Judgment

MHAU100000172021	Presented on : 05/01/2021. Registered on : 07/01/2021. Decided on : 31/07/2026. Duration : 05Y. 06M. 24D.

IN THE COURT OF JT. CIVIL JUDGE JUNIOR DIVISION, KHULTABAD

(Presided over by : Alok A. Pandey)

Regular Civil Suit No.03/2021 **Exh. No.43**

1) **Arun Gangadhar Dandekar.**
Age- 58 years, Occu. Agri,
R/o:- Surewadi, Jadhavwadi, Aurangabad
At Present Loni, Tq. Khultabad,
Dist. Aurangabad.

2) **Mina Satish Chavan.**
Age- 44 years, Occu. Agri,
R/o:- Sultanpur, Tq. Khultabad,
Dist. Aurangabad. .... **PLAINTIFFS**

VERSUS

1) **Vishvas Gangadhar Dandekar**,
Age- 60 years, Occu. Agri,

2) **Gulabrao @ Balu Gangadhar Dandekar**,
Age- 47 years, Occu. Agri,

3) **Karbhari Gangadhar Dandekar**,
Age- 50 years, Occu. Agri,
All R/o:- Loni, Tq. Khultabad,
Dist. Aurangabad. **.... DEFENDANTS**

SUIT FOR DECLARATION

Appearance:-

Learned Advocate for the plaintiffs	:-	Shri. M.G.Patil.
Learned Advocate for the defendants	:-	Shri. B.B. Nalawade.

JUDGMENT

(Delivered on 31/07/2026)

The plaintiffs have instituted this suit under Section 34 of the Specific Relief Act, 1963, for a declaration that plaintiff No. 1 is the owner and possessor of three defined areas of agricultural land situate at village Loni, Tal. Khultabad, Dist. Aurangabad, namely: (i) 24.25 R out of the composite block formed by Gut Nos. 50, 51 and 52, within the boundaries described in paragraph 5 of the plaint; (ii) 48 R out of Gut No. 43, within the boundaries described in paragraph 6 of the plaint; and (iii) 4 R out of Gut No. 62, within the boundaries described in paragraph 7 of the plaint *(hereinafter referred to as, "the suit land")*.

A brief outline of the plaintiffs' case is as follows:-

2. Plaintiff No. 1 and defendant Nos. 1 to 3 are real brothers; plaintiff No. 2 is their sister. Their father Gangadhar Vaman Dandekar and mother Shevantabai Gangadhar Dandekar are both dead.

3. It is pleaded that Gut Nos. 50, 51, 52 and 43 were purchased by the father and accordingly, mutation entries were sanctioned. On his death heirship mutations followed. In respect of Gut No. 62 the specific averment in paragraph 2 of the plaint is that "the father of the plaintiffs purchased 16 R of land in Gut No. 62 in the name of defendant No. 1 under a sale deed, on the basis whereof Mutation Entry No. 472 came to be sanctioned", and that the entry in the name of defendant No. 1 is merely nominal. It is further pleaded that the lands in

Gut Nos. 50, 51, 52, 43, 562 and 25 were purchased by the father out of the income of the joint family.

4. The foundation of the plaintiffs' case is an oral partition said to have taken place in the year 2004 between plaintiff No. 1 and defendant Nos. 1 to 3, in the following terms: (a) Gut Nos. 50, 51 and 52, being adjacent and lying north to south, were treated as one composite block and divided by east-west lines into four strips of 24.25 R each; (b) Gut No. 43, ad measuring 1 H 80 R, was divided by north-south lines, plaintiff No.1 taking 48 R, defendant No. 1 44 R, defendant No. 2 45 R and defendant No. 3 44 R; (c) Gut No. 62, ad measuring 16 R, was divided into four equal shares of 4 R each.

5. It is pleaded that plaintiff No. 2 relinquished her rights, having been given cash and ornaments at her marriage. Gut No. 25 and House No. 199 stand on a different footing and are therefore excluded from the suit. On 13.12.2020 the defendants flatly refused to have the mutation and revenue records effected in conformity with the oral partition, which gave rise to the cause of action.

