khed, Dist. Pune.	]
B5. Sheetal Pramod Pathare @ Sheetal	]
Pandit Jadhav @ Bhadale,	]
Age : Adult, Occ.: Housewife,	]
R/at Chandannagar, Kharadi,	]
Tal. Haveli, Dist. Pune.	]
C. Amruta Namdeo Jadhav (Bhadale),	]
Age : Adult, Occ.: Agriculture	]
D. Bhanudas Namdeo Jadhav @ Bhadale,	]
Age : Adult, Occ.: Agriculture	]
E. Popat Namdeo Jadhav @ Bhadale	]
(Since Deceased), through LRs.:-	]
a. Ranjana Popat Bhadale,	]
Age : Adult, Occ.: Household	]
b. Atul Popat Bhadale,	]
Age : Adult, Occ.: Agriculturist	]
c. Sitaram Popat Bhadale,	]
Age : Adult, Occ.: Agriculturist,	]
Nos.Ea to Ec residing at	]
Old Bhadale Wasti, Near Soyarik	]
Mangal Karyalaya, A/P Wagholi,	]
Tal. Haveli, Dist. Pune - 412 207.	]
d. Suvarna Nilesh Gadute,	]
Age : Adult, Occ.: Household,	]
R/at Flat No.4, Kalagaurav Complex,	]
Pimple Gurav Road, Near Shitaladevi	]
Temple, Dapodi, Pune - 411 012.	]

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| F. Tarabai Namdeo Jadhav @ Bhadale (Dead) |] | |
| 2. Balasaheb Namdeo Jadhav @ Balasaheb |] | |
| Sitaram Bhadale (Since Deceased), |] | |
| Through LRs.:- Respondent Nos.9 and 10. |] | |
| 3. Pandit Namdeo Jadhav (Bhadale), |] | |
| (Since Deceased), through LRs.:- Respondent |] | |
| Nos.1B1 to 1B5. |] | |
| 4. Amruta Namdeo Jadhav (Bhadale), |] | |
| Age : Adult, Occ.: Agriculture, |] | |
| All residing at Wagholi, Tal. Haveli, Dist. Pune |] | |
| 5. Vilas Balasaheb Bhadale, |] | |
| Age : Adult, Occ.: Agriculturist |] | |
| R/at Wagholi, Tal. Haveli, Dist. Pune. |] | |
| 6. Kailas Balasaheb Bhadale, |] | |
| Age : Adult, Occ.: Agriculture, |] | |
| R/at Wagholi, Tal. Haveli, Dist. Pune |] | |
| Through POA Suryakant Kakade |] | Appellants / |
| for all Appellants. |] | Applicants |

Versus

- | | |
|--|---|
| 1. Jaiprakash Sitaram Goel, |] |
| Age : Adult, Occ.: Agriculture and Business, |] |
| R/at Gangotri Apartment, Pune - 37. |] |
| 2. Subhash Sitaram Goel, |] |
| Age : Adult, Occ.: Agriculture and Business, |] |
| R/at 125, Nana Peth, Pune - 2. |] |
| 3. Rajendra Sitaram Goel, |] |
| Age : Adult, Occ.: Agriculture and Business, |] |
| R/at 119, Nana Peth, Pune - 2. |] |
| 4. Umesh Sitaram Goel (Since Deceased), |] |
| Through LRs.:- |] |
| a. Meena Umesh Goel, |] |

