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Reserved On : 20/08/2026
Pronounced On : 11/09/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 500 of 2026

With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2026
In R/SECOND APPEAL NO. 500 of 2026

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE MAULIK J.SHELAT *Sd/-*

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Approved for Reporting	Yes	No
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RANCHHODBHAI JESINGBHAI SINCE DEAD THROUGH HIS HEIRS AND LRS & ORS.
Versus
ANCHHIBHAI KAVJIBHAI CHAUDHARI SINCE DEAD THROUGH HIS HEIRS AND LRS & ORS.

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Appearance:
MR NV GANDHI(1693) for the Appellant(s) No. 1,1.1,1.2,1.3,1.4

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CORAM:**HONOURABLE MR. JUSTICE MAULIK J.SHELAT**

CAV JUDGMENT

1. Heard Mr.N.V.Gandhi, learned advocate for the appellants at length. Mr. Gandhi, learned advocate, took me through the judgement and decree passed by the courts below, as well as the pleading and evidence submitted with the paper-book.

2. The present Second Appeal filed under Section 100 of the Civil Procedure Code, 1908 (CPC), which is arising out of the judgment and

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decree dated 24.06.2026 passed by the 3rd Additional District Judge, Surat at Bardoli, in Regular Civil Appeal No. 51 of 2015 (Old RCA No. 183 of 2012 & 2 of 2012), whereby the Appellate Court has confirmed the judgment and decree dated 07.12.2011 passed by the Principal Senior Civil Judge, Bardoli, in Special Civil Suit No. 111 of 2011 (Old Regular Civil Suit No. 26 of 2002).

2.1 The appellants herein are the legal heirs of the original plaintiff, and respondent Nos. 1 and 3 herein are the legal heirs of original defendant Nos.1 and 3, while the remaining respondents are original defendant Nos.2, 4 and 5. For the sake of brevity and convenience, as far as possible, hereinafter, they will be referred to as the 'plaintiff' and the 'defendant', respectively.

SHORT FACTS

3. The original plaintiff claimed to be the brother of one Chhaniben, who died issueless on 15.07.1991. The said Chhaniben was married to one Jivlabhai, who hailed from Village - Nogama, Taluka - Mandvi, District - Surat, and was holding agricultural lands by way of tenancy rights. Such lands were subject matter of the suit. Since Jivlabhai died issueless prior to Chhaniben, being his wife, she had inherited the suit properties, and

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her name was accordingly mutated in the revenue records.

3.1 As per the case of the plaintiff, his sister Chhaniben executed one registered Will dated 24.07.1972 in favour of his son, namely, Raysangbhai. It is to be noted here that the plaintiff could not brought the aforesaid Will on record. Rather, it came on record that Chhaniben executed registered Will dated 01.07.1991 in favour of the defendant, thereby bequeathed her agricultural lands in favour of the defendant. The plaintiff appears to have referred in the plaint that the Will was executed by Chhaniben in favour of the defendant. Likewise, the plaintiff also averred in the plaint that he also executed a Will on 01.07.1991 in favour of the defendant, but, according to the plaintiff, he has cancelled his Will on 04.07.1997, and one power of attorney issued in favour of the defendant by the plaintiff was also got cancelled on 27.05.2002.

3.2 Thereafter, on 27.09.2002, Regular Civil Suit No. 26 of 2002 was instituted by the plaintiff seeking relief of declaration and injunction against the defendant. It has been prayed that his sister Chhaniben had no right to execute a Will in favour of the defendant and, for the reasons set out in the plaint, the Will may be declared as not legal. It was also prayed that, since the plaintiff happens to be the brother of Chhaniben, as a rule of survivorship, the plaintiff should be declared as the sole owner of the

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suit properties. The plaintiff further prayed that the defendant should be directed to hand over the possession of the suit properties along with mesne profits. The permanent injunction was also sought to the effect that the defendant shall be restrained from interfering with the possession of the plaintiff qua the suit property bearing Block Nos.51 and 366 at Village - Borigala, Taluka - Mandvi, Dist - Surat. It was lastly prayed that a Will dated 24.07.1972 executed by Chhaniben in favour of the defendant shall also be declared illegal, as she had no right to execute the Will.

3.3 Thus, essentially, the plaintiff sought a declaration that his sister Chhaniben had no right to execute a Will in favour of the defendant and, being the brother of deceased Chhaniben, as a rule of survivorship, he should be declared as the owner of her properties. The plaintiff had declared in the plaint that, since he belongs to the Scheduled Tribe (Chaudhari Community), exempted from paying any Court fees. It appears that the caste certificate was produced at Exhibit-58 before the Trial Court.

3.4 The defendant had appeared and contested the suit by filing a written statement. It is the case of the defendant that the execution of the Will dated 01.07.1991 by Chhaniben in favour of the defendant was well

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within the knowledge of the plaintiff, inasmuch as the plaintiff himself, along with the witness to the Will, went to the office of Advocate for preparation of the Will and, accordingly, after the demise of Chhaniben, the name of the defendant entered into the revenue record qua her agricultural lands bequeathed in favour of the defendant, which are the subject matter of the suit.

