



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

WRIT PETITION NO. 8005 OF 2024

1. Lahu S/o Babu Toprape,
Age: 74 years, Occu: Agriculturist,
R/o Korangala, Tq. Ausa,
Dist: Latur
2. Balaji s/o Lahu Toprape,
Age: 45 years, Occu.: Agriculturist,
R/o Korangala, Tq. Ausa,
District: Latur.
3. Krushna s/o Lahu Toprape,
Age: 35 years, Occu.: Agriculturist,
R/o Korangala, Tq. Ausa
District: Latur

.....(Org. Defendants)
PETITIONERS

VERSUS

1. Bhagwat s/o Babu Toprape,
(Died, through Legal Heirs)
- 1-a. Vimalbai wd/o Bhagwat Toprape,
Age: 60 years, Occu.: Household,
R/o Near Board No.5 of M.I.D.C.
Tq. & District: Latur
- 1-b. Balaji s/o Bhagwat Toprape,
Age: 38 years, Occu.: Labour,
R/o Near Board No.5 of M.I.D.C.
Tq. & District: Latur
- 1-c. Sumitra w/o Santosh Barle,
Age: 42 years, Occu.: Household,
R/o Vadval, Tq. Chakur,
District: Latur

- 1-d. Renuka w/o Munjaji Narve,
Age: 40 years, Occu.: Household,
R/o Dongargaon, Tq. Gangakhed,
District: Latur
2. Sojarbai w/o Tukaram Sagar,
Age: 70 years, Occu.: Household,
R/o Daapegaon, Tq. Ausa,
District Latur.

.....(Org. Plaintiffs)
RESPONDENTS

Mr. P. P. Mandlik, Advocate for the Petitioners
Mr. Ajay Shinde, Advocate for Respondent nos.1(d) and 2

CORAM : ROHIT W. JOSHI, J.

DATED : 26TH JUNE, 2025

ORAL JUDGMENT :-

- . Rule. Rule made returnable forthwith.
2. Heard finally with consent of the parties.
3. Late Bhagwat Babu Toprape, predecessor of the present respondent nos.1-a to 1-d and present respondent no.2 have filed a suit for partition and separate possession against the present petitioner being Regular Civil Suit No.416 of 2016. The suit is filed claiming that the plaintiffs are son and daughter respectively of late Babu Toprape. The defendants have denied this contention in the written statement.

4. In view of the rival pleadings, issues were framed by the learned Trial Court on 09.03.2017. However, the learned Trial Court had not framed any issue as to whether the plaintiffs were children of late Babu Toprape as claimed by them.

5. In view of the aforesaid, the respondents/defendants moved an application on 09.02.2017 vide Exh.17 *inter alia* praying that an additional issue be framed as under:

“Does the plaintiffs prove that, they are the real son & daughter of late Baburao Toprape”.

6. The said application was rejected by the learned Trial Court vide order dated 20.03.2018. The learned Trial Court was of the opinion that original issue no.3, covered the issue that the defendants wanted the learned Court to frame as additional issue.

7. In that view of the matter, at the relevant time, the defendants did not choose to challenge the said order rejecting the application for framing additional issue. However, the defendants moved an application dated 06.07.2023 vide Exh.83, *inter alia* praying for D.N.A. test of

the plaintiffs to determine as to whether they were children of deceased Babu Toprape as claimed by them.

8. This application came to be rejected by the learned Trial Court vide order dated 12.02.2024. The learned Trial Court has observed that since there is no issue with respect to paternity of the plaintiffs, the prayer for D.N.A. test was required to be rejected.

9. The present petition is filed in this backdrop challenging the order dated 20.03.2018, whereby the learned Trial Court had turned down the prayer for framing of additional issue. The contention of the learned Advocate for the petitioner/defendant is that the order was not challenged earlier in view of the observations of the order that the proposed issue was impliedly covered by issue no.3. He contends that in view of the order dated 12.02.2024, rejecting the prayer for DNA testing, it had become necessary to challenge the order refusing to frame additional issue. A statement is made by the petitioners/defendants that in the event additional issue is framed, they will not lead any further evidence. This statement is also recorded in the order dated

31.07.2024 passed by this Court.

10. The learned Counsel for the petitioners/defendants reiterates the said statement. He therefore submits that the additional issue with respect to *inter se* relationship of the parties and claim of the plaintiffs that they are son and daughter respectively of deceased Babu Toprape is required to be framed.

11. Learned Counsel for the respondents/plaintiffs opposes the petition contending that there is inordinate delay in filing the petition and that the issue as observed earlier by the learned Trial Court is impliedly covered under original issue no.3.

12. Having heard the rival submissions, in the considered opinion of this Court, the objection pertaining to delay is required to be rejected in view of explanation offered. The learned Trial Court had earlier observed that the proposed additional issue was covered by implication under issue no.3, however, subsequently it had taken a view otherwise. As regards merits of the claim, it is apparent from reading of the written statement that the defendants are disputing the status

of plaintiffs as son and daughter respectively of deceased Babu Toprape.

13. Having regard to the aforesaid, in the considered opinion of this Court, the application for framing of additional issue filed by the petitioners/defendants vide Exh.17 is required to be allowed.

14. The petition is allowed in the following terms.:

- i. Order dated 20.03.2018 passed by learned Joint Civil Judge Junior Division, Ausa on application at Exh.17 in Regular Civil Suit No.416 of 2016 is quashed.
- ii. Application at Exh.17 filed by the defendants/petitioners at Exh.17 in Regular Civil Suit No.416 of 2016 is allowed by framing the following additional issue:

“Does the plaintiffs prove that, they are son & daughter of late Baburao Toprape”.

15. The Writ Petition is **disposed** of accordingly.

16. Parties to bear their own cost.

(ROHIT W. JOSHI, J.)