- Age : Adult, Occ.: Housewife]
- b. Anju Umesh Goel,]
- Age : Adult, Occ.: Agriculture and Business,]
- c. Seema Umesh Goel,]
- Age : Adult, Occ.: Agriculture and Business,]
- d. Ankit Umesh Goel,]
- Age : Adult, Occ.: Agriculture and Business.]
- All 4a to 4d residing at 119, Nana Peth,]
- Pune - 2.]
5. Dwarkadas Ramkisan Nyati (Dead)]
6. Nitin Dwarkadas Nyati,]
- Age : Adult, Occ.: Agriculture & Business,]
- R/at 10/7, Anand Society, Pune - 37.]
7. Aslam Abdullah Haji,]
- Age : Adult, Occ.: Agriculture & Business,]
- R/at 6, Moledina Road, Camp, Pune - 1.]
8. Rajaram Jaywant Lokhande,]
- Age : Adult, Occ.: Advocacy & Agriculture,]
- R/at 421/18, Ram Co-op. Housing Society Ltd.,]
- Yerwada, Pune - 6.]
9. Subhash Tipanna Nelge,]
- Age : Adult, Occ.: Business.]
10. Babita Subhash Nelge,]
- Age : Adult, Occ.: Household]
11. Shivkumar Tipanna Nelge,]
- Age : Adult, Occ.: Business,]
- Respondent Nos.6 to 8 residing at]
- Sandwik Colony, Bhosari, Pune - 29.]
12. Arun Sampatrao Patil,]
- Age : Adult, Occ.: Business,]
- R/at 1206/42A, Lokmat Bhavan, Pune-4.]

13. Subhadra Sudam Thorve,]
Age : Adult, Occ.: Household.]
14. Ujwala Shamrao Gadute,]
Age : Adult, Occ.: Household,]
All residing at Wagholi, Tal. Haveli, Dist. Pune.] Respondents

Mr. Ram Apte, Senior Counsel, a/w. Mr. Purushottam Chavan and Ms. Shruti Tulpule, for the Appellants-Applicants.

Mr. P.K. Dhakephalkar, Senior Counsel, a/w. Mr. Girish Shedge, Mr. Shanay Shah, Mr. Nivit Srivastava and Ms. Sneha Patil, I/by M/s. Maniar Shrivastava & Co., for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 8TH AUGUST, 2018.

PRONOUNCED ON : 16TH AUGUST, 2018.

JUDGMENT :

1. Both these Appeals are arising out of one and the same Judgment of the Court of District Judge, Pune, in Civil Appeal No.445 of 1991 and Civil Appeal No.879 of 1997, dated 12th June 2017. These two Civil Appeals were preferred against the 'Judgment and Decree' dated 16th March 1991 passed by the 2nd Joint Civil Judge, Junior Division, Pune, in Regular Civil Suit No.2347 of 1985.

2. For the sake of convenience, the parties are referred to by their original nomenclature.

. The said Suit was filed by Leelabai for declaration that, she was the legally wedded wife of deceased Sitaram Genu Bhadale and, as such, the exclusive owner of the suit land bearing Gat No.2307, situate at Village Wagholi. It was her case that, her two elder sisters by name Parvatibai and thereafter Yamunabai were married with Sitaram and after their death, she being the youngest sister, was given in marriage to Sitaram in or about 1956. She co-habited with Sitaram at Wagholi for about ten to twelve years. However, subsequently, on account of some dispute between her and her husband Sitaram, she left his house and started residing at Village Karanjawane, along with her brother.

3. According to Leelabai, the suit land was purchased by Sitaram's mother Laxmibai in the year 1922 in the name of her three sons, namely, Nana, Sitaram and Namdeo by registered 'Sale-Deed' dated 24th January 1922. Nana died issue-less; whereas Namdeo was given in adoption to one Ganpat Jadhav. Therefore, her husband Sitaram had alone become the exclusive owner of the suit land. However, after the death of Sitaram, the name of Defendant No.2-Balasaheb, who was the son of Namdeo, came to be mutated in the 'Record of Rights' of the suit land, on his application that he was adopted by deceased Sitaram as his son. According to the Plaintiff-Leelabai, no such adoption had taken place. Her consent for the adoption was also never obtained and hence, on the basis of the alleged adoption, Defendant No.2-Balasaheb cannot

claim to be having any share in the suit land. Accordingly, she had taken an objection to the mutation entry, but that objection was dismissed. She has filed an Appeal against the said order before the Revenue Authority, but it was also dismissed. Hence, by issuing a notice through her Advocate on 9th March 1983, she has called upon Defendant No.1-Namdeo and Defendant No.2-Balasaheb to deliver possession of the suit property to her, as it belonging to her exclusively, after the death of her husband Sitaram in the year 1982.