3.5 It is discernible from the pleadings of the defendant that Jivlabhai, the husband of Chhaniben's, had a brother named Kavlabhai Chogdabhai. The said Kavlabhai was alive at the time of Channiben's death and had instituted Regular Civil Suit No. 46 of 1991 against both the plaintiff as well as the defendant. It appears that the plaintiff admitted the possession of the defendant when filed joint written statement with the defendant in the said suit. It was also disputed that, as a rule of survivorship, the plaintiff could not have inherited the property of Chhaniben especially when Chhaniben's brother-in-law, i.e., Kavlabhai, was alive as on the date of her death.

3.6 The Trial Court framed the following issues and answered accordingly:-

> "*1) Whether plaintiff proves the existence of will dtd.24.7.72 executed by deceased Chhaniben in favour of Raysingbhai*

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Ranchhodbhai Chaudhari?

2) Whether plaintiff proves that will, which had been executed in favour of defendants by plaintiff, was revoked on 4.7.1997?

3) Whether plaintiff proves that during the life time of deceased Chhaniben, he is in legal possession upon lands bearing Block No.51 & 52 as co-owner and after the death of deceased Chhaniben he became the sole owner of suit lands by rule of survivorship?

4) Whether plaintiff is entitled to get back possession of house No.4/101 & 4/102 from the defendants?

5) Whether plaintiff is entitled to seek any relief as prayed?

6) What order and decree?

5. My findings as to above issues are as under:

1) In negative.

2)In affirmative.

3) In negative.

4) In negative.

5)In partly affirmative.

6) As per final order."

3.7 The parties led oral and documentary evidence. The plaintiff examined himself and submitted few revenue records, including the registered Will dated 01.07.1991 executed by Chhaniben in favour of the defendant, along with its index copy submitted at Exhibits 80 and 81, respectively. Whereas, defendant No.1 examined himself and also examined the witnesses to the Will, including the Registrar in whose office the aforesaid Will was presented for the registration. So far as documentary evidence is concerned, the defendant appears to have

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submitted a certified copy of the written statement and affidavit of the plaintiff-defendant filed in RCS No. 46 of 1991, along with the certified copy of the list of documents produced in RCS No. 46 of 1991.

3.8 It appears that RCS No. 46 of 1991 was filed by Kavlabhai Chogdabhai, who happens to be the brother-in-law of Chhaniben, against the plaintiff and the defendant. It further appears that final outcome of RCS No. 46 of 1991 was not placed on record by the parties. Nonetheless, it came on record that, at the time of death of Chhaniben, her brother-in-law, namely, Kavlabhai Chogdabhai, was alive. It also came on record during cross-examination of the defendant No.1 that Chhaniben and the plaintiff were born of the same mother but different fathers.

3.9 After appreciating the evidence on record and having considered the fact that the plaintiff failed to prove the custom of his tribe whereby, he would only be entitled to inherit the property of his sister, Chhaniben, by the rule of survivorship, accordingly, the Trial Court disbelieved the claim of the plaintiff; rather, it relied upon the tenets of old Hindu law, as the Hindu Succession Act, 1956 (herein after referred as "***the Act, 1956***") is not applicable to the parties. According the Trial Court, as per old Hindu law, if any woman (widow) died issueless and had inherited the

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property from her husband, such property passed to the next heir of the male from whom she inherited it, i.e., the brother of her husband.

3.10 The Trial Court held that the plaintiff has admitted in his cross-examination that Chhaniben's brother-in-law, namely, Kavlabhai, who happens to be the elder brother of her husband Jivlabhai, was alive at the time of her death, since the reversioner of deceased Jivlabhai was alive at the time of death of Chhaniben, the plaintiff, being her brother, had no right to seek a declaration that he should be declared as the sole owner of the suit property as per the rule of survivorship and has no right to challenge the Will executed by Chhaniben. Yet, the plaintiff having found in possession of one of the suit properties, namely, Block No.366; therefore, the perpetual injunction was granted in favour of the plaintiff and against the defendant, whereby the defendant was directed not to obstruct the possession of the plaintiff qua the said suit property.

3.11 Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the Trial Court, the plaintiff preferred the aforesaid Regular Civil Appeal, wherein, after hearing the parties and upon re-appreciation of the evidence and placing reliance upon some of the provisions of the Act, 1956, the Appellate Court concerned dismissed the appeal vide its impugned judgment and decree dated 24.06.2026.

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3.12 Thus, this present Second Appeal is filed against the concurrent findings of fact recorded by the Courts below against the plaintiff.

SUBMISSIONS OF THE APPELLANT – PLAINTIFF.

4. Mr. N.V. Gandhi, learned advocate appearing for the appellant-plaintiff, has made the following submissions: -

4.1 The Courts below have committed a serious error in law by placing reliance upon the provisions of the Hindu Succession Act, 1956 (for short, '***the Act, 1956***') or Hindu Law, while adjudicating the *lis* between the parties. The deceased, Chhaniben, was a woman belonging to a Scheduled Tribe and, as per Section 2(2) of the Act, 1956, the provisions of the Act, 1956 are not applicable to Scheduled Tribe.

4.2 The judgment and decree passed by the Courts below are perverse and grossly erroneous and require interference by this Court solely on the ground that the issues decided by the Courts below are based on the provisions of Hindu law, which are inapplicable to Scheduled Tribe.

