IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 598 OF 1999

Narayan Ganpati Saste, deceased through his legal heirs.

1. Shri Sahebrao Narayan Saste
2. Shri Nana Narayan Saste
3. Shri Balu Narayan Saste
4. Suresh Narayan Saste

1b) Nanasaheb Narayan Saste

1b(i) Lilawati Nanasaheb Saste

1b(ii) Pravin Nanasaheb Saste

1b(iii) Yogita Anil Borte

1b(iv) Savita Hemant Dabhade

1b(v) Kavita Vaibhav Dhamdhere **...Appellants**

V/s.

1. Yashwant Baburao Saste (since deceased)

1a) Ratan Yashwant Saste

1b) Nirmala Rajendra Gujjar

1c) Rajesh Yashwant Saste

1d) Gajanan Yashwant Saste **...Respondents**

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Mr. R. S. Apte, *Senior Advocate with Mr. S. S. Ambedkar, Ms. Disha Nidre, Ms. Dhanshree Bhate and Mr. Harshal Nahta for Appellants.*

Mr. Anil Anturkar, *Senior Advocate with Ms. Kashish Chelani, Mr. Niranjan Bhavake, Ms. Drishti Madhani, Mr. Anurag Ramekar, Ms. Vaishnavi Chore and Ms. Mudra Bhayje i/b Bhavake and Associates for Respondents.*

CORAM: SANDEEP V. MARNE, J.

RESD. ON: 21 SEPTEMBER 2026

PRON. ON: 13 OCTOBER 2026

JUDGMENT:

1) The Appellants have filed the present Appeal challenging the judgment and decree dated 22 June 1999 passed by the 5th Additional District Judge, Pune allowing Civil Appeal No. 837 of 1993 and setting aside the judgment and decree passed by the Trial Court in Regular Civil Suit No. 202 of 1976. The Trial Court has dismissed the suit of the Plaintiffs by judgment and decree dated 28 March 1983. While decreeing the suit, the first Appellate Court has declared that Plaintiffs have a share in the suit properties and that they are entitled to partition and separate possession of their share in respect thereof. The landed property described in paragraph C of the Schedule to the plaint is directed to be partitioned by the Collector whereas house properties described in paragraphs A and B of Schedule to the plaint are directed to be partitioned by the Court Commissioner.

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2) Briefly stated, facts of the case are that Ganpati Balaji Saste was the original person in the family who had three sons-Baburao, Haribhau and Narayan. Ganpati had given Haribhau in adoption, leaving behind two sons Baburao and Narayan. Ganpati Saste died in the year 1949, leaving behind his sons Baburao and Narayan. Plaintiff No. 1 in the suit is Banubai Baburao Saste, who claims to be the wife of Baburao. Plaintiff Nos. 2 and 3 are the sons of Banubai. Baburao executed a Will and thereafter passed away at Pune on 5 July 1953.

3) Plaintiff No. 1 claims that Baburao had his first wife by name Geetabai and a daughter named Chhabubai was born out of the marriage between Baburao and Geetabai. Geetabai passed away and thereafter Baburao remarried with Plaintiff No. 1-Banubai. It is claimed by Plaintiffs that out of the wedlock between Baburao and Banubai, four sons *viz.* Jagannath, Digambar, Yashwant and Bhanudas were born. During lifetime of Baburao, daughter Chhabubai also died and at the time of death of Baburao, Banubai and four sons were living. However, two sons Digambar and Jagannath also died at Pune unmarried and this is how Banubai and her two sons claim right to succeed estate of deceased Baburao, who had executed Will dated 5 June 1953. Plaintiff No. 1 demanded share of Baburao from Narayan and on account being denied lawful share in the property, she filed Regular Civil Suit No. 202 of 1976 in the Court of Joint Civil Judge Senior Division, Pune seeking partition and separate possession of one-half share in the suit properties along with her two sons Yashwant and Bhanudas.

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4) Defendant-Narayan resisted the suit and filed written statement denying existence of any valid wedlock between his brother-Baburao and Plaintiff No. 1-Banubai. He claims that he alone was entitled to succeed to the properties of father-Ganpati.

5) Trial Court framed as many as 23 issues. Banubai examined herself in addition to few other witnesses. Defendant examined himself and one more witness. Parties relied on documents in support of their respective contentions. After considering the pleadings, documentary and oral evidence, the Trial Court proceeded to hold that Banubai is not the legally wedded wife of deceased-Baburao and that thereafter Plaintiff Nos. 2 and 3 are not born out of legal wedlock. The Trial Court therefore proceeded to dismiss the suit by judgment and decree dated 28 March 1983.

6) Plaintiffs filed Civil Appeal No. 837 of 1993 before the Court of Additional District Judge, Pune challenging the decree of the Trial Court. By judgment and order dated 22 June 1999, the first Appellate Court has allowed the Appeal filed by the Plaintiffs and has set aside the Trial Court's decree. The First Appellate Court has partly decreed the suit declaring that Plaintiffs have a share in the suit properties described in paragraph A, B and C of schedule to the plaint and are entitled to partition and separate possession of their respective shares therein. The landed property in paragraph C of the Schedule is directed to be partitioned by the Collector whereas house properties in paragraph A and B of the schedule are directed to be partitioned by the Court Commissioner. The Defendant had passed away during pendency of the

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Appeal and his legal heirs were brought on record. The legal heirs of the Defendants have filed the present Appeal challenging the decree of the First Appellate Court.

7) By order dated 24 April 2000, the Appeal came to be admitted on following substantial question of law:

> Q.1 The trial Court having recorded a finding that the suit was barred by limitation after referring in detail the evidence on record, was the Appellate Court justified in reversing that finding without referring to the evidence, oral and documentary, which was relied on by the Trial Court?

8) During pendency of the Appeal, one of the legal heirs of Narayan (Appellant No. 2) has also passed away. His legal heirs are brought on record. Similarly, Plaintiff No. 2-Yashwant also passed away and his legal heirs are brought on record.