4. This Suit came to be resisted by the Defendants vide written statement at Exhibit-15, denying that Plaintiff was the legally wedded wife of deceased Sitaram. It was submitted that, she was never married or co-habited with Sitaram and hence, she had no share in the property left behind by Sitaram. Conversely, it was contended that, Defendant No.2-Balasaheb, who was the son of Sitaram's brother Namdeo, was validly and legally taken in adoption by Sitaram, as Sitaram was not having his own issues. Hence, after the death of Sitaram, Defendant No.2-Balasaheb has become the exclusive owner thereof. In the alternate, it was submitted that, the suit property was the self-acquired property of Defendant No.1-Namdeo and hence, if the Court comes to the conclusion that it was not exclusively owned by Defendant No.2-Balasaheb, then, Defendant No.1-Namdeo, being in continuous possession thereof for over twelve years, had acquired title by adverse

possession; therefore, Plaintiff-Leelabai cannot get any share in the suit land. The Defendants, therefore, prayed for dismissal of the Suit.

5. On these respective pleadings of the parties, the Trial Court has framed in all seven issues, which read as under :-

- (1) *Does Plaintiff prove that she is legally wedded wife of deceased Sitaram Bhadale ?*
- (2) *Does Defendant No.2 prove that he was legally adopted by the deceased Sitaram Bhadale ?*
- (3) *Does Plaintiff prove that she has alone succeeded the suit property ?*
- (4) *Does Defendant No.1 prove that he has become owner of the suit property by way of an adverse possession ?*
- (5) *Is Plaintiff entitled for the declaration sought ?*
- (6) *Is she entitled for the possession of the suit property ?*
- (7) *What Order and Decree ?*

6. In support of her case, Plaintiff-Leelabai examined herself and one witness by name Baburao Sadashiv Londhe to prove her marriage with Sitaram. As against it, on behalf of Defendants, Defendant No.2-Balasaheb examined himself and one witness by name Kaluram Mahadu Kate to prove the 'Adoption Deed' (Exhibit-61).

7. On appreciation of their evidence, the Trial Court was pleased to hold that, the Plaintiff has proved that she is legally wedded wife of deceased Sitaram. The Trial Court further held that, Defendant No.2-

Balasaheb has also proved that he was legally adopted by deceased Sitaram. Accordingly, the Trial Court held that, both the Plaintiff-Leelabai and Defendant No.2-Balasaheb were entitled to succeed to the equal $\frac{1}{2}$ share in the suit land, as it was the property left behind by deceased Sitaram. The Trial Court, thus, decreed the Suit partly, declaring that, Plaintiff-Leelabai is the legally wedded wife of Sitaram and she has $\frac{1}{2}$ share in the suit property. Accordingly, the Trial Court further passed the 'Decree of Partition', so that her $\frac{1}{2}$ share can be partitioned by metes and bounds and be put into her separate possession.

8. This 'Judgment and Decree' of the Trial Court was challenged in two counter-Appeals; the one preferred by Plaintiff-Leelabai, claiming exclusive and sole ownership over the suit land, and another by Defendant No.1-Namdeo and Defendant No.2-Balasaheb, challenging the declaration that Plaintiff-Leelabai is the legally wedded wife of deceased Sitaram and she is having $\frac{1}{2}$ share in the suit land.

9. During pendency of these two Appeals before the first Appellate Court, the Defendants made an application to amend the written statement and for framing of additional issues. It was allowed by the first Appellate Court and two additional issues were framed as to '*whether Defendant No.1 proved that he is having $\frac{1}{2}$ share in the suit property?*'

and further '*whether it was his self-acquired property?*' and remanded the matter to the Trial Court for recording findings on these two issues.

