

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

SECOND APPEAL NO. 198 OF 2005

APPELLANT

(Ori. Deft. On R.A.)

Govinda s/o Parashram Mahalle,
Aged about 45 years, Cultivator and
R/o Kalamba Mahali, Taluka and
District Washim.

...V E R S U S...

RESPONDENTS

(Ori. Pltf. On R.A.)

- 1] Kasabai wd/o Tulshiram Survey
Aged about 74 years, Occu: Nil,
R/o Lathi, Post Shelubazar,
Tq. Mangrulpir, District Washim.
- 2] Dhrupatabai w/o Kashiram Bhoyar,
Aged about 34 years, Occu: Household,
R/o Kherda, Post-Sonale,
Taluka Mangrulpir, District -Washim.
- 3] Geetabai wd/o Govinda Raut,
Aged about 49 years.
- 4] Sopan s/o Jayaji Ugale,
Aged about 49 years.
- 5] Anusaya w/o Maroti Chaudhari,
Aged about 51 years.
- 6] Sakhubai w/o Rajaram Chaudhari,
Aged about 46 years.
- 7] Laxman Shriram Thakre,
Aged about 44 years.

Nos. 3 R/o Borala, Nos. 4 and 5
R/o Kajalamba, No. 6 R/o Kharola,
Taluka and District -Washim.

RESPONDENTS:
(Ori. Deft. Nos.6
to 10 on R.A.)

8] Tulsabai wd/o Parashram Thakre,
Aged about 44 years, R/o Kharola,
Taluka and District -Washim.

9] Subhash Dnyanba Mahalle,
Aged about 26 years.

10] Gajanan Dnyanba Mahalle,
Aged about 65 years.

Nos. 9 and 10 Cultivators, R/o Kajalamba
Mahalli, Taluka and District Wahsim.

11] Zingraji Parashram Mahalle,
Aged about 65 Years.

12] Gokarna Zingaraji Mahalle,
Aged about 59 Years.

Nos. 11 and 12 Resident of Kajalamba
Mahalli, Taluka and District Washim.

RESPONDENTS:
(Ori. Def. Nos. 2
to 5 on R.A.)

13] Kusum w/o Datta Mahalle,
Aged about 35 years.

14] Shama s/o Datta Mahalle,
Aged about 14 years, Minor.

15] Kishor s/o Datta Mahalle,
Aged about 13 years, Minor.

16] Jayshree d/o Datta Mahalle,
Aged about 10 years, Minor.

Nos. 13 to 16 all Resident of Washim
Shukrawarpeth c/o Madhukar Khotraji
Ghole, Taluka and District Washim, near
Laxminarayan Innani's Primary School,
Nos. 13 to 16 minor by G.A.L. No. 13
their mother i.e. Kusum wd/o Datta
Mahalle.

Shri R.L. Khapre, Senior Advocate assisted by Shri V.K. Paliwal
with A.S. Shukla, Advocate for appellant.

Shri S.R. Deshpande, Advocate assisted by Advocate Shri S.W.
Kolhe for Respondent Nos. 2, 3, 8, 11, 12, 14, 15 and 16.