9) The Appeal has remained pending for a considerable period of time. Respondents approached the Hon'ble Apex Court by filing SLP (C) Diary No. 19274 of 2026 seeking expeditious hearing of the Appeal. By order dated 27 July 2026, the Hon'ble Apex Court granted liberty to the Respondent to move an appropriate application for expeditious hearing of the Second Appeal. The Appeal is accordingly taken up for final hearing.

10) As the learned counsel appearing for the parties commenced their submissions, this Court felt that it was necessary to formulate two

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additional questions of law. Accordingly, by order dated 21 September 2026, this Court has formulated following two additional questions of law:

> Q.2 Whether the Plaintiff-Banubai can be treated as legally wedded wife of Baburao and whether Plaintiff Nos.2 and 3 can be treated as legitimate children of Baburao and Banubai ?
>
> Q.3 Whether Defendant-Narayan became sole owner of the suit property by virtue of application of principle of survivorship ?

11) After framing the above two additional questions of law, the learned counsel appearing for rival parties have been heard extensively on all the three questions of law. It would be apt to briefly summarize the gist of submissions canvassed by the learned counsel appearing for the parties.

12) Mr. Apte, the learned Senior Advocate appearing for the Appellants submits that the first Appellate Court has grossly erred in reversing a well-considered decision of the Trial Court. He submits that the suit was rightly held to be barred by the limitation. That Baburao was ousted from suit property by father Ganpati and the ouster had become known to Baburao. That Baburao's relationship with Banubai was not acceptable to father-Ganpati, who had clearly ousted Baburao from joint family properties. That ouster was to such an extent that Baburao never visited village Moshi nor even attended funeral of father-Ganpati. That in such circumstances, if Baburao wanted to claim share in the joint family property, suit ought to have been filed either by Baburao or by any

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person claiming through him within a period of 12 years of denial of share as per Article 110 of the Limitation Act, 1963 (**Limitation Act**). That the suit was rightly dismissed on the ground of limitation and the Appellate Court has grossly erred in reversing the said finding of the Trial Court.

13) Mr. Apte further submits that Banubai is not proved to be the legally wedded wife of Baburao. That Plaintiff did not produce any concrete evidence of Banubai's marriage with Baburao. That Banubai herself admitted in the cross-examination that the alleged wedding was performed only by garlanding at Alandi. That mere garlanding does not prove the factum of a lawful wedding. That thus, absence of lawful wedding is admitted by Banubai herself during the cross-examination. That even presumption of marriage is not created in the facts of the present case as Plaintiff failed to lead evidence of any other person to prove that Baburao and Banubai lived together as husband and wife. Since alleged marriage between Baburao and Banubai itself is invalid, Plaintiff Nos. 2 and 3 cannot claim any rights in respect of the estate of Ganpati.

14) Mr. Apte further submits that Defendant-Narayan has succeeded to the properties of Ganpati on the basis of survivorship. That there were no other legal heirs except Narayan at the time of death of father-Ganpati. Baburao was denied the share in the suit properties and failed to take any action to claim his share. Even if it is admitted that Baburao had share in the suit properties at the time of his father's death in 1949, Narayan became entitled to claim whole of the property after

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Baburao's death in 1953. That provisions of Hindu Succession Act were introduced in the year 1956 and prior to coming with the effect for the said Act, only surviving legal heirs/co-coparceners were entitled to inherit whole of the property.

15) Mr. Apte further submits that the Will allegedly executed by Baburao in the year 1953 cannot have the effect of bequeathing any rights in the suit properties in favour of the Plaintiffs. Taking me through the Will, Mr. Apte submits that there is an express admission of denial of share to Baburao in the Will. That therefore Will clearly establishes ouster of Baburao from the suit properties. At the highest, Baburao bequeathed only right to claim share in the suit properties.

16) Mr. Apte further submits that a co-parcener cannot execute a Will in respect of his undivided share in joint family property. In support he relies on judgment of this Court in ***Bhikabhai Oghaddas Shah vs. Purshottam Girdhardas and Anr.***[1] In support of his contention that an illegitimate son is only entitled to maintenance and not right to succeed to the estate of father's family, he relies on judgment of the Apex Court in ***Mothey Anja Ratna Raja Kumar vs. Koney Narayana Rao and Ors.***[2] He submits that the Trial Court had rightly dismissed the suit of Plaintiffs and the first Appellate Court has erred in reversing well-considered decision of the Trial Court.

1 ILR Vol. L 558
2 1951 SCC 1103.

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17) Mr. Anturkar, the learned Senior Advocate appearing for the Respondents/Plaintiffs opposes the Appeal. He submits that Baburao was never ousted from the joint family property. That Article 110 of the Limitation Act uses the word '*known to the Plaintiff*'. That there is nothing on record to indicate that any overt act was to be done by which either Baburao was excluded from share in the suit property or such exclusion was made known to him at any point of time. That far from Baburao being excluded from share in the suit property, there is ample evidence on record to indicate that he had submitted application to Mamlatdar for separation of his share and had also executed a Will in respect of his share. That it is difficult to believe that a person who is ousted from share in the joint family property would ever apply to Mamlatdar or execute a Will. That ouster of non-possessing co-heir by co-heir in possession must be made out by open assertion of hostile title, coupled with exclusive possession and enjoyment to the knowledge of non-possessing co-heir for a considerable time, without any steps by excluded heir to vindicate the title. In support, he relies on judgment of the Apex Court in ***P. Lakshmi Reddy V/s L. Lakshmi Reddy***[3]. He relies on judgment of the Apex Court in ***Annasaheb Bapusaheb Patil and Ors. V/s Balwant Alias Balasaheb Babusaheb Patil and Ors***.[4] in support of the contention that the person who bases title of adverse possession must show clear and unequivocal evidence and mere non-possession of joint family properties by co-coparcener does not mean his ouster. He relies on judgment of this Court in ***Fulsing Ramsingh Rajput V/s Durgabai Shivsingh Rajput***[5] in support of his contention that mere directing the

[3] (1956) 2 SCC 759
[4] (1995) 2 SCC 543
[5] (1996) 2 Mh.L.J 770

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Plaintiff to claim her share through Court does not amount to denial of share so as to attract the principle of ouster. He also relies on judgment of this Court in ***Gulabrao Maruti Bhagat V.s Bhagwan Nana Bhagat***[6] in support of his contention that Article 110 of the Limitation Act contemplates commission of some overt act for presumption of ouster.

