

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

**SECOND APPEAL NO.800 OF 2010  
WITH  
CA/15961/2015 IN SA/800/2010**

1. Sitabai W/o Kachru Chavn,  
(Died) Lrs. already on record as  
Appellants 2 and 3.  
Age: 78 Years, Occu.: Agriculture  
& Household,  
R/o.: Bhagur, Tq. Vaijapur,  
Dist.: Aurangabad
  2. Jijabai W/o Karbhari Chavan  
Age: 55 Years, Occu. & R/o.: As above
  3. Chandrabhagabai W/o Kachru Gaikwad,  
Age: 63 Years, Occu.: Household,  
R/o.: Panvi, Tq.: Vaijapur,  
Dist.: Aurangabad
  4. Digambar S/o Kachru Gaikwad  
Age: 48 Years, Occu.; Agriculture,  
R/o.: Bhagur, Tq.: Vaijapur,  
Dist.: Aurangabad
  5. Nirmalabai W/o Digamber Gaikwad  
Age: 40 Years, Occu.: Household,  
R/o.: As above
- .. Applicants**  
(Ori. Deft. No.1 to 5)

**VERSUS**

1. Hausabai W/o Eknath Hon,  
Age: 58 Years, Occu.: Household & Agri.,  
R/o.: Shivraj, Tq.: Vaijapur,  
Dist.: Aurangabad  
(Died) Lrs.
  - A) Eknath s/o Karbhari Hon,  
Age: 70 Years, Occu.: Labour,  
Shivrai, Tq.: Vaijapur,  
Dist.: Aurangabad
  - B) Parighabai w/o Sitaram Nage,  
Age: 50 Years, Occu.: Household,  
R/o.: Tonki, Tq.: Vaijapur

- C) Vimlabai w/o Vinayak Nage,  
Age: 45 Years, R/o.: Kopargaon,  
Dist.: Ahmednagar
- D) Machhindra s/o. Eknath Hon,  
Age: 50 Years, Occu.: Agri.,  
R/o.: Shivrai, Tq.: Vaijapur,  
Dist.: Aurangabad
2. Pandharinath S/o. Eknath Thorat,  
Age: 50 Years, Occu.: Agri.,  
R/o.: Jambargaon, Tq.: Vaijapur,  
Dist.: Aurangabad
3. Popat S/o Eknath Thorat,  
Age: 43 Years, Occu.: Agri.,  
R/o.: Shivraj, Tq.: Vaijapur,  
Dist.: Aurangabd
4. Bhamabai Shahram Pathade,  
Age: 73 Years, Occu.: Household & Agri.,  
R/o.: Shivraj, Tq.: Vaijapur,  
Dist.: Aurangabad  
**(Died) Lrs.**
- A) Babasaheb s/o Shahram Pathade,  
Age: 72 Years, Occu.: Agri.,  
R/o.:Walan, Tq.: Rahuri,  
R/o.: Ahmednagar
- B) Yadav s/o Shahram Pathade,  
Age: 64 Years, Occu.: Agri.,  
R/o.:Taklibhan, Tq.: Shrirampur,  
Dist.: Ahmednagar
- C) Shivaji s/o Shahram Pathade,  
Age: 54 Years, Occu.: Agri.,  
R/o.: Chinchkheda, Tq.: Gangapur,  
Dist.: Aurangabad
- D) Lakshmibai w/o Dagdu Ghadge,  
Age: 69 Years, Occu.: Household,  
R/o.: Wakadi, Tq.: Rahata,  
Dist.: Ahmednagar
5. Bhimabai W/o Murlidhar Dhube,  
Age: 68 Years, Occu.: Household,  
R/o.: Chinchkheda, Tq.: Gangapur,  
Dist.: Aurangabad

**.. Respondents**

(Ori Pltff, & Deft 6 to 9)