CORAM : **S.M.MODAK, J.**
DATE OF RESERVED : **26/08/2021.**
DATE OF DECISION : **28/10/2021.**

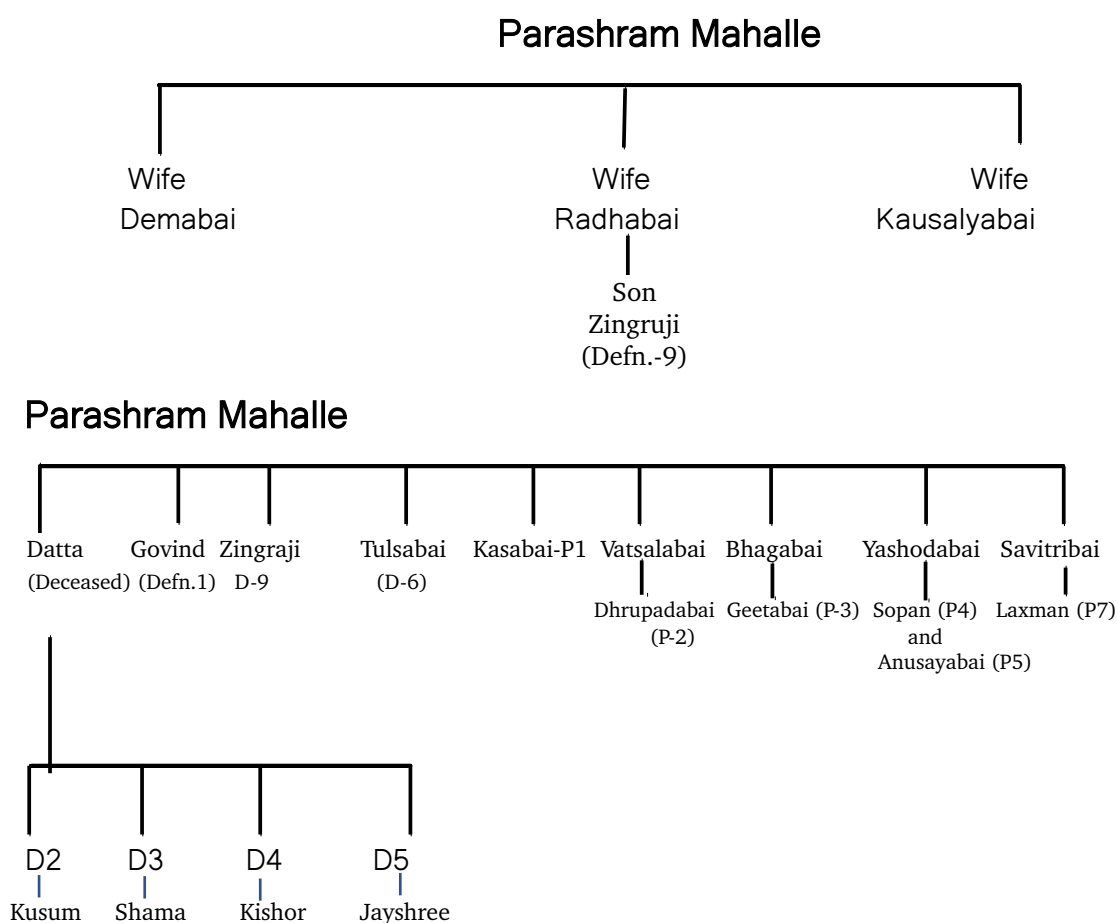
ORAL JUDGMENT

1] This is an appeal preferred by the Original Defendant No.1 of Regular Civil Suit No. 121/1996. Apart from him, there were 9 defendants they are his relatives. Whereas there were 7 plaintiffs; plaintiff Nos. 3 to 7 were joined later on when plaintiff Nos. 1 and 2 filed an application for amendment. Similarly, defendant Nos. 7 to 10 were joined later on, on the application of original plaintiffs for amendment.

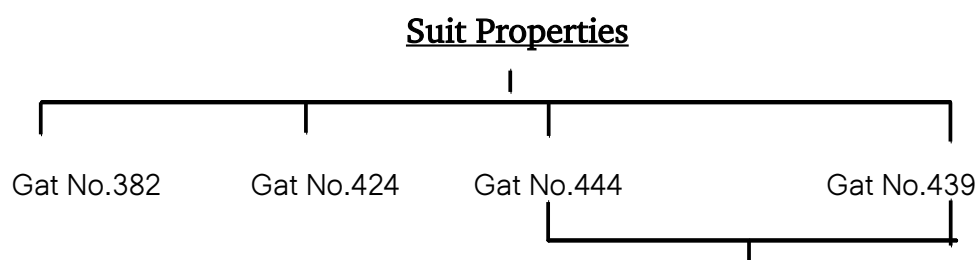
2] Plaintiff No.1-Kasabai and one Vatsalabai were real sisters. Dhrupatabai-Plaintiff No.2 is the daughter of said Vatsalabai. They initially filed suit. Tulsabai - Defendant No.6 is another sister of Kasabai- Plaintiff No.1. By way of counterclaim, she also claimed a share in the partition. Those three sisters were the daughters of one Parshuram Mahalle. Parshuram was having three sons. They are Defendant No.1-Govinda, Datta [predecessor-in-title of Defendant Nos. 2 to 5] and one Zingraji [Defendant

No.9]

3] The said Parshuram married with three ladies. The plaintiffs and the defendants are the children of deceased Parshuram begotten from different wives. For better understanding, the genealogical tree is reproduced below.