18) Mr. Anturkar further submits that performance of marriage between Baburao and Banubai is clearly proved by evidence on record. That in addition of specific evidence of performance of marriage at Alandi, there is also clear presumption of existence of valid marriage on account of the fact that Baburao and Banubai lived together, had four children and Baburao felt the need to make a Will in favour of his wife and four children. That in any case, Defendant did not seek a declaration of non-existence of marriage. Therefore, in collateral proceedings, he cannot question validity of marriage.

19) On the issue of survivorship, Mr. Anturkar submits that once valid marriage between Baburao and Banubai is proved, existence of other co-parceners to share joint family property automatically gets established and the principle of survivorship does not apply. He refers to provisions of the Hindu Women's Right to Property Act, 1937 in support of his contention that widow-Banubai was otherwise entitled to inherit the share of her husband during her lifetime and after her death, children of Banubai and Baburao were entitled to inherit the said share.

6 2001 (2) Mh.L.J. 665

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20) So far as the Will is concerned, Mr. Anturkar submits that Defendant never challenged validity of the Will. That the very fact that Will is made by Baburao is indicative of his intention to claim share in the property as well as clear evidence of Banubai being his legally wedded wife. Mr. Anturkar accordingly prays for dismissal of the Appeal.

21) Rival contentions urged on behalf of the parties now fall for my consideration.

22) The case involves claim by Banubai and her two children claiming right of inheritance in respect of properties of Ganpati. As observed above, Ganpati had three sons Baburao, Haribhau and Narayan. Since Haribhau went in adoption, he no longer remained part of Ganpati's family. Thus, only Baburao and Narayan had right to claim inheritance in respect of the joint family's property.

23) There is no dispute to the position that Baburao had earlier married Geetabai and the couple had daughter named Chhabubai. After Geetabai passed away, Baburao apparently lived with Banubai. It is Banubai's claim that Baburao married her. It is also claimed by Banubai that four sons were born to her out of the wedlock with Baburao. It is therefore claimed that Baburao had five children viz. four sons through Banubai and a daughter Chhabubai through wedlock with Geetabai. However, Chhabubai passed away issueless. It is therefore claim of Banubai that she, alongwith her four children, alone became entitled to inherit share of Baburao. By the time suit was filed by Banubai claiming share in the suit properties, her two children Jagannath and Digambar

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had passed away. Thus, Banubai brought suit for partition alongwith her two surviving sons, Yashwant and Bhanudas.

24) The Trial Court did not accept Banubai's contention of lawful wedding with Baburao and held that Baburao was ousted from suit properties by father Ganpati. The suit of Plaintiffs was accordingly dismissed by the judgment and decree dated 28 March 1983. In appeal, however, the Appellate Court has reversed the decree of the Trial Court and Plaintiff's suit for partition has been decreed recognizing their one-half share in the suit properties. Defendant/his legal heirs are in Appeal before this Court.

25) As observed above, the Appeal was initially admitted framing only a singular question of law relating to limitation. This Court has framed two additional issues relating to validity of marriage between Baburao and Banubai and entitlement of Defendant Narayan to become sole owner of suit property by survivorship. I proceed to answer each of the three questions.

QUESTION NO. 1

26) The first question is with regard to the correctness of Appellate Court's decision in reversing the finding of the Trial Court on the issue of limitation. The Trial Court proceeded to hold that the suit of the Plaintiffs was barred by limitation by referring to the provisions of Article 110 of the Limitation Act. The Trial Court held that the deceased Baburao was excluded from joint family property right from the year

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1949. The relevant findings recorded by the Trial Court on the issue of limitation are as under:

> Haribhau was born at Moshi and he spent his whole at Moshi. The house of his adoptive father is just near the house of his genetive father. He deposed that during the life time of his has for genetive father Ganpati Baburao had asked partition and his separate share. But Ganpati refused to give him the share as he had kept mistress and had defamed the family. It the appears that right from the year 1949 till his death Baburao never returned to Moshi. He did not even attend the funeral of his father. After obsequies his mother and defendant told him to go away and so Baburao returned. His attempt to ask for his share turned futile. Haribhau has further deposed that after the death of Baburao the plaintiff No.1 had come to the threshing floor asking her share in the yield but the same was refused to her. It, therefore, appears that deceased Baburao was excluded from the joint family property right from the year 1949 and this is apparent from the averment in his own will Exhibit No.100. If the we read the Will Exhibit No.100 in between lines it will be evident that Baburao was neither in possession nor in enjoyment of the joint family property although his name was nominally entered in the record of rights along with defendant Narayan. Exhibit No.101 is office copy of the application dated 22.5.1953 alleged to have been submitted to Mamledar by the deceased Baburao. that application also Baburao has averred that has no source of income although his name entered in the record of rights and that defendant alone is enjoying the yield of the ancestral land. This will go to prove that deceased Baburao excluded from the joint family property. As per article No.110 of the limitation Act a person excluded from the joint family property can file a suit to enforce a right of share therein within 12 years from the date when the exclusion becomes known to the plaintiff. From the evidence on record, during the life time or his father and lastly on the days of obsequies of his father Baburao came to know that he was excluded from the and joint family property and the approximate year will be 1950 because Ganpati died in 1949. So plaintiffs ought to have brought the suit within 12 years therefrom i.e. in the year 1962. But it appears that except executing the Will of 1953 and submitting Baburao one application to Mamlatdar deceased Baburao did nothing and so the suit filed by the plaintiffs who claim through deceased Baburao is clearly barred by limitation as per article 110 of the limitation Act. It has been held in Rajendra versus Jogendra 14 M.I.A. 67; the Mamlatdar 15 W.R. 41 Brijraj versus Vasant 1929 A 561 that,
>
> > "If the plaintiff was in a position to sue before and the long delay in bringing suit has prejudiced the defendant and has occasioned loss of evidence by death otherwise, a strong presumption may arise against the plaintiff unless good cause is shown."

