



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

SECOND APPEAL NO.328 OF 2021

APPELLANTS

(Ori. Defendants)

- :-** 1) Natthu S/o. Sonba Tulankar,
Aged about 70 years, Occ. Agriculturist,
R/o. Behind Gopal Krushi Kendra,
Samudrapur, Tah. Samudrapur, Dist.
Wardha.
- 2) Datthu S/o. Sonba Tulankar,
Aged about 65 years, Occ. Agriculturist,
R/o. Barfa, Post Nimbha, Tah. Samudrapur,
Disot. Wardha.

..VERSUS..

RESPONDENTS :-

(Ori. Plaintiff)
(On R.A)

- 1) Uttam S/o. Dama Kashti,
Aged 45 years, Occu. Agriculturist,
R/o. Umari (Naik), Tah. Warora, Dist.
Chandrapur.
- 2) Watchayala Ankush Khangar,
Aged about 57 years, Occu. Household,
R/o. Masala, Tah. Warora, Dist.
Chandrapur.

Mr. P.S. Tidke, Advocate for Appellants.
Mr. M.P. Kariya, Advocate for Respondents.

CORAM : ROHIT W. JOSHI, J.

DATE : 18/11/2025

ORAL JUDGMENT :

1. The present second appeal arises out of the judgment and decree dated 15.09.2021, passed by the learned District Judge-2, Hinganghat, Wardha, in Regular Civil Appeal No.162 of 2017 by which the learned First Appellate Court has affirmed the judgment and decree dated 29.03.2016, passed by the learned Jt. Civil Judge Junior Division, Samudrapur, in Regular Civil Suit No.03 of 2011. The present appellants are the original defendants and the respondents are the original plaintiffs. Parties will be referred as 'plaintiffs' and 'defendants' hereinafter in the present judgment.

2. The plaintiffs have filed a suit for partition and separate possession with respect to two agricultural lands situated at village Barfa, Tah. Samudrapur, Dist. Wardha, hereinafter referred to as 'suit properties'.

3. It is the case of the plaintiffs that one Sonba Tulankar was survived by two sons i.e. defendant Nos.1 and 2 and a daughter Gayabai, who is the mother of the plaintiffs. It is contended that the suit properties were ancestral properties in the hands of the deceased Sonaba and after his demise, the suit properties were vested with the defendant Nos.1 and 2 and their mother Gayabai, each having 1/3rd share. The plaintiffs further contended that they made a demand for partition of the suit properties by issuing legal notices dated

15.06.2010 and 01.10.2010, however, the defendants did not partition the suit properties, as a consequence of which the aforesaid suit was required to be filed. The defendants appeared in the matter and filed their written statement *inter alia* contending that deceased Sonba had expired in the year 1954, prior to commencement of the Hindu Succession Act, 1956 and as such, his daughter cannot claim any share in the suit property and resultantly, the plaintiffs who are sons of daughter of Sonba also cannot claim any right, title or interest in the suit properties. The defendants also stated that Gayabai, the mother of the plaintiffs was begotten by Sonba from his first wife, who had expired in the year, 1935 -1936 and that the defendants are the sons of second wife of Sonba, whose marriage was solemnized after demise of the first wife.

4. The learned trial Court framed issues in the matter, on the basis of which both parties led their evidence.

5. The defendants have filed on record death certificate of deceased Sonba, according to which his date of demise is 14.04.1951. However, the learned trial Court disbelieved this document on the ground that it was issued in a format used for birth certificates and did not bear the signature of the Head Copyist. The defendants also placed reliance on mutation entries at Exhs.33 and