Description of suit properties is as follows:-



Standing in the name of D9 & D10
Subsequently added page 59 of Paper Book

4] Gat No. 382 and Gat No. 424 are situated at village Kalamba Mahali, District Washim were the original suit properties. Gat No. 444 and Gat No. 439 were included later on by way of amendment in the plaint. They stands in the name of Zingraji D-9 and his son D-10. After trial, the first two properties were only held to be joined family properties. Whereas, subsequently joined properties were held not to be joint family properties.

5] According to the plaintiffs, suit properties being joint family properties, the plaintiffs have asked for a share in them. According to them, the D-1 Govinda was in exclusive possession of the suit properties.

6] Amongst 10 defendants only D-1-Govinda, D-8 Gajanan and D-7 Subhash filed written statements opposing the reliefs prayed by the plaintiffs. Whereas D-6-Tulsabai filed a written statement and counterclaim, thereby supporting the case of plaintiffs. The suit is mainly contested by Govinda D-1. The sum and substance of his objection is as follows :-

- a] Suit properties do not continue to be joint family properties.
- b] The partition effected by his father Parshuram

during his lifetime and sharers were given to D-1 himself, Datta [predecessor-in-title of D- 2 to D-5 and Zigaruji] was pleaded.

- c] Giving of golden ornaments at the time of the marriage of sisters by father Parshuram and that is why they have not claimed share for so long years.
- d] Suit is time-barred.
- e] Execution of Relinquishment Deed by Datta, Kasabai P-1 and Tulsabai-D-6 [Exhibit-72] on 20.04.1985.
- f] Relinquishment of share by Datta by giving consent letter dated 06.03.1971 [Exhibit 82]
- g] Non-joinder of various parties.

7] The plaintiff examined and relied upon the following evidences:

- 1] P.W.1 - Kasabai
- 2] P.W.2 - Sopan Jagoji Ugale [P-4].
- 3] Mutation entries [Exhibit-49 and 52 and 53]
- 4] 7/12 Extract --Exhibit No.50.

Defendant No.6 – Tulsabai gave following evidences.

- 1) Chandrabhan Khanduji Mahalle [Witness-2]
- 2) Relinquishment Deed [Exhibit No.72]

Defendant No.1 Govinda gave the following evidence :-

- a] One Govinda himself

- b] Jayram Khanduji Mahalle (Witness No.2)
- c) Consent letter by Datta -- Exhibit No.82
- d) Relinquishment Deed [Exhibit No.72]

FINDING BY THE TRIAL COURT

8] The theory of [a] Partition by father Parshuram [b] Theory of Relinquishment Deed by [Datta, Tulsabai D-6 and Kasabai -P-1] [c] Consenting for relinquishing by Datta [Exhibit-72] was not believed by the trial Court. The properties subsequently added were not considered as Joint Family Properties. The other two properties were considered as joint family properties. On these observations, the trial Court declared share of parties, as follows:-

a)	Kasabai (P-1)	--- 1/5 th share
b)	Dhrupatabai (P-2)	--- 1/5 th share
c)	Govinda (D-1)	--- 1/5 th share
d)	D-2 to D-5	--- 1/5 th share together
e)	Tulsabai (D-6)	--- 1/5 th share

The Trial Court has not granted any share to following persons.

- a] D-9 Zingaraji.
- b] D-2 to D-5 – heirs of Datta.

The sale executed in favour of defendant Nos. 7 and 8 by defendant No.1 was held illegal and not binding on plaintiffs.

FIRST APPEAL

Govinda-D-1 and D-2 to D-5 have preferred First Appeal. The First Appellate Court though dismissed the appeal has modified the allocation of shares. It is as follows:-

a) Kasabai (P-1)	---	1/6 th share
b) Dhrupatabai (P-2)	---	1/6 th share
c) Govinda (D-1)	---	1/6 th share
d) D-2 to D-5	---	1/6 th share together
e] Tulsabai (D-6)	---	1/6 th share
<u>f] Zingruji (D-9)</u>	-	<u>1/6th share</u>

9] So, the First Appellate Court also considered the share of Zingruji and accordingly declared their shares as 1/6th each as mentioned above. The trial Court as well as the First Appellate Court has not given any share to P-3 to P-7. The findings of the Trial Court were confirmed except the modification of share as mentioned above.