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> In the instant case also plaintiff no.1 has not shown any good cause why right from the death of Baburao in the year 1953 till the year 1976 he did not file the suit. Hence for all these reasons I hold that although after the death of Ganpati the name of Baburao was entered in the record of rights still it is not proved that Baburao alone or ever managed the joint family property. Similarly I further hold that the plaintiffs have failed to prove that due to persuation and assurance of the defendant the plaintiff did not persue the application for getting their names entered in the record of rights and also further hold that the defendant has proved that the suit is barred by limitation. Hence my findings on issue Nos. 14, 15 and 23 accordingly.

27) Thus, the Trial Court relied on following factors for accepting the theory of exclusion/ouster:

i. Haribhau's deposition that Baburao had asked for partition and his separate share and father-Ganpati refused to give him share as Baburao had kept a mistress and had defamed the family.
ii. Since 1949 till his death, Baburao never returned to Moshi.
iii. Baburao did not even attend funeral of his own father-Ganpati.
iv. After Baburao's death, Banubai had approached claiming her share in the yield from the suit properties, but the same was denied to her.
v. The Will executed by Baburao indicated that he was neither in possession nor in enjoyment of joint family property.
vi. In Application dated 22 March 1953 submitted to Mamlatdar, Baburao averred that he had no source of income though his name was entered in the record of rights and that Narayan alone was enjoying the yield of the ancestral land.
vii. During lifetime of his father as well as on the days of obsequies of his father, Baburao had acquired knowledge that he was excluded from joint family property.

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28) The Appellate Court has however reversed the finding of the Trial Court on the issue of limitation by rejecting the theory of exclusion/ouster by holding in paragraph 22 of the judgment as under:

> 22. But after going through the entire evidence on record and particularly the evidence adduced by the original defendant I think that the Learned Trial Judge has committed an error in dismissing the suit on the ground of limitation. Because, it appears from the evidence on record that the defendant has not adduced any cogent evidence to show that deceased Baburao was ousted from the suit properties during the life time of their father except the bare words of himself and his brother Haribhau. On the contrary, it appears from the record that Baburao used to come to village Moshi during his life time. So as to prove the exclusion it is settled principle that the person who alleges such exclusion of other co-parceners has to prove that such co-parcener has been ousted or excluded from the joint family property and he has to specify the time as to when such exclusion took place. Not only this, but he has further to prove that the excluded co-parcener came to know that he is excluded or ousted from the joint family property. But it appears from the evidence on record that the defendant has not adduced any cogent evidence, to prove these material factors of the exclusion of the co-parcener. Therefore, I think that the Defendant has failed to prove this part of his case.

29) The Appellate Court took into consideration Defendant's plea of adverse possession for deciding the issue of limitation. The Appellate Court held that the Trial Court itself negatived Defendant's plea of adverse possession and has accordingly proceeded to hold that since plea of adverse possession was not established, the suit could not be held to be barred by limitation. The Appellate Court has held in paragraph 23 of the judgment as under:

> 23. So far as the stand of adverse possession taken by the defendant is concerned, the Learned Trial Judge himself has negatived the same. However, the Learned Trial Judge has held that the suit filed by the plaintiff is time barred. So far as the suit for partition by the co-owner is concerned, it is settled principle that such suit is maintainable within 12 years from the date when the possession of the defendant became adverse to him by virtue of Article 65 of

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> the Limitation Act. As stated earlier the Learned Trial Judge himself has held that the defendant has failed to prove his ownership over the share of Baburao by adverse possession. In view of this finding the Learned Trial Judge should have come to the conclusion that the suit filed by the plaintiffs for partition is within limitation. But it appears that the Learned Trial Judge has not considered this legal aspect in proper perspective. Therefore, I think that the entire Judgment & Decree under appeal need to be interferred.

30) Thus, the Trial Court's judgment discusses evidence of Haribhau for arriving at the conclusion of ouster, whereas the Appellate Court has held that records did not demonstrate production of any cogent evidence to prove material factors for exclusion.

31) In my view, Defendant's plea of exclusion/ouster is not established in the facts of the present case. The Trial Court completely misunderstood the concept of 'exclusion' or 'ouster' within the meaning of Article 110 of the Limitation Act. Under Article 110, the suit by a person excluded from joint family property to enforce a right to share therein must be filed within a period of 12 years from the date when the exclusion becomes known to him. Article 110 of the Limitation Act provides thus:-

	Description of Suit	**Period of Limitation**	**Time from which period begins to run**
110	By a person excluded from a joint family property to enforce a right to share therein	Twelve years.	When the exclusion becomes known to the plaintiff.

32) Thus, Article 110 contemplates twin situations. Firstly, there must be an 'exclusion' from 'joint family property'. Secondly and

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more importantly, such exclusion must be made known to the Plaintiff. Thus, mere establishment of exclusion is not enough and it is necessary to demonstrate that such exclusion is made known to the Plaintiff.

33) The 'exclusion' contemplated under Article 110 of the Limitation Act requires a positive act or conduct by which the exclusion from the joint family property becomes known to the Plaintiff. Merely because Plaintiff is denied a share in the yield of joint family property does not constitute 'exclusion' within the meaning of Article 110 of the Limitation Act. If one heir cultivates the land and derives yield therefrom, he may deny any share in the yield to other heir, which does not mean that in addition to loss of share in the yield, the other heir also looses share in the land. Similarly, a father who is livid at his son and tells in a fate of anger that the son would not receive any share in the joint family property, again would not constitute 'exclusion' within the meaning of Article 110 of the Limitation Act. Similarly, mere factum of denial to jointly possess family property by one co-heir to another co-heir again would not constitute 'ouster' or 'exclusion'. This is because possession by one heir is treated in law as possession by all co-heirs.