10. This order of the first Appellate Court was challenged by the Plaintiff before this Court by preferring Writ Petition No.7558 of 2009, which came to be withdrawn with a direction to the Trial Court to decide those issues in time-bound manner.

11. Before the Trial Court, Plaintiff-Leelabai again examined herself; while on behalf of the Defendants, Bhanudas, son of Defendant No.1-Namdeo entered into the witness box.

12. On appreciation of their evidence and the earlier evidence led by the parties, the Trial Court was pleased to hold that, Defendant No.1-Namdeo has proved that he is having $\frac{1}{2}$ share in the suit property and it is his self-acquired property. In this respect, the Trial Court considered that Laxmibai, who has purchased the suit land in the name of her three sons, namely, Nana, Sitaram and Namdeo, was having her own source of income. It was further held by the Trial Court that, Nana has expired unmarried and issue-less and, therefore, Sitaram and his brother Defendant No.1-Namdeo alone became entitled to the $\frac{1}{2}$ share in the suit land. It was further held that, even though Namdeo was given in adoption, as it was in the year 1927, i.e. after purchase of the suit land

by his mother Laxmibai in the year 1922, the suit land was already vested in Namdeo and, therefore, he was entitled to retain the ownership thereof to the extent of $\frac{1}{2}$ share in the suit land. Accordingly, the Trial Court has held that, Defendant No.1-Namdeo has proved that he is having $\frac{1}{2}$ share in the suit property as his self-acquired property.

13. On receipt of the finding to these two issues from the Trial Court, the first Appellate Court has heard both these Appeals and set aside the finding of the Trial Court on these two additional issues. The first Appellate Court was pleased to confirm the earlier finding of the Trial Court that, Plaintiff-Leelabai is the legally wedded wife of deceased Sitaram and further held that, Defendants failed to prove that Defendant No.2-Balasaheb was taken in adoption by deceased Sitaram. Accordingly, the first Appellate Court decreed the Plaintiff's Suit in toto; thus, declaring her to be the exclusive owner of the suit land and directing the Defendants to handover possession thereof to the Plaintiff within three months.

14. This Judgment of the first Appellate Court is challenged in these two separate Second Appeals preferred by Defendant Nos.1 and 2.

15. According to learned Senior Counsel for the Appellant/Defendant No.1-Namdeo, the controversy involved herein is, *'whether the suit land*

can be called as joint family property; when the evidence on record clearly goes to show that it was purchased by Laxmibai, out of her own earnings in the name of her three minor sons?' It is submitted that, on the death of Nana, his 1/3rd share would devolve on his mother Laxmibai as a limited interest, as per Section 43 of the Mulla's 'Principles of Hindu Law', and after her death, her 1/3rd share would devolve on her son Sitaram. Therefore, Sitaram's share in the suit property, at the highest, can be only 2/3rd; whereas, the first Appellate Court has given him 100% share in the suit property. It is urged that, 1/3rd share of Defendant No.1- Namdeo, which was crystallized as on the date of the 'Sale-Deed' itself, remained unaffected even after Namdeo was given in adoption to Ganpat Jadhav. This finding of the Trial Court was never challenged before the first Appellate Court by the Plaintiff-Leelabai and in such situation, it was not proper on the part of the first Appellate Court to reverse the said finding. According to learned Senior Counsel for the Appellant-Defendant No.1, the impugned 'Judgment and Decree' of the first Appellate Court, therefore, cannot be sustainable in law and hence, it is liable to be set aside.

16. Per contra, learned Senior Counsel for the Respondent-Plaintiff has supported the said Judgment by submitting that, all these contentions are raised by the Appellants-Defendants as an after-thought, giving up the original case, which they had put up in the written statement.