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Advocate for Appellants: Mr. D. R. Bhadekar  
 Advocate for Respondent Nos.1A to 1D: Mr. P. N.  
 Kalani h/f. Mr. L. K. Pradhan and Mr. M. B. Ubale  
 Advocate for Respondent Nos.2, 3, 4A to 4D & 5:  
 Mr. G. S. Khaire

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| <b>CORAM:</b> | <b>ARUN R. PEDNEKER, J.</b> |
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| <b>Reserved for Judgment on:</b> | <b>11.11.2022</b> |
| <b>Judgment Pronounced on:</b>   | <b>30.01.2023</b> |

**JUDGMENT:**

1. The present second appeal is admitted on the below quoted questions of law (i) and (ii) and in the course of arguments further 2 questions of law (iii) and (iv) were raised by the appellants as under:-

"i) Whether the suit filed by the respondent No.1 for partition was within limitation?

ii) Whether the District Judge has passed the impugned judgment and decree beyond jurisdiction of the Civil Court arising out of the Statutes when amended provisions of 2005 regarding status of Co-parcenership as daughter in Hindu Succession Act were not at all in existence at the time of filing of the Original Suit in 2002?

iii) Whether the point – Plaintiff claims property of Tatya s/o Ganpati or Tatya s/o Bapu as per 2 different death certificates placed on record emerges under S.103 by CA 15961/2015?

iv) Whether factum that Deceased Karbhari exclusively holding the Gat No.79 in his name as well as Gat No.218

inherited by him both were succeeded by widow Jijabai Deft No.2 and his mother Sitabai Deft No.1 already prior to filing of the Suit shows that case is governed by Section 8 of Hindu Succession Act in the absence of principle of burden as per para 18 in D.S.Laxmaiah case (Supra) reproduced in the SC Judgment of Makhansing ?

2. Heard Mr. D. R. Bhadekar, learned Advocate for Appellants, Mr. P. N. Kalani holding for Mr. L. K. Pradhan and Mr. M. B. Ubale, learned Advocates for Respondent Nos.1A to 1D and Mr. G. S. Khaire, learned Advocate for Respondent Nos.2, 3, 4A to 4D & 5.

3. The undisputed facts leading to the filing of the second appeal can be summarized as under:-

A. Sole plaintiff Hausabai filed Regular Civil Suit No.161 of 2002 for partition and separate possession claiming 1/5th share of the suit properties described in the plaint. The plaintiff is the daughter of Tatya Ganpati, whereas defendant no.1 is the wife of her brother Kachru Tatya, whereas

defendant no.2 is the daughter-in-law of defendant no.1. Defendant no.3 is the daughter of defendant no.1. Defendant nos.4 and 5 are the son and daughter-in-law of defendant no.3, whereas defendant nos.6 and 7 are the children of his sister Parvatabai and defendant nos.8 and 9 are her real sisters.

B. As per plaintiff, her father Tatya Ganpati expired in the year 1972. He was predeceased by his wife Geetabai somewhere in 1970. Plaintiff has one brother and three sisters out of whom brother Kachru Tatya expired in the year 1969-1970. Her elder sister expired prior to about five years leaving behind defendant nos.6 and 7 as her heir. As per plaintiff, she has ancestral property, i.e. lands more particularly described in para 2 of the plaint {hereinafter referred to as the suit properties}.