34, wherein it was stated that deceased Sonba had died in the year 1951. The learned trial Court recorded that the document of mutation was insufficient to arrive at inference that deceased Sonba died in the year 1951. However, the learned trial Court thereafter referred to the evidence of the plaintiffs, wherein the plaintiffs expressed ignorance regarding the death of deceased Sonba in the year 1954 or otherwise. The learned trial Court has accordingly assumed that the deceased had expired prior to the year 1956 and has proceeded to decide the suit accordingly. The learned trial Court placed reliance on the Hindu Women's Rights to Property Act, 1937, to hold that on Sonba's death, his wife Bahina, daughter Gayabai (mother of the plaintiffs) and defendant Nos.1 and 2 each inherited $\frac{1}{4}^{\text{th}}$ share in the suit properties. Accordingly, the plaintiffs inherited $\frac{1}{4}^{\text{th}}$ share in the suit property as legal representatives of their mother. It was held that defendant No.2 had $\frac{3}{8}^{\text{th}}$ share.

6. The learned First Appellate Court has affirmed the finding by the learned trial Court that Sonba had died prior to commencement of the Hindu Succession Act, 1956 (hereinafter referred to as "HSA, 1956"). However, the learned First Appellate Court held that even before commencement of HSA, 1956, a daughter of a Hindu male was entitled to inherit his property upon

his demise. The learned First Appellate Court has placed reliance on judgment of this Court in the matter of *Laxman Tukaram ..vs.. Bendrabai Tukaram Karwate*, reported in **2005(3) Mh.LJ 506** (SB), in order to arrive at the said conclusion. The appeal accordingly, came to be dismissed. It is against these concurrent decrees for partition and separate possession that the present appeal is filed by the original defendants. Notice in the present appeal was issued on the following substantial question of law vide order dated 12.10.2023 :-

“Whether the Courts below have misinterpreted the provision of Clause 72 in Chapter (VI) of Mulla’s Hindu Law?”

By order dated 07.02.2025, appeal was ordered to be listed for final hearing and is accordingly taken up for final hearing today.

7. Heard Mr. R.S. Tidke, learned Advocate for the appellants and Mr. M.P. Kariya, learned Advocate for the respondents.

8. Perused the judgments, pleadings, depositions and relevant exhibited documents with the able assistance of the learned advocates.

9. At the outset, it must be stated that the findings of fact recorded by both the learned Courts, that Sonba expired prior to commencement of HSA, 1956, is a finding of fact which does not warrant any interference. The learned Advocate for the respondents also did not make any serious attempt to dislodge the finding. Although the death certificate, which was produced after the evidence of both sides was over and was accordingly discarded by both the learned Courts, it needs to be mentioned that mutation entries with respect to the suit properties in favour of the widow and sons of Sonba, recorded prior to 1956, are sufficient to hold that Sonba expired before 1956, i.e., prior to the commencement of the Hindu Succession Act, 1956.

10. Both the learned Courts have granted share to the plaintiffs on the ground that their mother Gayabai was entitled to 1/4th share in the suit properties being daughter of deceased Sonba. It is therefore, necessary to consider whether prior to commencement of HSA, 1956, a daughter was entitled to inherit property of her father on his demise as his legal representatives.

11. The learned First Appellate Court has held that a daughter was entitled to inherit properties of her father even prior to commencement of HSA, 1956, by placing reliance on Single

Bench decision of this Court in the matter of *Laxman Tukaram* (Supra). However, the correctness of law laid down in the matter of *Laxman Tukaram* (Supra) was doubted by another Single Judge of this Court, and accordingly, reference was made to the Division Bench to decide the said issue. The Division Bench has answered the reference in matter of *Radhabai Balasaheb Shirke and Ors. ..vs.. Keshav Ramchandra Jadhav and Anr.*, reported in **2025(1) Bom.C.R. 41**, holding that a daughter is not entitled to inherit property of her father in case where the father died prior to commencement of HSA, 1956. It is held that *Laxman Tukaram* (Supra) is not good law to the extent it holds that a daughter will be entitled to inherit her father's property even in cases where the father expired prior to the commencement of the Hindu Succession Act, 1956. A similar view was taken in another Single Bench judgment in the matter of *Bhagirathibai Chandrabhan Nimbarte & Anr. ..vs..Tanabai Ramchandra Zanzad (Dead) & Ors.*, reported in **2013(3) Bom.C.R. 598**.