According to him, even otherwise also, there is no evidence on record to prove that the suit property was the ancestral or coparcenary property of Laxmibai. It is urged that, there is a difference even between the 'joint family property' and the 'ancestral coparcenary property'. The joint family or self-acquired property can devolve only by succession and not by survivorship. Here in the case, therefore, after the death of Laxmibai, the entire property devolved upon Sitaram, as Nana has already died issue-less and Defendant No.1-Namdeo was also given in adoption. Therefore, after the death of Sitaram, his share in the suit property will devolve on his wife; as in the present case, there is no evidence to prove the adoption of Defendant No.2-Balasaheb by deceased Sitaram and the legality of the alleged 'Adoption Deed'.

17. In the light of the rival submissions advanced by learned Senior Counsel for the parties, following substantial questions of law arise for my consideration :-

- (1) *Whether Plaintiff is proved to be the legally wedded wife of Sitaram?*
- (2) *Whether Defendant No.2 is proved to be the legally adopted son of Sitaram?*
- (3) *Whether Defendant No.1 proves that the suit land is his self-acquired property?*
- (4) *Whether the first Appellate Court has committed an error in directing enquiry for mesne profit?*

18. It has to be stated that, Plaintiff-Leelabai has claimed only two reliefs, namely, that she is the legally wedded wife of Sitaram and hence, she is the exclusive owner of the suit property, after the death of Sitaram. Defendants had challenged the Suit only on the count that, the Plaintiff is not the legally wedded wife of Sitaram. Conversely, as Sitaram has adopted Defendant No.2-Balasaheb as his son, Defendant No.2-Balasaheb became entitled to entire property owned by Sitaram. In the alternate, it was contended that, as Defendant No.1-Namdeo was in possession of the suit land, he has become owner thereof by way of adverse possession. A vague plea was also raised that, it was his self-acquired property, which is subsequently developed in the First Appeals contending that, the said property was vested in Defendant No.1-Namdeo prior to his adoption and, therefore, he has acquired $\frac{1}{3}^{\text{rd}}$ share therein. Subsequent to death of his mother Laxmibai, the said property devolved on Sitaram and Namdeo alone and, therefore, Namdeo has become the owner to the extent of $\frac{1}{2}$ share in the said property.

19. Now as to the first question, it has to be held that, there is concurrent finding of the fact recorded by both the Courts below that, Plaintiff-Leelabai has succeeded in proving that she is legally wedded wife of Sitaram. This finding of fact is based on proper appreciation of evidence. In addition to the oral evidence of the Plaintiff-Leelabai herself, there is also the evidence of the witness by name Baburao

Londhe, who has actually performed the marriage of Plaintiff with Sitaram. He has recited *Mangalashtaka* (sacred song) in the said marriage. As observed by both the Courts below, he is a respected person of the village, who was at the time of giving evidence in the Court was of 85 years of age. The Trial Court, which had occasion to observe his demeanor, was convinced that he is the witness, who is worth placing reliance, as he was rendering the true account of the facts and had no grudge against the Defendants. Both the Courts below also found that, there is sufficient documentary evidence on record, like the Ration Card and the Voter's Card, which carry the name of the Plaintiff-Leelabai as the legally wedded wife of the deceased Sitaram. Hence, as regards this finding of the fact, this Court need not dilate and had no reason to take any other view of the matter than the view taken by both the Courts below.

20. The second issue for consideration is about the alleged adoption of Defendant No.2-Balasaheb by deceased Sitaram. In this respect, the Trial Court has accepted the case of adoption; whereas, the first Appellate Court has reversed the said finding. In my considered opinion, the best possible evidence to prove the adoption was that of Defendant No.1-Namdeo, the biological father of Defendant No.2-Balasaheb, who is alleged to have given Defendant No.2-Balasaheb in adoption to Sitaram. However, he has not entered into witness box, nor he has examined even

his wife, the biological mother of Defendant No.2, who was very much alive. The non-examination of the biological parents as witnesses in this case, though available, creates a serious doubt as to whether adoption had really taken place or not. The only evidence in this respect is that of Defendant No.2-Balasaheb, who was allegedly given in adoption. No doubt, he has deposed that, after performing the Dattak Ceremony, he was given in adoption to Sitaram by his father, but then, considering the age of Defendant No.2-Balasaheb, at the relevant time, it becomes difficult to place reliance on his evidence. No other witness, who could have claimed that he was present at the time of the said Dattak Ceremony, is examined by the Defendants.