SECOND APPEAL.

10] D-1- Govinda has preferred this Second Appeal. It was admitted on 25.08.2006 on following substantial question of law.

“Has the First Appellate Court decreed the suit correctly considering the Section-6 of Hindu Succession Act?”

11] On this background, I have heard learned Senior Advocate Shri R.L. Khapre assisted by learned Advocate Shri A.S.Shukla and learned Advocate Shri S.R. Deshpande assisted by learned Advocate Shri S.W. Kolhe for respondent Nos. 2,3,8, 11, 12, 14, 15 and 16.

12] Though in the memo of present appeal, the sole appellant has suggested various substantial question of law, only substantial question of law as reproduced above is framed. There is drastic amendment in the provisions of Section-6 of Hindu Succession Act, 1956 [hereinafter referred to as "Act of 1956"] in the year 2005. After 2005 amendment, the daughters born in a Joint Hindu Family governed by Mitakshara Law is given status just that of Son. When the Trial Court and the First Appellate Court decided the proceedings, the provisions of pre-amended Section-6 of Act 1956 were in force. Both the Courts below have declared $1/5^{\text{th}}$ – $1/6^{\text{th}}$ share on the assumption that they are entitled to share after the death of common ancestor deceased Parshuram. It means either male members /female members were not held entitled to the share during the life time of deceased Parshuram. Whereas according to the appellant/Govinda :-

a] They ought to have been notional partition presumed to have been effected during the life time of deceased

Parshuram.

- b] Deceased Parshuram and three sons [D-1 Govinda, Deceased Datta and D-9-Jingruji] ought to have been awarded 1/4th share each
- c] Daughters of deceased Parshuram ought to have been awarded relevant share in 1/4th share of deceased Parshuram.

13] When this Second Appeal No.198/2005 was filed in the month of March-2005, amendment to Section-6 has not come into force. So, after the amendment come into force on 09.09.2005, the daughters were treated as sons. In other words, they are also entitled to equal share that of a Son. So, they do not claim a share in the share of their father but independently.

14] Till the pronouncement by Hon'ble Supreme Court in the case of *Vineeta Sharma v/s Rakesh Sharma and others*¹ they were differences of opinion amongst various High Courts. Now, it has been clarified that the daughters even born prior to 09.09.2005 were held entitled to share just like that of a son [Para-137.2]. Even, it has been clarified that these observations are applicable even to appeal proceedings and proceedings filed for drawing of final decree. [Para-137.4]

15] The learned Senior Advocate had made feeble

attempt by contending that in spite of those observations, still the daughters will not be entitled to share as that of Son. It is on the basis of provision of Section-6(5) of amended provisions of Section-6 of the said Act. This contention is clarified by saying that as there there was a partition in between deceased Parshuram on one hand and three sons on the other hand, the daughters will not get share as that of Son.

16] Before dealing with all above contentions, it will be material to consider certain background:

BACKGROUND

Deceased Parshuram was having three wives, they are Demabai, Radhabai and Kausalyabai. It is not known, whether deceased Parshuram married to them after the first marriage is dissolved or during subsistence of the first marriage or whether all married earlier to 1955. So, we are proceeding on the assumption that the issues born to deceased Parshuram from respective wives are the legitimate issues. Either plaintiffs or contesting defendants have not adduced any evidence as to how deceased Parshuram acquire two suit properties. There are mutation entries at Exhibit No.49 [adding the names of Kasabai P-1 Vatsalabai [mother of P-2], D-6 Tulsabai, Datta and D-1 Govinda, as legal heirs of deceased

Parshuram. Parshuram expired on 17/07/1963. There are 7/12 extracts at Exhibit Nos. 50 and 51 regarding names of other above 5 persons. These are the only documents. Other document pertains to relinquishment deed and consent letter. On the basis of this evidence, trial Court as well as First Appellate Court concluded that the two properties are joint family properties.

17] Appellant/Govinda has contended in the present appeal that “relinquishment deed can be said to be a document regarding oral relinquishment and as such it does not require registration”. Even he has contended that “the possession of appellant can be considered to be adverse to those of other sharers”. At one stage, even he has pleaded that “the two properties [subsequently added in the plaint] belonging to D-9 Zingraji can be said to be joint family properties [This contention is on the basis that the Courts below have not believed the theory of partition as claimed by him]”. So, in the memo of appeal he has not challenged the findings of the Courts below that “two suits properties are joint family properties. In view of that there is no reason for this Court to interfere in those findings. So also, the trial Court as well as First Appellate Court has not believed three defences taken by the appellant/Govinda.