4.3 The Courts below have completely lost sight of the fact that the plaintiff, being the brother of Chhaniben, who died issueless, was the only legal heir of Chhaniben who could inherit her property after her

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death as a rule of survivorship. Chhaniben had inherited the suit property from her husband Jivlabhai, and since Jivlabhai and Chhaniben died issueless, the plaintiff, being only surviving legal heir of Chhaniben, who was not only residing along with her but was taking due care of her, entitled to inherit her property.

4.4 The suit properties were restricted-tenure lands and, as per Section 73AA of the Gujarat Land Revenue Code, 1879 (for short, ***'the Code, 1879***'), Chhaniben could not have bequeathed the suit property by way of Will and, as such, the defendant has no right to receive the property by way of her Will.

4.5 The Courts below have erroneously observed that, since the brother of Jivlabhai, namely, Kavlabhai, was alive at the time of death of Chhaniben, and had instituted Regular Civil Suit No. 46 of 1991 against the plaintiff and the defendant, the plaintiff could not maintain the suit seeking the relief of declaration and injunction. Kavlabhai was not a legal heir of Chhaniben, unlike the plaintiff.

4.6 In support of his submissions, Mr. Gandhi, learned advocate, would rely upon the decision of the Coordinate Bench of this Court in the case of ***LH of Late Jashvantbhai Abhesingbhai Vasava & Ors. Vs.***

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Jesingbhai Abhesingbhai Vasava & Ors. rendered in ***Second Appeal No. 113 of 2024***, dated 19.11.2024.

4.7 By making the above submissions, Mr. Gandhi, learned advocate, would request this Court to admit this appeal on the substantial questions of law framed in para-2 of the memo of appeal.

4.8 No other and further submissions are being made.

ANALYSIS AND REASONS.

5. The facts which are mentioned, at the outset, are not in dispute. It appears that the plaintiff happens to be the brother of Chhaniben, but not her real brother, as it came out from the evidence of the parties that Chhaniben and the plaintiff were born of the same mother but different fathers. It is also an undisputed fact that Chhaniben died issueless on 15.07.1991 and, prior thereto, her husband, namely, Jivlabhai Chogdabhai, died in and around year 1958-59, thereby she had inherited her husband's properties, i.e., the suit properties.

5.1 The plaintiff admitted in his cross-examination that, at the time of death of Chhaniben, the brother of her husband, namely Kavlabhai Chogdabhai, who happens to be the elder brother of husband of Chhaniben (Jivlabhai Chogdabhai), was alive. It further appears that,

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prior to her death, Chhaniben executed a registered Will in favour of the defendant on 01.07.1991, wherein she referred the defendant as her nephews. The defendant proved the Will by examined the witnesses to Will, including the Registrar in whose office the Will was presented for the registration. Whereas, the plaintiff failed to prove the execution of the Will by Chhaniben in favour of his son, Raysangbhai, on 24.07.1972, as no such Will was produced on record.

5.2 The name of the defendant appears to have been mutated in the revenue record qua the suit properties which were bequeathed by Chhaniben in favour of the defendant through the said Will. It also came on record that said Kavlabhai (brother-in-law of Chhaniben) filed Regular Civil Suit No. 46 of 1991 against the plaintiff and the defendant. Since the parties to suit have not produced any final outcome of the said suit before the Courts below, at this juncture, I would not like to observe anything except to state that the brother-in-law of Chhaniben, namely Kavlabhai, was alive at the time of her death.

5.3 It is true that the Trial Court recorded in para 9.2 of its judgment that the parties belonging to a Scheduled Tribe (ST), whereby, as per Section 2(2) of the Act, 1956, the provisions of the Act, 1956 are not applicable to the parties. At the same time, it was also recorded by the

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Trial Court that the plaintiff has not pleaded that the parties are governed by a particular custom which was prevailing in their community at the time of death of Chhaniben. Rather, in the para-6 of the defendant No.1's affidavit in lieu of examination in chief, it was deposed that since their community followed the Hindu tradition and as per tradition, Hindu Succession Act applied to their community, accordingly, Chhaniben became absolute owner of the suit properties. The Trial Court appears to have taken note of the tenets of Old Hindu law while disbelieved the claim of the plaintiff.

5.4 Thus, after appreciating the oral and documentary evidence on the record, the Trial Court placed reliance upon old Hindu law to decide the *lis* between the parties. Consequently, the Trial Court partly allowed the suit in favour of the plaintiff. Since the plaintiff was found in possession of one of the suit properties, i.e., Block No. 366 at Village Nogama, Taluka - Mandvi, the decree of permanent injunction in his favour was passed qua the said property. The Trial Court refused to grant the declaration that Chhaniben had no right to execute the Will and that the plaintiff was entitled to sole ownership under the rule of survivorship.

5.5 Whereas, the Appellate Court has taken note of Sections 14 to 16 and 30 of the Act, 1956 and, considering the aforesaid facts, and since the

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brother-in-law of Chhaniben, namely Kavlabhai, was alive to inherit her property which was devolved upon her from her husband upon his death, the Appellate Court found no merit in the plaintiff's case. Thus, it dismissed the appeal, thereby confirmed the judgment and decree passed by the Trial Court.