21. Though the reliance is placed by the Defendants on the 'Adoption Deed' (Exhibit-61), it is pertinent to note that, it is registered after several years from the alleged adoption. The very stamp-paper for execution of this 'Adoption Deed' (Exhibit-61) is purchased by Defendant No.2-Balasaheb. The first Appellate Court has rightly found various suspicious features in the said 'Adoption Deed' (Exhibit-61) also. The attesting witness examined on the said 'Adoption Deed', namely, Kaluram Mahadu Kate, has also admitted in his cross-examination that, on the eve of Akshay Tritiya, he was called to the house of deceased Sitaram for lunch and after the lunch, he has signed on this 'Adoption Deed' (Exhibit-61). He has admitted that, he does not know who had

dictated or at whose instance, the contents of the 'Adoption Deed' (Exhibit-61) were scribed. The first Appellate Court has, therefore, rightly refused to place reliance on the evidence of this witness.

22. The law is well settled that, as the adoption results in changing the course of succession, depriving wives and daughters of their rights and transfer of properties to comparatively strangers or more remote relations, it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud, inconsistency and probability, so as to leave no occasion for doubting its truth. Here in the case, the best possible evidence of the biological parents, who were very much available and the father was also party to this Suit, is withheld from the Court and whatever evidence is produced is not free from suspicion. Hence, merely relying upon the Ration Card or the Wedding Invitation Card, in which name of deceased Sitaram was shown as father of Defendant No.2-Balasaheb, it would be difficult to accept that adoption of Defendant No.2-Balasaheb is proved. Moreover, such adoption is also not proved to be legal and valid. The first Appellate Court has hence rightly held that, the Defendants have failed to prove that Defendant No.2-Balasaheb is the legally adopted son of deceased Sitaram.

23. This, however, leaves the third issue for consideration, which is raised in the course of the First Appeal. As can be seen from the

Judgment of the Trial Court, it was not at all pleaded or argued before the Trial Court that Defendant No.1-Namdeo has become owner by survivorship. By seeking some amendment of a typographical nature in the written statement, a new case is introduced to the effect that Defendant No.1-Namdeo is also having $\frac{1}{2}$ share in the suit property, as the said property was purchased by his mother Laxmibai and after the death of Laxmibai, it devolved by way of survivorship on Sitaram and Defendant No.1-Namdeo. Accordingly, the additional evidence was also led before the Trial Court with the permission of the first Appellate Court by framing necessary issues to that effect. The Trial Court has, on the basis of the evidence adduced before it, held that, Defendant No.1-Namdeo has become owner of $\frac{1}{2}$ share in the suit land, as the said share was vested in him before his adoption. In the course of this Appeal also, learned Senior Counsel for Defendant No.1-Namdeo has led much emphasis on this aspect of the case by submitting that, it being the ancestral joint family property of Laxmibai, after her death, it would devolve by survivorship on her three sons; Nana, Sitaram and Namdeo. As Nana died issue-less, both Sitaram and Namdeo got $\frac{1}{2}$ share in the suit property. If not, at-least, Defendant No.1-Namdeo has $\frac{1}{3}^{\text{rd}}$ share in the property, as it was purchased before his adoption. In this respect, learned Senior Counsel for the Defendant No.1-Namdeo has placed reliance on various Judgments of this Court and the Hon'ble Apex Court, as follows :-

- (i) *Dubaria Vs. Har Prasad and Anr.*, (2009) 9 SCC 346;
- (ii) *Sabera Begum and Ors. Vs. G.M. Ansari*, 1979 Bom.C.R. 110;
- (iii) *Bahinabai Shravan Patil Vs. Kisanlal Kunjilal Shet and Ors.*, AIR 1950 Bom 47;
- (iv) *Shamsu Suhara Beevi Vs. G. Alex and Anr.*, (2004) 8 SCC 569;
- (v) *Shiv Kumar Sharma Vs. Santosh Kumari*, (2007) 8 SCC 600;
- (vi) *Balram Yadav Vs. Fulmaniya Yadav*, 2016 AIR (SC) 2161.