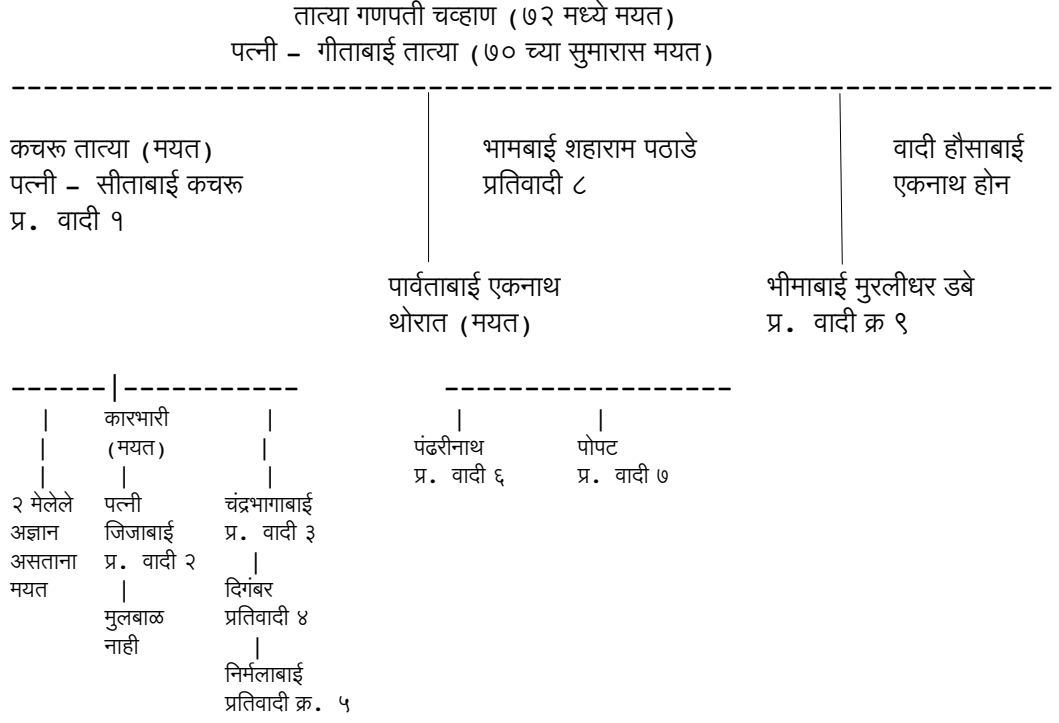
C. As per plaintiff, the suit properties were cultivated by her father Tatya Ganpati, as same were standing in his name. He was giving share in the crop to the plaintiff. Thereafter, defendant no.1 and her son Karbhari started looking after the suit properties and even Karbhari used to give share in crop to the plaintiff and her other sisters. Till the lifetime of Karbhari, everything was smooth and she was getting her share in the crops regularly. Karbhari expired prior to about 1½ year of filing of suit and after his death he left behind only heir as his wife defendant no.2. As per plaintiff Karbhari had no issue of his own or otherwise. After the death of Karbhari, defendants stopped giving share in the crops to the plaintiff. Thereafter, the plaintiff demanded her share in the crops, but, the defendants avoided to do so.

D. As per plaintiff, she demanded the share in the suit properties on 15.07.2002 in presence of her relatives, but, the defendants refused and, therefore, she filed suit for partition.