6. The principal grievances of the appellant-plaintiff before this Court are twofold; firstly that, despite noticed that the parties were belonging to Scheduled Tribe and that, as per Section 2(2) of the Act, 1956, the provisions of the said Act were not applicable to them, the Courts below relied upon the provisions of old Hindu law as well as the Act, 1956, as the case may be, and accordingly, committed a serious error in law in not granting the declarations in favour of the plaintiff, as prayed for. Secondly, that the suit properties being restricted-tenure lands, the bar under Section 73AA of the Code, 1879 is attracted, and, in view of the decision of this Court in the case of ***LH of Late Jashvantbhai Abhesingbhai Vasava & Ors. (supra)***, the defendant could not derive any right, title, interest and/or occupy the suit land by virtue of the Will.

6.1 The arguments canvassed by Mr. Gandhi, learned advocate for the plaintiff, noted above, at first blush look attractive, but, on deeper scrutiny, they are required to be turned down for the following reasons.

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7. It is true that the provisions of the Act, 1956 are not applicable to Scheduled Tribe communities as per Section 2(2) of the Act, 1956. At the same time, the Court cannot be oblivious of the fact that, in the absence of any custom of a particular tribe which prohibits a woman from inheriting property from her husband and/or ancestor, the Court can always believe that such woman has a right of inheritance.

7.1 The plaintiff had not specifically pleaded in the plaint and, as such, he failed to lead any evidence to show that any custom prevailing in the community of the parties (Tribal/Adivasi Chaudhari), whereby, in a case like the present one, if a widowed sister dies issueless, her property which was inherited by her from her husband passes only to her brother. Rather, as noted above, in para-6 of the defendant No.1's affidavit in lieu of examination in chief, he deposed that since their community followed the Hindu tradition and as per tradition, Hindu Succession Act applied to their community, accordingly, Chhaniben became absolute owner of the suit properties. Mr. Gandhi, learned advocate, has fairly conceded before this Court during the course of his argument that no such evidence was led before the Trial Court by the plaintiff.

7.2 Having noted above, none of the provisions of the Act, 1956 are

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applicable to the parties and in the absence of any such custom whereby the plaintiff could seek a declaration that, as a rule of survivorship, he should be declared the sole owner of the suit properties, being the brother of Chhaniben, and non-applicability of the Act, 1956, the Court is bound to adjudicate the *lis* on the principles of justice, equity and good conscience.

7.3 It was not disputed by the plaintiff that the suit property was inherited by Chhaniben from her husband. Chhaniben's husband, Jivlabhai, was holding the suit land and had acquired by way of tenancy rights and both died issueless.

7.4 At this stage, it would be profitable to refer to and rely upon the recent past judgment of the Hon'ble Apex Court in the case of ***Ram Charan and Ors. Vs. Sukhram and Ors.*** reported in ***AIR 2025 (Civil) SC 2363***, wherein in somewhat similar factual scenario and circumstances, the Hon'ble Apex Court has observed and held thus:-

> *"**3. The short question involved in this appeal is whether a tribal woman (or her legal heirs) would be entitled to an equal share in her ancestral property or not**. One would think that in this day and age, where great strides have been made in realizing the constitutional goal of equality, this Court would not need to intervene for equality between the successors of a common ancestor and the same*

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should be a given, irrespective of their biological differences, but it is not so.

4. *The facts lie in a narrow compass. The appellants-plaintiffs are the legal heirs of one Dhaiya, a woman belonging to a Scheduled Tribe. They sought partition of a property belonging to their maternal grandfather, Bhajju alias Bhanjan Gond. Their mother was one of the six children - five sons and one daughter, stating that their mother is entitled to an equal share in the scheduled property. The cause of action arose in October 1992 when defendant Nos. 6 to 16 refused to make a partition. The appellant-plaintiffs approached the Trial Court seeking a declaration of title and partition of the suit property.*

12. *At the outset of our consideration, it is clarified that the question of the parties having adopted Hindu customs and way of life is no longer in play. That apart, we may also notice Section 2(2) of the Hindu Succession Act, 1956, which unequivocally excludes from its application, Scheduled Tribes. It reads:*

> *"**Section 2(2)** : Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."*

13. ***Since the Hindu Law has no application, the next possibility to be considered is that of the application of the custom. For the application of a custom to be shown, it has to be proved, but it was not in the present case****. In fact, the Courts below proceeded, in our view, with an assumption in mind and that assumption was*

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misplaced. The point of inception regarding the discussion of customs was at the exclusion stage, meaning thereby that they assumed there to be an exclusionary custom in a place where the daughters would not be entitled to any inheritance and expected the appellant-plaintiffs to prove otherwise. An alternate scenario was also possible where not exclusion, but inclusion could have been presumed and the defendants then could have been asked to show that women were not entitled to inherit property. This patriarchal predisposition appears to be an inference from Hindu law, which has no place in the present case.