24. In my considered opinion, the factual aspects of the case are more than sufficient to show that, none of these Judgments can be applicable to the present case. Admittedly, the suit land was purchased by Laxmibai in the year 1922 by virtue of registered 'Sale-Deed' dated 24th January 1922. At that time, she was widow. There is no evidence on record to prove that her husband Genu was having any ancestral joint family property, the income from which, could have formed the nucleus. In the absence of such evidence on record, it has to be held that Laxmibai has purchased this property from her own income. To that extent, there is evidence and admission given by the Plaintiff-Leelabai also in her cross-examination, after the matter was remanded. She has categorically admitted that, Laxmibai was working in the agricultural fields. She was also having the hens and selling the eggs. She was doing dairy business also. There is further admission by the Plaintiff-Leelabai

that the suit land was purchased by Laxmibai from her own earnings. Therefore it follows that, it was the self-acquired property of Laxmibai. Hence, it cannot be called as 'ancestral coparcenary property'.

25. So far as Defendant No.1-Namdeo is concerned, admittedly, he was given in adoption to Ganpat Jadhav. There is no direct evidence on record as to the date on which he was given in adoption. Neither the Plaintiff nor the Defendants have produced the evidence relating to Namdeo's adoption, though the fact that he was given in adoption is not disputed. The very fact that, the 'Sale-Deed', under which Laxmibai has purchased the suit land in the year 1992, is in the name of her three minor sons, including Namdeo, clearly goes to show that, in the year 1922, Namdeo was not given in adoption, but, at that time, he was minor. Therefore, one can safely say that Namdeo was given in adoption after the suit land was purchased in the name of three sons by Laxmibai. Hence, according to learned Senior Counsel for Defendant No.1-Namdeo, to that extent, the $\frac{1}{3}^{\text{rd}}$ share in the suit land was already vested in Namdeo.

26. According to learned Senior Counsel for the Plaintiff, however, as the suit property was the self-acquired property of Laxmibai, till her death, the shares therein cannot devolve on her sons and as at the time of her death, Defendant No.1-Namdeo was already given in adoption to Ganpat Jadhav, her share cannot devolve on Defendant No.1-Namdeo.

Similarly, as Nana has also died issue-less, after Defendant No.1-Namdeo was given in adoption, his share also cannot devolve on Namdeo. Hence, according to learned Senior Counsel for the Plaintiff, as the share of Laxmibai and Nana, on their respective deaths, devolved on Sitaram alone, Sitaram become the exclusive owner of the suit land and after his death, Plaintiff-Leelabai is the sole owner thereof.

27. It is submitted by learned Senior Counsel for Defendant No.1-Namdeo that, as Laxmibai had purchased the suit land jointly in the name of her three sons and as the 'Sale-Deed' is silent about the shares of these three sons, it has to be held that, all the three sons were having $1/3^{\text{rd}}$ share each in the suit land and as Defendant No.1-Namdeo was given in adoption after the 'Sale-Deed', he was also having $1/3^{\text{rd}}$ share in the suit land. Moreover, after the death of Laxmibai, he became entitled to get her share also.