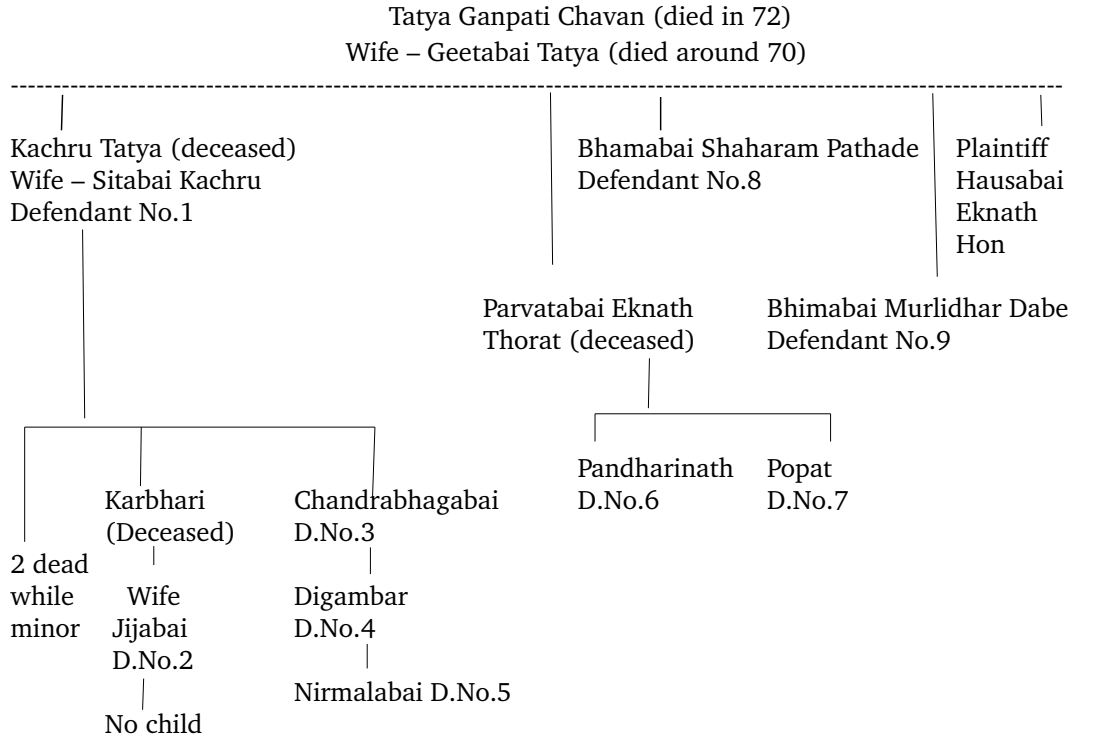
E. Defendant nos.1 to 5 contested the claim of the plaintiff. They have not disputed the relationship between the parties inter se. However, they claim that the suit is barred by limitation and contended that defendant no.4 was adopted by Taty and Geetabai and all the sisters have waived their rights and interest in the suit property and now the plaintiff is estopped from claiming any right in the suit property. The trial courts dismissed the suit and an appeal was preferred by the plaintiff. The appeal was allowed and the plaintiff is held to be entitled to 1/5th share in the suit property. Aggrieved thereto, the present appellants have filed the second appeal on the above questions of law.

**Consideration of Question of Law (i), referred at paragraph no.(1):-**

4. The learned counsel for the appellants has taken me through the family tree which is as under:-



English translation of the same is as under:-



5. The learned counsel for appellants submits that the plaintiff is claiming through her father her share in the joint family property. Her father expired somewhere in the year 1970. There was notional partition of the same and the plaintiff has relinquished her rights in the suit property and is barred to file a suit after a period of 30 years. He relies upon Article 110 of the Limitation Act, 1963 stating that the suit has to be filed within 12 years from the time of her exclusion. Mutation entries were carried out of the properties in the name of defendant no.4 and others and that the plaintiff relinquished her right in the suit property and the suit is barred by limitation.

6. The learned counsel for the respondents on the aspect of limitation submits that after the demise of her father in the year 1970 the property continued to be held as joint property and the defendants have held the suit property on behalf of all the family members of the joint family and that there was no exclusion until one and half

year prior to the filing of the suit, where her share was declined by the defendants and, therefore, the suit is within limitation. He further submits that the exclusion has to be proved.

7. On consideration of material on record it is to be noted that the evidence of defendant no.4, who in the cross-examination has clearly stated that nobody has claimed share in the property at a prior point of time and as such no share was given to any one. The date of exclusion is important as the limitation would start from the date of exclusion. In the instant case as the share was not demanded by the plaintiff prior to 1½ year of filing of plaint and the same was not given, there was no exclusion prior to 1½ year of the date of filing of the suit. In the case of Md. Mohammadali (dead) by Lrs. Vs. Jagadish Kalita and others, 2004 (2) Mh.L.J. 611, and Govind Vishwanath Bansode and another Vs. Manika Gangaram Bansode and others, 2008 (6) Mh.L.J. 715, it has been held that the limitation would commence from

the point of exclusion and the exclusion will have to be specifically proved.