34) In ***Gulabrao Maruti Bhagat*** (supra), a Single Judge of this Court (*Dr. D. Y. Chandrachud, J as His Lordship then was*) has held in paragraph 17 of the judgment as under:

> 17. Insofar as the aspect of limitation is concerned, reference has to be made to the provisions of Article 110 of the Limitation Act, 1963. Article 110 provides a period of limitation of 12 years for a suit by a person excluded from Joint family property to enforce a right to a share therein. Time begins to run when the exclusion becomes known to the plaintiff. In other words, for the purposes

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> of Article 110, there has to be a positive act or conduct by which the exclusion from joint family property becomes known to the plaintiff. In the present case, there is absolutely no evidence to suggest that the Appellant has been excluded from the property of the joint family more than 12 years prior to the institution of the suit. The properties of the joint family were admittedly in the occupation of tenants. Consequently, there was no question of the actual exclusion of any member of the joint family from cultivation or enjoyment of the suit lands. In the circumstances, the view which has been taken by the trial Court and in an appeal by the Appellate Court is clearly erroneous.

35) Thus, as held by this Court in ***Gulabrao Maruti Bhagat***, for the purposes of Article 110 there has to be a positive act or conduct by which exclusion from joint family property becomes known to the Plaintiff. In the present case, I am unable to locate any positive act or conduct which made Baburao know the fact that he was ousted from joint family property.

36) In ***P. Lakshmi Reddy*** (supra), the Hon'ble Apex Court, while dealing with a plea for adverse possession, has held that possession of one co-heir is considered in law as possession of all the co-heirs. It is further held that when one co-heir is found to be in the possession of the properties, it is presumed to be on the basis of joint property. It is further held that ouster of non-possessing co-heir by the co-heir in possession must be specifically made out. The Apex Court has held in paragraphs 5 and 8 of the judgment as under:

> **5.** It will be convenient to consider in the first instance whether or not the possession of Hanimi Reddy from 20-1-1930, up to the date of his death in 1936 was adverse to his co-heirs. The facts relevant for this purpose are the following. At the date when Venkata Reddy died his properties were in the custody of the two maternal uncles of his father. Hanimi Reddy filed his suit on the allegation, as already stated above, that he was the nearest agnatic relation alive of the deceased minor Venkata Reddy and as his next rightful heir to succeed to *all* the estate, movable and immovable, of the said minor, set forth in the schedules thereto. He appended a genealogical tree to his plaint which showed his relationship to

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Venkata Reddy through a common ancestor and showed only the two lines of himself and Venkata Reddy. The plaintiff and the second defendant belong to another line emanating from the same common ancestor but that line was not shown and the plaintiff and second defendant were ignored. The first defendant in the present suit did not admit the relationship of plaintiff and second defendant in his written statement. He disputed that the father of the plaintiff and second defendant was descended from the common ancestor either by birth or by adoption, as shown in the genealogical table attached to the present plaint. It is possible that this may have been the reason for Hanimi Reddy ignoring the plaintiff and the second defendant in his suit. However, this may be, at the trial in this suit it was admitted, that the plaintiff and the second defendant are the agnatic relations of Venkata Reddy of the same degree as Hanimi Reddy. The defendants in the earlier suit who were in possession on that date claimed to retain possession on behalf of an alleged illatom son-in-law, (of Venkata Reddy's father) a son of the second defendant therein. It may be mentioned that in that part of the country (Andhra) an illatom son-in-law is a boy incorporated into the family with a view to give a daughter in marriage and is customarily recognised as an heir in the absence of a natural-born son. This claim appears to have been negatived and the suit was decreed. During the pendency of the suit a Receiver was appointed in February 1928. He presumably took possession though the date of his taking possession is not on the record. The decree in that suit dated 15-3-1929, is as follows:

> "This Court doth order and decree that plaintiff do recover possession of immovable property and movables in the possession of the Receiver."

8. Now, the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario.* (See *Secy. of State for India in Council* v. *Debendra Lal Khan* [*Secy. of State for India in Council* v. *Debendra Lal Khan*, 1933 SCC OnLine PC 65 : (1933) LR 61 IA 78, 82] .) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See *Radhamoni Debi* v. *Collector* [*Radhamoni Debi* v. *Collector*, 1900 SCC OnLine PC 4 : (1900) LR 27 IA 136, 140] .) But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Cores* v. *Appuhamy* [*Cores* v. *Appuhamy*, 1912 AC 230 (PC)] .) It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and

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> maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai* v. *Jeevarathnammal* [*N. Varada Pillai* v. *Jeevarathnammal*, 1918 SCC OnLine PC 50 : AIR 1919 PC 44, 47] quotes, apparently with approval, a passage from *Culley* v. *Deod Taylerson* [*Culley* v. *Deod Taylerson*, 3 P & D 539 : 52 RR 566] which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur". (See also *Govindrao* v. *Rajabai* [*Govindrao* v. *Rajabai*, 1930 SCC OnLine PC 92 : AIR 1931 PC 48] .) It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession.

37) In the present case, as Defendant raised specific plea of adverse possession, the fact that Defendant raised plea of adverse possession clearly demolishes his theory of 'exclusion or ouster'. The plea of adverse possession proceeds on acknowledgment of title of opposite party. Thus, by raising plea of adverse possession Defendant-Narayan acknowledged title of Baburao in respect of his share but claimed title in respect of that share by prescription. If Baburao was indeed oustered or excluded in respect of the suit properties, Narayan would have become sole owner in respect of the entire joint family property and there was no question of admitting Baburao's title *qua* half share. In the present case thus, mere raising plea for adverse possession by Narayan clearly demolished his defence of exclusion/ouster. In ***Annasaheb Bapusaheb Patil*** (supra), the Apex Court has held that mere failure to jointly possess the property by co-parcener does not mean that he has been ousted. It is held in paragraph 16 of the judgment as under:

> **16.** In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenary property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one,

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> therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other. The right of the plaintiff to file suit for partition had arisen after the Act has come into force and re-grant was made by the Collector under sub-section (1) of Section 5. The defendant, therefore, must plead and prove that after the re-grant, he asserted his own exclusive right, title and interest to the plaint schedule property to the knowledge of the plaintiff and the latter acquiesced to such a hostile exercise of the right and allowed the defendant to remain in continuous possession and enjoyment of the property in assertion of that hostile title during the entire statutory period of 12 years without any let and hindrance and the plaintiff stood thereby.