FINDINGS ON THE POINT OF THEORY OF PARTITION

18] The trial Court observed “as per the evidence of Govinda, partition took place during the life time of father Parashram in the year 1983 whereas in the cross-examination, he has admitted that father expired in the year 1963”. Therefore, partition during the life time of the father around 1983 is not believable [para-25]. The trial Court noted down inadequate pleadings in the written statement about the partition. The trial Court has also taken a note of fact of not filing any document about partition [Para-24]. Whereas nothing from the appellate Court judgment is pointed out to me about theory of partition.

**FINDINGS ON THE POINT OF RELINQUISHMENT DEED AND
CONSENT LETTER**

The trial Court observed :-

- a] Witness Chandrbhan Mahalle [Examined by D-6-Tulsabai] is not aware anything about the contents of the documents.
- b] No revenue record was changed after 1971 or 1985, in view of the documents at Exhibit Nos. 72 and 82.
- c] Mutation Entry [Exhibit No.49] still shows the names of plaintiffs and defendant Nos. 1 to 6. It seems that

Exhibit Nos. 72 and 82 were not acted upon.

- d] Relinquishment deed is compulsorily registerable document and they are not registered and hence in admissible in evidence. [Para-21, 29 and 30].

Whereas the Appellate Court have also confirmed those findings.

- 19] It means that on the basis of above findings, the appellant/Govinda while arguing the appeal has restricted his arguments to the issue of interpretation of Section-6 of the Hindu Succession Act.

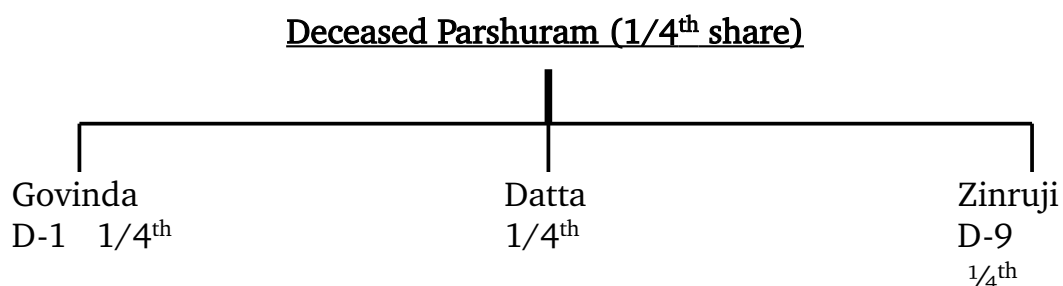
**PROVISIONS OF SECTION-6 OF THE HINDU SUCCESSION
ACT, 1956.**

- 20] The provisions of Section-6 of the said Act can be invoked only when there is an interest in Mitakshara Coparcenary Property. The position prior to the amendment of 2005 is as follows:-

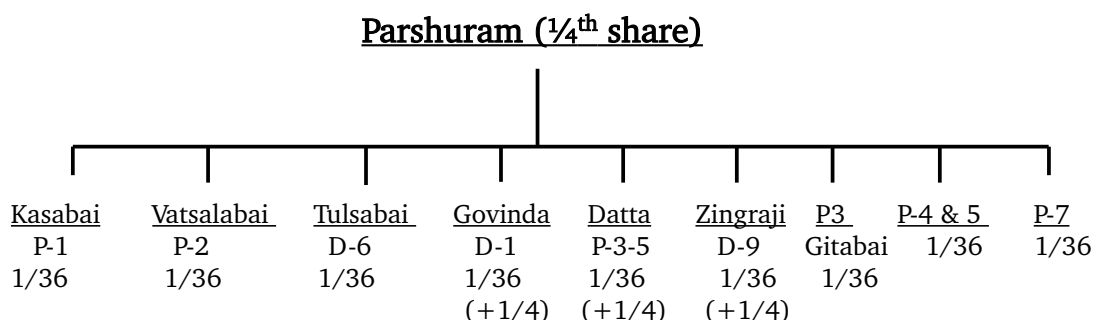
- a] The interest devolves by survivorship upon the surviving numbers of the coparcenor.
- b] If there is a female member then above rule of succession is deviated. In that case, the interest devolves by testamentary or intestate succession and not by survivorship.