18. *It is trite in law that this principle can be applied only when there is a void or, in other words, in the absence of any law governing that aspect. Since no custom to the effect that women were entitled to the property, the application thereof would be consistent with this position. What exactly this phrase 'justice, equity and good conscience' entails has been considered by this Court on a few occasions. We may refer to certain instances:*

> *(a) In Niemla Textile Finishing Mills Ltd. v. 2nd Punjab Tribunal (AIR 1957 SC 329), it was held by a Constitution Bench of this Court that this principle can be applied even in the context of labour disputes, so long as the law on the question in consideration is not codified for there are many situations that arise in everyday function, which, it is not possible for a legislature to foresee and account for in the principal legislation.*
>
> *(b) The principle of 'justice, equity and good conscience' is not of recent application. As J.C. Shah, J.*

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demonstrated the Courts, which functioned in the former British Indian territory, were also equipped to apply the said principle. See Superintendent and Remembrancer of Legal Affairs v. Corpn. of Calcutta (AIR 1967 SC 997).

(c) This principle found an extensive discussion in the decision of a Constitution Bench of this Court in M. Siddiq v. Suresh Das (2020) 1 SCC 1, (Ram Janmabhoomi Temple), relevant extracts whereof are as follows:

*"**Justice, Equity and Good Conscience today***

1019. With the development of statutory law and judicial precedent, including the progressive codification of customs in the Hindu Code and in the Shariat Act, 1937, the need to place reliance on justice, equity and good conscience gradually reduced. There is (at least in theory) a reduced scope for the application of justice, equity and good conscience when doctrinal positions established under a statute cover factual situations or where the principles underlying the system of personal law in question can be definitively ascertained. But even then, it would do disservice to judicial craft to adopt a theory which excludes the application of justice, equity and good conscience to areas of law governed by statute. For the law develops interstitially, as Judges work themselves in tandem with statute law to arrive at just outcomes. Where the rights of the parties are not governed by a particular personal law, or where the personal law is silent or incapable of being ascertained by a court, where a code

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has a lacuna, or where the source of law fails or requires to be supplemented, justice, equity and good conscience may properly be referred to.

...

1022. The common underlying thread is that justice, good conscience and equity plays a supplementary role in enabling courts to mould the relief to suit the circumstances that present themselves before courts with the principal purpose of ensuring a just outcome. Where the existing statutory framework is inadequate for courts to adjudicate upon the dispute before them, or no settled judicial doctrine or custom can be availed of, courts may legitimately take recourse to the principles of justice, equity and good conscience to effectively and fairly dispose of the case. A court cannot abdicate its responsibility to decide a dispute over legal rights merely because the facts of a case do not readily submit themselves to the application of the letter of the existing law. Courts in India have long availed of the principles of justice, good conscience and equity to supplement the incompleteness or inapplicability of the letter of the law with the ground realities of legal disputes to do justice between the parties. Equity, as an essential component of justice, formed the final step in the just adjudication of disputes. After taking recourse to legal principles from varied legal systems, scholarly written work on the subject, and the experience of the Bar and Bench, if no decisive or just outcome could be reached, a Judge may apply the principles of equity between the parties to ensure that justice is done. This has often found form in the power of the court to craft reliefs that are both legally sustainable and just."

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(Emphasis supplied)

> *(d) In* ***Tirith Kumar (AIR 2025 SC 119) (supra****), which was also an appeal arising from a judgment of the High Court of Chhattisgarh, this Court speaking through one of us (Sanjay Karol J.) had the occasion to consider the application of this principle and in accordance with it, the order of the High Court granting right over the property to the female heirs was confirmed.*

19. *When applying the principle of justice, equity and good conscience, the Courts have to be mindful of the above and apply this otherwise open-ended principle contextually****. In the present case, a woman or her successors, if the views of the lower Court are upheld, would be denied a right to property on the basis of the absence of a positive assertion to such inheritance in custom. However, customs too, like the law, cannot remain stuck in time and others cannot be allowed to take refuge in customs or hide behind them to deprive others of their right.***

20. *Apart from the application of this general principle, we also find this to be a question of violation of Article 14 of the Constitution of India. There appears to be no rational nexus or reasonable classification for only males to be granted succession over the property of their forebears and not women, more so in the case where no prohibition to such effect can be shown to be prevalent as per law. Article 15(1) states that the State shall not discriminate against any person on grounds of religion, race, caste, sex or place of birth. This, along with Articles 38 and 46, points to the collective ethos of*

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the Constitution in ensuring that there is no discrimination against women.

26. *This discussion on equality under Article 14, which, needless to state, includes the aspect of gender equality within its fold will be, in our view, incomplete without reference to the first and most commendable step taken under the Hindu Law by way of the Hindu Succession (Amendment) Act, 2005 which made daughters the coparceners in joint family property. The object and reasons as stated in the Bill are instructive in the general sense and we reproduce the same with profit:*

> *"...The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975..."*
>
> *(Emphasis supplied)*

27. Similarly, we are of the view that, unless otherwise prescribed in law, denying the female heir a right in the property only exacerbates gender division and discrimination, which the law should ensure to weed out.