28. In my considered opinion, it becomes difficult to accept that, merely because the 'Sale-Deed' states that Laxmibai has purchased the property in the name of her three minor sons, the property will stand vested in the name of all the three minor sons on the date of execution of 'Sale-Deed' itself. It was clearly a property purchased by Laxmibai from her own earnings. It may be for the benefit of her minor sons. However, it cannot be called as an ancestral coparcenery property, so that Defendant No.1-Namdeo can get any share therein, immediately on the

purchase of the said property. When, admittedly, there is no evidence to prove that this family was having any ancestral joint family property, from the income of which this land could have been purchased by Laxmibai, it has to be held that, Laxmibai has, for the first time, acquired this land. Hence, on her death only, the succession will open. As before her death, Defendant No.1-Namdeo was already given in adoption and Nana has also expired, it follows that, Laxmibai's share devolved on her only surviving son Sitaram. Plaintiff-Leelabai being the legally wedded wife of Sitaram and Defendants having failed to prove that Defendant No.2-Balasaheb was the adopted son of Sitaram, it follows that, Plaintiff-Leelabai alone will get the exclusive ownership and right over the suit land.

29. The reliance placed by learned Senior Counsel for the Appellant/Defendant No.1-Namdeo on the Judgment of the Hon'ble Apex Court in the case of *Amirtham Kudumbah Vs. Sarnam Kudumban*, (1991) 3 SCC 20, is totally misplaced. It cannot in any way be said to be applicable to the facts of the present case.

30. As to the reliance placed on the Judgment of the Hon'ble Apex Court in the case of *Surendra Kumar Vs. Phoolchand (Dead), through LRs. and Anr.*, (1996) 2 SCC 491, instead of supporting the case of Defendant No.1-Namdeo, it supports the case of the Plaintiff-Leelabai; because, it lays down and re-affirms the legal position 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 acquired. No doubt, such a presumption is a presumption of fact, which can be rebutted.”

31. However, in the present case, absolutely no evidence is led on record to rebut this presumption.

32. Learned Senior Counsel for Defendant No.1-Namdeo has then relied upon the Judgment of the Hon'ble Apex Court in the case of *Shreya Vidyarthi Vs. Ashok Vidyarthi and Others, AIR 2016 SC 139*, to submit that,

“Hindu widow is not coparcener in undivided family of her husband and, therefore, she cannot be a 'Karta', but she can act as a 'manager' of the family.”

33. There cannot be any two opinions about this legal proposition. Here in the case, even if it is accepted that, Laxmibai has acted as 'manager' of the joint family, that will not again help the case of Defendant No.1-Namdeo to prove that, he has got share in the said property by way of survivorship. As it is, the succession in the present case will open only upon the death of Laxmibai and, therefore, as by that time, Defendant No.1-Namdeo has already gone in adoption, he cannot be entitled to get any share therein.

34. The last submission advanced by learned Senior Counsel for Appellant/Defendant No.1-Namdeo is that, though Plaintiff-Leelabai has not asked for mesne profits, the first Appellate Court has ordered an enquiry, under Order 20 Rule 12 of the CPC, for ascertaining the amount of mesne profits. According to learned Senior Counsel for Appellant/Defendant No.1-Namdeo, such decree cannot be passed. To support this submission, reliance is placed on the Judgment of the Hon'ble Apex Court in the case of *Shiv Kumar Sharma Vs. Santosh Kumari*, (2007) 8 SCC 600. However, the facts of the said case reveal that, in a suit for possession and injunction filed by the Plaintiff, no claim was made for damages or mesne profits in Suit. In the Appeal filed by the Defendant in the High Court, for the first time, in addition to uphold the decree for possession and injunction, the direction was given for payment of compensation to the Plaintiff and granting liberty to the Plaintiff to file a separate Suit for damages and mesne profits. In that backdrop, it was held that,

“There may be independent causes of action for the damages, the mesne profits or the compensation, in a Suit for specific performance, such relief could not have been granted.”

35. As against it, in the present case, the Plaintiff - a widow, is deprived from possession of the suit property for years together, to which she was lawfully entitled. Hence, it cannot be said that the first Appellate Court has committed any error in passing such order of directing enquiry in

the mesne profits, so as to warrant interference therein in these Second Appeals. Both the Second Appeals, therefore, hold no merits; hence stand dismissed.

36. In view of dismissal of both the Second Appeals, Civil Applications pending therein do not survive and the same stand disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]