21] So, even if it is presumed that there was Mitakshara Coparcenary Property forming deceased Parshuram and his three sons, the question arises that how the interest of deceased Parshuram will devolve as per the Rule of Survivorship? Because at that time, deceased Parshuram was having three daughters. Plaintiff-1 Kasabai, Vatsalabai P-2 Tulsabai D-6. So, interest will devolve as per the succession and not as per the survivorship. In that eventuality, what will be the interest of deceased Parshuram at the time of death in joint family property, is the question? At this juncture, the theory of notional partition will come into picture.

22] So, the learned Senior Advocate Shri R.L. Khapre is right that the Trial Court as well as the First Appellate Court has not considered these principles of the Hindu Succession Act. Both the Courts have presumed that every sharer will get equal and independent share. The principle of notional partition was not at all considered. The Courts below ought to have done calculation of shares as follows :-



So, $\frac{1}{4}^{\text{th}}$ share of deceased Parshuram will devolve on his death as follows :-



However, this apportionment is only of academic interest. Because, the law has changed after 2005 amendment.

2005 AMENDMENT

23] One of preamended Section-6 of the said Act comes into picture only when there is a female member. Otherwise interest devolves by survivorship on surviving members of coparcenary. Till 2005 amendment, only male members were forming coparcenary. However, as per 2005 amendment, even daughter is considered as a coparcenor.

24] As there were differences of opinion, the Hon'ble Supreme Court in the case of Vineeta Sharma had put to rest the controversy. Now, the daughter born even prior to 09/09/2005 is to be considered as a coparcenor. The three daughters were admittedly born prior to 09/09/2005. Even it has been clarified that the interpretation given will be applicable to pending appeals

and even to proceedings pending for drawing up a final decree. There was a feeble attempt to rely upon the provisions of Section 6(5) of amended provision. The amended provisions will not be applicable in following contingencies.

- a] If there is already partition effected prior to 20/12/2004.
- b] The partition shall either be registered deed of partition or partition effected by decree of Court.

24-A. The Hon'ble Supreme Court in Vineeta Sharma's case have also interpreted this provision as follows :-

“Oral partition in exceptional case can be accepted, if it is supported by public documents and the evidence should be of such degree that it has to be presumed that partition was effected by decree of Court”.

25] In this case, even though there was a theory of partition alleged by appellant-Govinda, there was never public document, even there was no document evidencing the partition effected during the lifetime of father Parshuram.

26] Even though this Court has concluded that both the Courts below have erred in considering the provisions of Section 6 of 1956 Act in view of the observations by the Hon'ble Supreme

Court in the case of *Vineeta Sharma v/s Rakesh Sharma and others* [which is binding by this Court too], this Court has to answer the substantial question in the affirmative. It means that decision about decreeing the suit has to be confirmed.

DECLARATION OF SHARES

27] Both the Courts below were right in concluding that Gut No. 382 and Gut No. 424 were the only joint family properties. There is an objection that Zigaruji ought not to have granted 1/6th share by the First Appellate Court. The reason is he has not challenged the findings [not granting share] of the trial Court.

28] Even both the Courts below have not given share to legal heirs of deceased-Datta [subsequently added plaintiffs]. It is a known fact that Court is bound to declare shares of persons entitled in a suit for partition. Once they have been joined, whether they have claimed share or not and whether they have contested the suit or not, it is immaterial. So, the contention about defendant No.9 Zingruji not entitled to share [as he has not asked for it] cannot be accepted. The trial Court observed that “only the original parties so that the P-1, P-2, D-1, D-2 to D-5 and D-6 are the sharers of the suit property”. The trial Court has considered

them as five heirs and granted 1/5th share[Para-34]. Whereas the Appellate Court held that “each daughter and each son is entitled for 1/6th share. Accordingly, granted 1/6th share to defendant No.9 also. It is true that the First Appellate Court corrected the mistake committed by the trial Court. Even this Court feels that plaintiff Nos. 3 to 5 and 7 are entitled to share in two properties. Out of them, Plaintiff No.4- Sopan has given evidence. These plaintiffs are the heirs of daughters of Parshuram. So, they will get the share of their predecessor-in-title. So far as, the plaintiff No.6–Sakubai is concerned her relationship with Parshuram is not cleared. Hence, this Court is unable to consider her claim. In view of that, fresh allocation of shares will be as follows :-