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> ***28. <u>Granted that no such custom of female succession could be established by the appellant-plaintiffs, but nonetheless it is also equally true that a custom to the contrary also could not be shown in the slightest, much less proved</u>. <u>That being the case, denying Dhaiya her share in her father's property, when the custom is silent, would violate her right to equality vis-à-vis her brothers or those of her legal heirs vis-à-vis their cousin</u>.***
>
> ***29. <u>In view of the above discussion, we are of the firm view that in keeping with the principles of justice, equity and good conscience, read along with the overarching effect of Article 14 of the Constitution, the appellant-plaintiffs, being Dhaiya's legal heirs, are entitled to their equal share in the property</u>.*** *The judgments of the Courts below are accordingly set aside to that extent. The civil appeal is allowed accordingly. Pending application(s), if any, shall stand disposed of.*
>
> *(Emphasis supplied)*

7.5 Thus, in view of the above exposition of law laid down by the Hon'ble Apex Court, the Scheduled Tribe woman is entitled to inherit an equal share in the property of her ancestor who died intestate. Applying the aforesaid principle to the facts of the case, no gross error of law can be found in the finding of the fact recorded by the Courts below that Chhaniben inherited the suit property from her husband. Rather, it can be safely held that, once Chhaniben inherited the suit property from her

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husband, it became her self-acquired property. In such circumstances, she was not prohibited from executing the Will, inasmuch as no such custom was brought to the notice of the Courts below and/or this Court by the plaintiff, whereby she was prohibited to execute the Will of her property.

7.6 Apart from the aforesaid, it is an undisputed fact that the suit properties were originally acquired by Chhaniben's husband and Chhaniben, being the wife of Jivlabhai, inherited that properties, and both died issueless. In such a situation, the disposition of her property would be through execution of a Will or by the rule of survivorship if any prevailed as per their custom which also prevented her from executing the Will.

7.7 Since the execution of the Will dated 01.07.1991 by Chhaniben in favour of the defendant is duly proved before the Trial Court and the plaintiff has failed to prove that such Will was in any manner defective and/or not proved in accordance with law, in this Second Appeal, this Court would not like to disturb the finding of fact recorded by the Courts below that the execution of the Will of Chhaniben in favour of the defendant is duly proved.

7.8 Therefore, even if the provisions of the Act, 1956 are not

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applicable to the parties, as observed supra, Chhaniben was well within her right to execute the Will. The effect of the Will in favour of the defendant would be that the defendant derived the suit properties by virtue of the Will and, as such, the name of the defendant was mutated in the revenue records without any objection.

7.9 Furthermore, it has come on record and, as such, admitted by the plaintiff that Chhaniben's brother-in-law, Kavlabhai Chogda, was alive, who happens to be the elder brother of Chhaniben's husband, namely, Jivlabhai. Since no custom was proved within Jivlabhai's tribe regarding the devolution of an issueless widow's property passes only in favour of her birth family, the plaintiff's prayer for a declaration of sole ownership under the doctrine of survivorship must fail. Rather, as per the tenets of Hindu law (though not applicable), in a case like the present one, the property of Chhaniben passes to the next heir of the male from whom she inherited it, i.e., Kavlabhai (her brother-in-law). Since the said Kavlabhai was not joined as a party to the suit, this issue does not warrant any further deliberation. Nevertheless, the plaintiff cannot claim that, being the brother of the deceased Chhaniben, he is the sole person entitled to the ownership of the suit properties upon the death of his sister.

8. Thus, in view of the aforesaid, the first grievance of the plaintiff is

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unsustainable in law and correctly not entertained by the Courts below.

9. So far as second grievance of the plaintiff that the suit properties being restricted-tenure lands, the bar under Section 73AA of the Code, 1879 is attracted, and the defendant could not derive any right, title, interest and/or occupy the suit land by virtue of the Will. For the foregoing reasons, such grievance is also devoid of merit.

9.1 First of all, the said grievance and or argument was never pressed into service before the Courts below, and there is also nothing on record to show that any revenue proceeding was initiated by the plaintiff as per Section 73AA(3)(a) of the Code, 1879, before the Collector concerned. Moreover, nothing was brought on record to show that even revenue authority at given point of time *suo motu* initiated any inquiry/proceeding against mutation of the revenue entry in favour of the defendant. In the absence of any such material evidence on record, *prima facie*, at the stage of the Second Appeal, the plaintiff cannot be allowed to raise such a new plea.

9.2 Furthermore, the decision of this Court in the case of ***LH of Late Jashvantbhai Abhesingbhai Vasava & Ors. (supra)*** is not applicable to the case at hand, inasmuch as the defendant herein has neither filed any

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counter-claim nor sought any declaration that they should be declared as owner by virtue of the execution of the Will by Chhaniben in their favour. Whereas, in the cited case, the appellant therein, who happens to be a plaintiff, went to the Court seeking a declaration that the plaintiff be declared as the absolute owner and occupier of the suit property on the basis of the Will executed by the deceased concerned in favour of the plaintiff, and, in light of such fact, it was held that restricted property (as per Section 73AA of the Code, 1879), cannot be transferred on the strength of the Will. It was also observed that before claiming right over the property, the plaintiff ought to have obtain the probate, which was not obtained. Thus, in light of the said peculiar facts and circumstances, this Court dismissed the second appeal.

9.3 Apart from the aforesaid, it came on record especially in the oral evidence of the witness to the Will that preparation and execution of the Will of Chhaniben, was at the instance of the original plaintiff, meaning thereby, he was instrumental in process of the Will. Even assuming for the time being that through Will, the suit land could not have been transferred in favour of defendant as alleged, at least the plaintiff being wrongdoer cannot later on cry-foul and allow to make a grievance that no suit land could have been transferred by way of Will in favour of

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defendant, when no such objections raised by the revenue authorities by mutating the name of defendant in the revenue record.