12. In view of the aforesaid, the finding recorded by both the learned Courts that on demise of Sonba, Gayabai, his daughter inherited $\frac{1}{4}$ th share along with the defendant Nos.1 and 2(sons) and Bahinabai widow is clearly unsustainable.

13. As regards Article 72(vi) of Mulla's Hindu Law, the plaintiffs cannot claim any right over the suit property under the said provisions. Reliance in this regard can be placed on judgment of this Court in the matter of *Gurudayalsing ..vs.. Basant Singh*, reported in **2014(6) Mh.L.J. 186**, wherein it is held that an heir in a prior category excludes an heir in a subsequent category. Therefore, the plaintiffs who fall under Article 72(vi) stand excluded by the defendants who fall under Article 72(i).

14. Mr. Kariya, learned Advocate further contends that daughter's son is entitled to inherit property of his maternal grandfather in his own right. He has placed reliance on Article 43(6)(i) of Commentary, 'Mulla's Hindu Law', in support of his contention. I am afraid the said contention cannot be accepted. Article 43 of Mulla's Hindu Law deals with order of succession amongst sapindas.

15. At the outset, it must be stated that the plaintiffs have mentioned their age as 45 years and 52 years respectively as on 12.01.2011 i.e. the date of filing of the suit which implies that the plaintiff No.1 was born somewhere around in the year 1964-65 and the plaintiff No.2 was born somewhere around in the year 1959-1960. Thus, both the plaintiffs were born after demise of Sonaba. It

is obvious that the succession of Sonba opened on the date of his demise, when both the plaintiffs were not born. Therefore, they cannot claim inheritance of the property of Sonaba.

16. It must also be stated that the plaintiff No.2 is daughter and not son of Gayabai (daughter of Sonba) and therefore, is not covered under Article 43(6). She can claim only Article 46(13)(B). It must also be stated that, except for son, grandson and great grandson, whose father has expired and great grandson whose father and grandfather both have expired, no other legal representative is covered.

17. It will be pertinent to mention here that heirs in preceding entries in Article 43 exclude those in succeeding entries, except legal representative entries 1, 2, and 3, which comprise a son, a son of a predeceased son, and a son of a predeceased son of a predeceased son who inherit simultaneously. Likewise, after the commencement of the Hindu Women's Rights to Property Act, 1937, the widow also inherits the property along with heirs specified in entries 1 to 3.

18. In the case at hand, Sonba died after commencement of the Hindu Women's Rights to Property Act, 1937, and therefore, his property was inherited by defendant Nos.1 and 2 who are his

sons and his widow Bahinabai. It will also be pertinent to state that Bahinabai is the step mother of Gayabai (mother of plaintiffs) and therefore, Gayabai, being her step daughter could not inherit the share of Bahinabai. Gayabai's mother died during lifetime of her husband (Sonba) and did not inherit his property.

19. In view of the aforesaid, it needs to be held that the plaintiffs do not have any share in the suit properties. Both the learned Courts have erred in granting decree for partition and separate possession in favour of the plaintiffs. The impugned decrees are unsustainable and liable to be quashed. Suit for partition and separate possession filed by the plaintiffs is liable to be dismissed. In view of the above, Second Appeal is allowed in the following terms:-

- i) Second Appeal is **allowed**.
- ii) The order dated 15.09.2021, passed by the District Judge-2, Hinganghat, Dist. Wardha, in Regular Civil Appeal No.162 of 2017, and order dated 29.03.2016, passed by the Jt. Civil Judge Junior Division, Samudrapur, in Regular Civil Suit No.3 of 2011, is hereby quashed and set aside.
- iii) Parties to bear their own costs.