38) Therefore, mere exclusivity of possession of the suit properties by Narayan did not mean that Baburao was ousted or excluded within the meaning of Article 110 of the Limitation Act.

39) In ***Fulsing Ramsingh Rajput*** (supra), a Single Judge of this Court has held that mere statement of the Defendants directing Plaintiff to claim her share through Court would not lead to denial of share of the Plaintiff so as to amount to ouster/exclude from the suit property.

40) In the present case, even if Haribhau's contention of father-Ganpati telling Baburao that he would not secure share in the suit properties is accepted to be correct, the same would not *ipso facto* create presumption of exclusion/ouster. Father Ganpati may have been extremely angry on account of Baburao residing with Banubai, who is described by Haribhau and Narayan as Baburao's mistress. However, mere wrath expressed by the father at his child performing marriage

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against his wish and telling the son in a state of rage that he would not receive any share in the property would not amount to exclusion within the meaning of Article 110 of the Limitation Act.

41) Thus, the fact of Baburao/Banubai being denied share in the yield or exclusive possession of Narayan in respect of the suit properties or father-Ganpati orally telling Baburao that he would not secure any share in the property are not factors enough for establishing exclusion/ouster within the meaning of Article 110 of the Limitation Act.

42) Under Article 110 of the Limitation Act, it is necessary to prove performance of an overt act constituting denial of share to the Plaintiff in the joint family property. Such overt act may include effecting of partition excluding Plaintiff by other co-coparceners, applying to the revenue authorities for mutation of names to the exclusion of Plaintiff, causing sale of suit properties by denying any share to the Plaintiff, etc. The list is not exhaustive and there may be several other circumstances which can establish 'exclusion' within the meaning of Article 110 of the Limitation Act. In the present case however, no overt or positive act has taken place to infer 'exclusion'.

43) Also, even if any overt act has occurred, which may result in exclusion/ouster of Plaintiffs from joint family properties, such overt or positive act must be made known to the Plaintiff. Despite knowing his exclusion from joint family properties, if Plaintiff acquiesces in such overt or positive act and does not bring a suit for claiming his share within a period of 12 years after acquisition of such knowledge, his

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remedy to file suit for partition is extinguished under Section 28 of the Limitation Act.

44) In the present case, there is nothing on record to establish Baburao's exclusion/ouster from joint family properties. The first condition of exclusion itself is not made and there is no question of fulfillment of the second condition of making exclusion known to Baburao. In addition to non-existence of factors necessary to constitute exclusion, there are in fact two acts performed by Baburao which clearly go contrary to the defence of exclusion/ouster. Baburao filed an application before the Mamlatdar on 22 May 1953 in respect of the suit properties. This indicates clear intention on the part of Baburao to assert his rights in respect of the suit property. Secondly and more importantly, Baburao also executed a Will in respect of the suit properties in favour of Banubai and the children. This again indicates state of mind of Baburao who believes that he was entitled to inherit one-half share in the suit properties after death of his father Ganpati. There is nothing on record to indicate Baburao's exclusion from suit properties. In my view therefore, the suit was not barred by limitation and the Appellate Court is justified in reversing erroneous finding recorded by the Trial Court on the issue of limitation. The first question is answered accordingly.

QUESTION NO. 2

45) This question relates to the validity of marriage between Baburao and Banubai. Before proceeding to decide the issue, it must be observed at the very outset that Defendant did not seek any declaration

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about invalidity of marriage between his brother Baburao and Banubai. His main defence in the written statement was about Baburao's exclusion from suit properties and his alleged acquisition of title by survivorship. Defendant also raised a plea of adverse possession to claim title. In paragraph No. 7 of his written statement, Defendant contended that Baburao had married Geetabai, after whose death, Baburao performed marriage with daughter of Shripati Kalje and out of that wedlock Chhabubai was born. In order to create difficulties in the suit, Defendant raised a plea that Chhabubai was married to one Yadav Laxman Thundare and he was the heir of Chhabubai after her death. Defendant therefore sought to raise the plea of non-joinder of Chhabubai's husband. This is all that was pleaded by Defendant in the written statement. He did not specifically raise the issue of invalidity of marriage between Baburao and Banubai. He merely denied the factum of marriage and relationship of Plaintiff Nos. 2 and 3 as sons of Baburao. Nevertheless, the Trial Court conducted an inquiry into validity of marriage between Baburao and Banubai. The issue was answered against Plaintiffs by the Trial Court by recording following findings:

> The plaintiff no.1 contends that she is legally wedded wife of the deceased Baburao and plaintiff Nos.2 and 3 were born out of the legal wedlock. As against this the defendant contends that plaintiff No.1 was a kept mistress of Baburao and plaintiff Nos.2 and 3 are not the sons begotten from Baburao as alleged and therefore, the plaintiffs have no share in the suit property. In order to prove her marriage with deceased Baburao plaintiff No.1 has examined herself at Exhibit No.2 and has produced the record from the remand home at Exhibit Nos. 121 to 126. The plaintiff no.1 deposed that she hails from village Mavadi, that her grand mother Janabai reared her up and her father was working as labourer. She lived at Mavadi up to the age of 15, 16 years working as agricultural labourer and then she came to Pune along with one woman never to return back to her village. During cross examination plaintiff No.1 has deposed that from Mavadi village she came directly to reside in the house of