9.4 Without adding anything further on this, it can only be observed that, in the absence of any initiation of any revenue proceedings either by the plaintiff or *suo motu* by the Revenue Authority against mutation of the name of the defendant in the revenue record on the strength of the said Will of Chhaniben in relation to concerned the suit properties, now, at this stage, in absence of any such issue raised before the Courts below, the plaintiff cannot be allowed to raise a new plea, whereby claimed that Chhaniben had no right to execute the Will in favour of the defendant and or the defendant cannot be allowed to possess the suit properties by virtue of the Chhaniben's Will.

10. It is settled position of law that if the issue raised in the Second Appeal is already decided by Hon'ble Apex Court and/or this Court, such issue cannot be considered as a substantial question of law.

10.1 At this juncture, it is profitable to rely upon the Constitution Bench decision of the Hon'ble Apex Court in the case of ***Sir Chunilal V. Mehta And Sons Limited Versus Century Spinning And Manufacturing Company Limited***, reported in ***AIR 1962 SC 1314*** : ***1962 (0) AIJEL-SC***

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5258, where in para 3 and para 6, it has been held that:-

> *"3. The next question is whether the interpretation of a document of the kind referred to above raises a substantial question of law. For, Art. 133(1) provides that where the judgment, decree or final order appealed, from affirms the decision of the court immediately below in any case other than a case referred to in sub-cl. (c) an appeal shall be to this Court if the High Court certifies that the appeal involves some substantial question of law. To the same effect are the provisions of sec. 110 of the Code of Civil Procedure. In the old Judicial Commissioner's Court of Oudh the view was taken that a substantial question of law meant a question of general importance. Following that view its successor, the Chief Court of oudh, refused to grant a certificate to one Raghunath Prasad Singh whose appeal it had dismissed. The appellant, therefore, moved the Privy Council for special leave on the ground that the appeal raised a substantial question of law. The Privy Council granted special leave to the appellant and while granting it made the following observation in their judgment:*
>
> > *"Admittedly here the decision of the Court affirmed the decision of the Court immediately below and, therefore, the whole question turns upon whether there is a substantial question of law. There seems to have been some doubt, at any rate in the old court of Oudh, to which the present court succeeded as to whether a substantial question of law meant a question of general importance. Their Lordships think it is quite clear-and indeed it was conceded by Mr. De Gruyther-that that is not the meaning but that "substantial question of law"*

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is substantial question of law as between the parties in the case involved."

Then their Lordships observed that as the case had occupied the High Court for a very long time and on which a very elaborate Judgement was delivered the appeal on its face raised as between the parties a substantial question of law. This case is reported in 54 Ind App 126 : AIR 1927 PC 110. What is a substantial question of law as between the parties would certainly depend upon the facts and circumstances of every case. Thus, for instance, if a question of law had been settled by the highest court of the country the question of law however important or difficult it may have been regarded in the past and however much it may affect any of the parties would cease to be a substantial question of law. Nor, again, would a question of law which is palpably absurd be a substantial question of law as between the parties. The Bombay High Court, however, in their earlier decision already adverted to have not properly appreciated the test laid down by the Privy Council for ascertaining what is a substantial question of law. Apparently the Judgement of the Privy Council was brought to their notice for, though they do not make a direct reference to it, they have observed as follows :

"The only guidance that we have had from the Privy Council is that substantial question is not necessarily a question which is of public importance. It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated, is not a question of law alone; it must be a substantial

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question. One can define it negatively. For instance, if there is a well established principle of law and that principle is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest Court."

One of the points which the learned judges of the Bombay High Court had to consider in this case was whether the question of the construction to be placed upon a decree was a substantial question of law. The learned Judges said in their Judgement that the decree was undoubtedly of a complicated character but even so they refused to grant a certificate u/s. 110 of the Code of Civil Procedure for appeal to the Federal Court because the construction which the Court was called upon to place on the decree did not raise a substantial question of law. They have observed that even though a decree may be of a complicated character what the Court has to do is to look at its various provisions and draw its inference therefrom. ***Thus according to the learned Judges merely because the inference to be drawn is from a complicated decree no substantial question of law would arise. Apparently in coming to this conclusion they omitted to attach sufficient weight to the view of the Privy Council that a question of law is "a substantial question of law" when it affects the rights of the parties to the proceeding.*** *Further the learned Judges seem to have taken the view that there should*

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be a doubt in the mind of the Court as to the principle of law involved and unless there is such doubt in its mind the question of law decided by it cannot be said to be "a substantial question of law" so as to entitle a party to a certificate under S. 110 of the Code of Civil Procedure. It is true that they have not said in so many words that such a doubt must be entertained by the Court itself but that is what we understand their Judgement to mean and in particular the last sentence in the portion of their Judgement which we have quoted above.

6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. ***The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and, substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally, settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."***

(Emphasis supplied)

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11. Thus, in view of the aforesaid pronouncement of law by the Highest Court and after going through the substantial questions of law proposed by the appellant in para-2 of this second appeal, in view of the reasons supra, the same can hardly be treated as substantial questions of law; rather, according to my view, they may be treated as questions of law.

12. It is now a well-settled position of law that even if any erroneous finding of fact recorded by the Courts below cannot be a ground to interfere with such judgment and decree by this Court while exercising its powers under Section 100 of the CPC, as the Second Appeal cannot be entertained merely on question of law.