8. The next question of law relates to the right of the daughter under the Hindu Succession Act, 1956 as the amended Act came into force in the year 2005 and the suit being filed in the year 2002 i.e. whether the daughters have any right in the joint family property? After the judgment of the Supreme Court in the case of **Vineeta Sharma Vs. Rakesh Sharma and others**, AIR 2020 SC 3717, this issue is no more res integra and as such the appellant has not seriously contested the same. The learned Advocate for the appellants further submits that the notional partition has taken place in the year 1970 and that the effect of Section 8 of Hindu Succession Act, 1956 having commenced in the year 1970 itself there was nothing left of the joint family property to be partitioned and given to the daughters as the father had already expired long before the 2005 amendment giving right of coparceners share to the daughters. However, this issue is also concluded

by the aforesaid judgment of **Vineeta Sharma** (*supra*) and the same is no more res integra. At Paragraph No.69 the Hon'ble Supreme Court has concluded this issue, that the right of the daughter is by birth and has not accrued after the amendment and that it is not necessary that the father was alive at the time the amendment came into force and as such this submission is also not tenable. Paragraph No.69 of the judgment **Vineeta Sharma** (*supra*) reads thus:-

*"69. The argument raised that if the father or any other coparcener died before the 2005 Amendment Act, the interest of the father or other coparcener would have already merged in the surviving coparcenary, and there was no coparcener alive from whom the daughter would succeed. We are unable to accept the submission because it is not by the death of the father or other coparcener that rights accrue. It is by the factum of birth. It is only when a female of Class I heir is left, or in case of her death, male relative is left, the share of the deceased coparcener is fixed to be distributed by a deemed partition, in the event of an actual*

*partition, as and when it takes place as per the proviso to unamended Section 6. The share of the surviving coparcener may undergo change till the actual partition is made. The proviso to Section 6 does not come in the way of formation of a coparcenary, and who can be a coparcener. The proviso to Section 6 as originally stood, contained an exception to the survivorship right. The right conferred under substituted Section 6(1) is not by survivorship but by birth. The death of every coparcener is inevitable. How the property passes on death is not relevant for interpreting the provisions of Section 6(1). Significant is how right of a coparcener is acquired under Mitakshara coparcenary. It cannot be inferred that the daughter is conferred with the right only on the death of a living coparcener, by declaration contained in Section 6, she has been made a coparcener. The precise declaration made in Section 6(1) has to be taken to its logical end; otherwise, it would amount to a denial of the very right to a daughter expressly conferred by the legislature. Survivorship as a mode of succession of property of a Mitakshara coparcener, has*

*been abrogated with effect from 9-9-2005 by Section 6(3)."*

9. As regards the questions of law (iii) at paragraph no.(1) raised at the time of hearing of this appeal that the father's name is indicated as Tatya s/o. Ganpati or Tatya Bapu and the learned Advocate for the appellants has produced on record two different death certificates. It is pointed out by the Respondent / plaintiff that the plaint itself indicates that Tatya Ganpati @ Tatya Bapu is their father and this fact is not disputed in the written statement and that using the two different death certificates today would not make any difference to their case. In any event, the death certificate relied is shown to have been received by the defendant / appellant herein before the filing of the plaint and no explanation is given as to why the same was not produced on record before the trial court. Thus, this fact being raised for the first time in this second appeal, the same is not permitted to be canvassed and in any event it would not arise for consideration.

10. The next question of law no.(iv) at paragraph no.(1) also does not arise for consideration as there was no partition of joint family property in the year 1970, Section 8 of the Hindu Succession Act, 1956 is not applicable to the present case. Question nos.3 and 4 are not permitted to be raised as this involves discussion on facts, evidence of which was not before the courts below and was not discussed by the courts below.

11. The Second Appeal is dismissed and all pending Civil Applications are disposed of.

**[ARUN R. PEDNEKER, J.]**

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