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Baburao at Pune, that she had seen Baburao for the first time when she came to Pune. And she has further clear term admitted that she married Baburao because she did not think it fit to live together with Baburao without any tie. She has admitted that it was the love marriage and the marriage was performed at Alandi by garlanding each other. She has also further stated that the attesting witnesses on the will were the witnesses to her marriage. We find that Ramanlal Shah Exh.56 and Ramanlal Gujar Ex.57 have in clear terms denied that they attended the marriage of plaintiff No.1 Except the mere word of plaintiff No.1 there 1 is nothing on the record to prove the alleged marriage. It has been held in 1936 B.L.R. page No.77 that there are two ceremonies essential to the validity of viz the invocation before the consecrated fire and the Saptpadi or the taking of seven steps by the bride groom and bride jointly before consecrated fire. No such evidence has been brought on the record by plaintiff No.1 to prove the alleged marriage. It is true that a presumption under section 114 arises about the marriage, if a man and woman live together as husband and wife for a pretty long time and if the neighbours and others recognize them as husband and wife in the public. But the plaintiff No.1 has not brought any cogent evidence to prove that she and Baburao were recognized as husband and wife by the public at large or at least by their neighbours. On the contrary she has admitted that although she delivered five times in the hospital of Sharadbai, still she has not produced the birth extracts of her sons and did not examine Sharadabai although she is admittedly alive. From the admissions given by Plaintiff no. 1 regarding her cohabitation with Baburao immediately after her arrival at Pune to show that she was living with Baburao perhaps husband and wife even before the alleged marriage and this is evident from her admission from the following sentence. “Myself and Baburao married each other because we did not think it fit to live together without any tie” It has been held in 1929 B.L.R. page 453 that “no presumption of marriage could be drawn in view of the facts that the connection between the parties originated in concubinage, that the intercourse between the parties was admittedly illicit for a large number of years and that the status of man was than lower than the woman”. From the admissions of plaintiff No.1 as stated above it can be safely inferred that she and Baburao were living as husband and wife and she was the kept mistress of Baburao. This is evident from her inaction in not for taking any steps against the defendant for partition immediately after the death of Baburao. Baburao died in the year 1953 and it appears from the record of the remand home Exh.121 to 126 that in the year 1956 she put all her sons n the remand home and Exh. 121 shows that she gave her name as Smt. Kundabai Baburao Saste and not Banubai Baburao Saste. If readily Plaintiff No. 1 was the married wife of deceased Baburao and if Plaintiff Nos.2 and 3 were the sons born out of legal wedlock she would not have kept quiet for such long a period from 1953 to 1976 to assert her right of partition and particularly when she had the will of Baburao in her possession. The Defendant and his brother Haribhau have told the consistent story that plaintiff No.1 was the kept mistress of Baburao. I believe more in the word of Haribhau because he was given in adoption in another family and had lost his right, title and interest in suit property. Plaintiff No.1 has given out the her age

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> as 58 in the year 1983 and she says that she was married at the age of 15 years, which means that according to her, she was married sometime in 1941 or 1942. She has further admitted that she married with Baburao six years before the death of Ganpati. Ganpati died in 1949 and with this calculation the year of marriage comes to 1943. She got the first issue after which six years which date does not tally with the date in the record of the remand home. Thus, the date as given by the plaintiff do not tally with each other and the attesting witnesses to the will have denied that they were present at the time of he marriage. The silence of plaintiff no.1 for last 23 years in not filing the suit is also eloquent. As a prudent legally married wife she ought to have filed the suit immediately after the death of Baburao. All those circumstances coupled with the evidence on record aim at the irresistible conclusion that plaintiff No.1 is not legally wedded wife of deceased Baburao and plaintiff Nos.2 and 3 were not born out of legal wedlock and as such I hold that plaintiffs have legally no share in the suit property. Hence my findings on Issue No.6 and 16 in the negative and on issue on No.18 in the affirmative.

46) The Appellate Court, on the other hand, has reversed the finding of Trial Court about validity of marriage between Baburao and Banubai by holding in paragraphs 13 and 17 as under:

> 13. But after going through the entire evidence on record I think that the Learned Trial Judge has committed an error in negativing this part of the case of the plaintiffs. Because, it appears from the record that there is some evidence on the basis of which it can be safely be said that Banubai was the legally wedded wife of Baburao and plaintiff Nos.2 & 3 are their legitimate sons. A perusal of the record shows that Banubai has examined herself and she stated that her marriage was performed with Baburao at Devachi Alandi and at that time they had garlanded each other and thereafter their marriage was performed. So far as this part of the evidence of Banubai is concerned, there is nothing on record to disbelieve the same. Not only this, but it has come in evidence that Banubai and Baburao were residing together as husband and wife at Pune for years together. It has also come in the evidence that the plaintiff Nos.2 & 3 and their deceased brothers were admitted in Remand Home at Pune and the name of Baburao Saste was shown as their father in the record of Remand Home. It appears from the record that plaintiff Nos.2 & 3 and their deceased brothers were admitted in Remand Home immediately after the demise of Baburao Saste. If we consider all these aspects together with the evidence of Banubai, then I think that there is absolutely no any reason to disbelieve her evidence of Banubai, then I think that there is absolutely no any reason to disbelieve her evidence so far her marriage with Baburao is concerned.

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> 17. A perusal of the evidence on record clearly shows that Banubai and Baburao resided together as husband and wife for some years and during that period Banubai has delivered four sons. So far as the stay of a man and woman for years together is concerned, Their Lordships of the Supreme Court have held in the case reported in AIR 1978 SC 1557 Badri Prasad vs. Deputy Director of Consolidation that there is strong presumption in favour of the wedlock. I have already stated earlier that Banubai has deposed about her marriage with the deceased Baburao. According to me, she is the proper witness who can depose about her marriage. After going through the evidence on record it also appears that Banubai has given birth to four sons and those sons were admitted in Remand Home and the name of Baburao was shown as their father in the record. If we consider all these aspects together, then strong presumption regarding wedlock of Banubai and Baburao can safely be drawn. Therefore, I think that the plaintiffs have established that Banubai was the legally wedded wife of Baburao and plaintiff Nos. 2 and 3 are their legitimate sons.