12.1 It is not out of place to refer to and rely upon the decision of the Hon'ble Apex Court in the case of ***Jaichand (Dead) through Lrs and Others v. Sahnulal and Another*** reported in ***2024 SCC OnLine SC 3864***, whereby, the Hon'ble Apex Court held as under:

> *"25. In* ***Kshitisn Chandra Purkait v. Santhosh Kumar Purkait*** *reported in* ***(1997) 5 S.C.C. 438)****,* ***this Court held that in the Second Appeal, the High Court should be satisfied that the case involves a substantial question of law and not mere question of law.***

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27. This Court in ***Kondira Dagadu Kadam v. Savitribai Sopan Gujar*** *reported in* ***AIR 1999 S.C. 2213*** *held:-*

> *"**The High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence**."*

28. It is thus clear that under Section 100, C.P.C., the High Court cannot interfere with the findings of fact arrived at by the first Appellate Court which is the final Court of facts except in such cases where such findings were erroneous being contrary to the mandatory provisions of law, or its settled position on the basis of the pronouncement made by the Apex Court or based upon inadmissible evidence or without evidence."

(Emphasis supplied)

12.2 Even, recently also, the Hon'ble Apex Court in the case of ***Russi Fisheries (P) Ltd. v. Bhavna Seth,*** reported in ***2026 SCC OnLine SC 555,*** wherein it has been categorically held that this Court should not interfere with finding of fact recorded by the Courts below unless it is so perverse or grossly erroneous, and / or runs contrary to a settled principles of law. The pertinent observations made in the said decision read thus:

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"31. It is settled in law that the findings of fact howsoever erroneous, cannot be reopened and disturbed in second appeal which is required to be adjudicated only upon the substantial question of law, if any, arising therein. Thus, the argument that the High Court in second appeal ought to have examined the evidence to ensure the correctness of the findings of the First Appellate Court has no legs to stand and fails.

32. Long back in 1981, three judges of this Court in the case of ***Bholaram v. Ameerchand*** *had ruled that* ***even if findings of facts by courts below are wrong or grossly inexcusable that by itself would not entitle the High Court to interfere under Section 100 CPC in the absence of clear error of law****. A similar view was reiterated in* ***Madhavan Nair v. Bhaskar Pillai (Dead) by Lrs****., wherein it has been laid down that even if the First Appellate Court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.*

33. In ***Kashibai w/o Lachiram v. Parwatibai w/o Lachiram****, a similar proposition of law was laid down by this Court and it was held that the High Court cannot reappreciate the evidence and interfere with the findings of facts unless a substantial question of law or a question of law duly formulated is to be decided. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.*

35. Again, in ***Kulwant Kaur v. Gurdial Singh Mann (Dead) by Lrs****, it was emphasized that the fact remains that in a second appeal,* ***a finding of fact, even if erroneous,***

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will not be disturbed unless it is found that it stands vitiated for want of perversity. *No such case for interference has been made out in the present case."*

(Emphasis supplied)

CONCLUSION.

13. In view of the foregoing observations, discussion and reasons, I am of the considered opinion that deceased Chhaniben entitled to inherit the property of her husband late Jivlabhai and having been inherited the suit property, as a sole survivor of late Jivlabhai, she became absolute owner of the suit property. In absence of any custom prevailing in the tribe of deceased Chhaniben, whereby she was prevented to execute the Will, according to me, deceased Chhaniben was entitled to execute the Will.

13.1 Since the execution of Will of deceased Chhaniben was duly proved on record by the defendant and in absence of any perversity in the finding of facts recorded by the Courts below in this regard, the plaintiff cannot allow to claim the ownership over the suit property on the basis of rule of survivorship, especially when Kavlabhai – brother-in-law of deceased Chhaniben was alive at the time of her death, who was not joined in the suit proceedings.

14. The concurrent findings and final conclusion recorded by the Courts below cannot be said to be either perverse or grossly erroneous

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nor do they run contrary to the settled position of law declared by the Hon'ble Apex Court. In such circumstances, no interference by this Court is warranted under Section 100 of the CPC.

15. Before parting with the matter, I deem it necessary to observe that, in order to prevent such type of disputes and conflicting claims arising upon the death of a member of a Scheduled Tribe, it is imperative that the State Government initiate necessary steps for the issuance of an appropriate notification by the Central Government under Section 2(2) of the Hindu Succession Act, 1956. Such a measure is essential to protect the equal property rights of tribal women and to provide a clear framework for the devolution of property of those dying intestate within the State especially those tribe which are profess Hindu traditions.

16. The Registry shall send a copy of this judgment to the Office of the Government Pleader, High Court of Gujarat, which, in turn, shall send it to the concerned Department of the State of Gujarat for onward action, as suggested supra, if they so desire.

17. In view of the foregoing conclusion, the present Second Appeal is found to be meritless and, accordingly, it is hereby dismissed in *limine*. The judgments and decree passed by the Courts below are hereby

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confirmed. There shall be no order as to costs. Decree shall be drawn accordingly.

18. As a sequel, the Connected Civil Application for the stay also stands disposed of.

Sd/-

(MAULIK J.SHELAT,J)

Lalji Desai

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