a)	Kasabai (P-1)	--- 1/9 th share each
b)	Dhrupatabai (P-2)	--- 1/9 th share each
c)	Geetabai (P-3)	--- 1/9 th share each
d)	Sopan (P-4) and Anusayabai (P-5)	---1/9 th share collectively
e)	Laxman (P-7)	--- 1/9 th share each
f)	Govinda (D-1)	--- 1/9 th share each
g)	D-2 to D-5	--- 1/9 th share each
h)	Tulsabai (D-6)	--- 1/9 th share each
i)	Zingaraji (D-9)	--- 1/9 th share each

**EXECUTION OF SALE-DEED IN FAVOUR OF DEFENDANT
NOS. 7 AND 8**

29] The Defendant No.1 has sold 1 Guntha each of the land to Defendant Nos. 7 and 8. It is admitted by Defendant No.1

during cross-examination. Those defendants have not disputed this position [Para-31]. It was considered by the trial Court while dealing with the prayer of plaintiff for grant of permanent injunction. Those sale-deed were considered as illegal and unauthorized and not binding of other parties [Para-37]. Those sale-deeds were not declared illegal by passing an operative order. On this background, this Court can only say that when the suit lands will be partitioned by Revenue Authorities, the area sold by defendant No.1 in favour of defendant Nos. 7 and 8 be considered in the share to be allotted to defendant No.1. At the same time, decree of permanent injunction needs to be confirmed against defendant No.1.

DAMAGES

30] The trial Court has directed defendant No.1 to give share of Rs. 6000/- each to Plaintiff Nos. 1, 2 and D-6 for the last three years. Discussion find place in para-36 of the trial Court judgment. Apart from amount granted to P-1, P2 and D-6 (by the trial Court), the Appellate Court granted Rs. 6,000/- to D-9 and D2 - 5 (Collectively). While fixing the amount of mesne profit in subsequent inquiry, this amount be adjusted. Others are entitled to similar relief.

FRAGMENTATION

31] If during execution, issue of fragmentation will arise,

the trial Court has taken care by observing share of defendant No.6 be added in the share of Plaintiff Nos.1 and 2. The Appellate Court has modified the share from $1/5^{\text{th}}$ to $1/6^{\text{th}}$. Whereas this Court has modified to $1/9^{\text{th}}$ share. The Executing Authority/ Revenue Authorities are at liberty to adjust the shares by addition of share of one member with other, if he or she consent in order to avoid fragmentation of land.

32] In view of the above discussion, the following order is passed :-

ORDER

- 1] The appeal is dismissed.
- 2] The share of two suit lands i.e. Gat Nos. 382 and 424 is modified as follows :-

a)	Kasabai (P-1)	--- $1/9^{\text{th}}$ share each
b)	Dhrupatabai (P-2)	--- $1/9^{\text{th}}$ share each
c)	Geetabai (P-3)	--- $1/9^{\text{th}}$ share each
d)	Sopan (P-4) and Anusayabai (P-5)	--- $1/9^{\text{th}}$ share collectively
e)	Laxman (P-7)	--- $1/9^{\text{th}}$ share each
f)	Govinda (D-1)	--- $1/9^{\text{th}}$ share each
g)	D-2 to D-5	--- $1/9^{\text{th}}$ share each
h)	Tulsabai (D-6)	--- $1/9^{\text{th}}$ share each
i)	Zingaraji (D-9)	--- $1/9^{\text{th}}$ share each

- 3] In addition to plaintiff Nos.1 and 2, D2- D-5 (collectively), Defendant No.6 and Defendant No.9,

Defendant No.1 is directed to pay Rs. 6,000/- to
Plaintiff Nos. 3, 4 & 5 (collectively) and to P-7.

- 4] The direction to defendant No.1 not to alienate two
suit lands is confirmed.
- 5] The order of conducting inquiry as to mesne profit is
confirmed.
- 6] Preliminary decree be drawn.
- 7] In view of the above modification, the appeal is
disposed of.

JUDGE