47) In my view, the Trial Court had clearly erred in holding that there was no valid marriage between Baburao and Banubai. The Trial Court expected Banubai to lead additional evidence, apart from her oral deposition, to prove factum of marriage. There is no dispute to the position that four sons were born to Banubai and in the records of the remand home, name of Baburao was entered as their father. For some odd reasons, name of Banubai was not mentioned in the records of remand home as mother. Some other name (Smt. Kandubai Baburao Saste) was entered in those records. However, the name of Baburao Saste clearly appears even against entry of father's name. Thus, there is some contemporaneous evidence on record to indicate that the children born to Banubai are related to Baburao. It is Defendant's own case that Baburao was leaving with a mistress and was therefore ousted from joint family property. Thus, ignoring the attempt by the Defendant to brand Banubai as Baburao's mistress, the fact remains that he admitted Baburao living with Banubai.

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48) Thus, it is established by evidence that (i) Baburao and Banubai garlanded each other at Devachi Alandi with intention of marriage (ii) both lived together for a considerable period of time. (iii) the couple had 4 sons out of their relationship (iv) name of Baburao is entered in records of remand home as father of those four sons (v) Baburao made a Will for bequeathing the property by treating Banubai as wife and the children as his children. The case thus does not involve raising of a claim by a complete stranger in respect of share of Baburao.

49) To further buttress the claim of valid marriage, Baburao himself executed a registered Will dated 5 June 1953 in which he described Banubai as his wife. Thus, voluminous evidence is available on record to clearly presume marriage between Baburao and Banubai. This Court also takes judicial notice of the fact that several marriages are performed each day at Devachi Alandi and once Banubai stated in her cross-examination that she and Baburao garlanded each other, it was not necessary for her to make further statements in the cross-examination that other ceremonies relating to marriage were also performed. When the circumstances are considered cumulatively, the inescapable conclusion that emerges is that Banubai's marriage with Baburao is clearly established.

50) In ***Kattukandi Edathil Krishnan v. Kattukandi Edathil Valsan***[7], the issues before the Apex Court were whether the plaintiff therein was a valid son of Damodaran and Chiruthakutty born in a wedlock; and about the status of children born in a relationship of long

[7] (2022) 16 SCC 71

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cohabitation. The Apex Court has held that if a man and a woman live together for long years as husband and wife, there would be a presumption in favour of wedlock.

> 15. It is well settled that if a man and a woman live together for long years as husband and wife, there would be a presumption in favour of wedlock. Such a presumption could be drawn under Section 114 of the Evidence Act. Although, the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin to prove that no marriage took place.
>
> 18. In Badri Prasad v. Director of Consolidation [Badri Prasad v. Director of Consolidation, (1978) 3 SCC 527] , it was held by this Court that a strong presumption arises in favour of wedlock where two partners have lived together for long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon the bastardy.

51) In the present case, the conclusion drawn by the first Appellate Court about validity of marriage between Baburao and Banubai, after reappreciation of evidence on record, appears to be correct and the Appellants have failed to make out a case of perversity in the same. Thus, Banubai's marriage with Baburao is clearly established. Question No. 2 is answered accordingly.

QUESTION NO. 3

52) This question relates to the right of Narayan to become the sole owner in respect of suit properties by virtue of survivorship. The Trial Court accepted the plea of survivorship by recording following findings:

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> ... Now as regards the other contention it is true and is proved by the evidence on record that deceased Baburao was excluded from the joint family property right from the year 1949. He died in the year 1953 executing a Will Exhibit No.100 but then the suit filed by the plaintiffs in 1976 is barred by limitation. Hence by survivalship and as a sole surviving co-parceners I hold that the defendant has become the absolute owner of the suit property and the plaintiffs cannot divest the defendant of the property which has been vested in by survivalship. Hence my finding on issue No.8 is the affirmative.

53) Thus, Defendant-Narayan is held to be the sole survivor co-parcener by rejecting the theory of valid marriage between Baburao and Banubai. However, once the marriage between Baburao and Banubai is held to be performed and once Plaintiff Nos. 2 and 3 are held to legitimate children of Baburao, the issue of Narayan acquiring sole ownership in respect of suit properties by survivorship is rendered academic. Therefore, it is held that Narayan did not become owner of suit properties by survivorship. Question No.3 is answered accordingly.

54) Mr. Apte has strenuously contended that Baburao did not have right to make Will and has relied on judgment of this Court in ***Bhikabhai*** (supra). It is true that a Hindu co-parcener cannot bequeath his share in joint family property by making a Will. He has contended that upon death of a co-parcener, his share goes to the other co-parceners by survivorship and the share cannot be bequeathed by way of Will. The proposition essentially applies when a co-parcener bequeaths his share in joint family property to an outsider. The said principle has no application to the present case as Plaintiffs are entitled to succeed to the share of Baburao in their capacity as co-parceners. Even if Baburao was not to make Will, Plaintiffs would have otherwise succeeded to the share of Baburao by survivorship.

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55) Mr. Apte's reliance on judgment of this Court in ***Mothey Anja Ratna Raja Kumar*** (supra) is in apposite as Plaintiff Nos. 2 and 3 cannot be treated as illegitimate children of Baburao.

56) Considering the above position and in view of answers to the three questions hereinabove, in my view, there is no warrant for interference in the judgment and decree of the first Appellate Court. The decree of the first Appellate Court appears, to my mind, to be unexceptional. Curtains would accordingly be drawn on the dispute, which commenced 53 years ago. The Appeal accordingly fails.

57) The second Appeal is accordingly **dismissed** with costs.

58) In view, of disposal of Second Appeal nothing survives in the pending Applications and the same are also **disposed of.**

[SANDEEP V. MARNE, J.]

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