6. Defendant Nos. 1 to 3 filed a joint written statement at Exh. 10. They admit the relationship, the deaths of the parents, the ancestral character of Gut Nos. 43, 50, 51 and 52, that Gat No. 50 was purchased by the father in the name of defendant No. 1, that all have shares in Gut No. 25 and are in possession thereof, and the position regarding House No. 199. They also admit that in Gut No. 43 there were rough/vague partitions, though they contend it to have happened in the year 2001 and not 2004.

7. Their specific defence is: (a) Gut No. 62 is the self-acquired property of defendant No. 1, purchased by him out of his own funds after the brothers had separated. It has never been partitioned. It is in his exclusive possession and cultivation. Neither the plaintiffs nor defendant Nos. 2 and 3 have any right in it. The averment that the father purchased it in his name is false. (b) In respect of Gut Nos. 50, 51, 52 and 43, no legal partition by metes and bounds has taken place. The areas and the four boundaries pleaded are false and are denied. (c) There is no cause of action for the present suit, the valuation is wrong and the court fee deficient, and the suit is a device to grab Gut No. 62 and 4 R in excess in Gat No. 43. They pray for dismissal with costs and for compensation of Rs. 25,000/- (rupees twenty-five thousand only) to each defendant.

8. My learned predecessor framed the following issues at Exh. 12 on 29.10.2021. My findings, for the reasons recorded thereon, are as follows.

SR. NO.	**ISSUES**	**FINDIN*GS***
1	Do plaintiffs prove that they are owner of suit land that is Gut No. 50, 51, 52 ad measuring total 24.25 R situated at Loni, Tq. Khultabad?	In negative.
2	Do plaintiffs prove that plaintiff No. 1 is owner of suit land that is Gut No. 43 admeasuring 48 R situated at Loni, Tq. Khultabad?	In negative.
3	Do plaintiffs prove that plaintiff No. 1 is owner of suit land that is Gut No. 62 admeasuring 4 R situated at Loni, Tq. Khultabad?	In negative.
4	Do plaintiffs prove that they are in possession of the said land?	Partly in affirmative.
5	Whether plaintiffs are entitled for declaration as prayed for?	No.
6.	What order and decree?	The suit is dismissed with costs.

REASONS

9. The plaintiffs examined plaintiff No. 1 Arun (PW1) on affidavit at Exh. 11. The following documents were exhibited through him.

Sr. No.	Document	Exhibit No.
1.	7/12 extract of Gut No. 50	21
2.	7/12 extract of Gut No. 51	22
3.	7/12 extract of Gut No. 52	23
4.	7/12 extract of Gut No. 62	24
5.	7/12 extract of Gut No. 43	25
6.	7/12 extract of Gut No. 25	26
7.	Mutation Entry No. 472	27
8.	Mutation Entry No. 249	28
9.	Mutation Entry No. 1001	29

10. The defendants examined Defendant No. 1 Vishwas (DW1) on affidavit at Exh. 34 and Defendant No. 3 Karbhari (DW2) on affidavit at Exh. 39.

11. At the outset, the glaring omissions on the part of the plaintiffs and the defendants needs to be recorded. As regards plaintiffs, plaintiff No. 2, Mina, has not entered the witness box, and the deed of relinquishment attributed to her has not been produced. As regards defendants, although defendant No. 1 has filed the sale deed of the year 2003 on which his plea of self-acquisition of Gut No. 62 rests, that document was never proved or exhibited and bears no exhibit number. The Hon'ble Supreme Court of India in case of, ***Sait Tarajee Khimchand v. Yelamarti Satyam, (1972) 4 SCC 562*** held that, *"a document merely filed on the record of a suit is not evidence in the suit. Until it is tendered in the witness box, proved according to law and exhibited, it cannot be* *looked at or read, and a submission from the Bar cannot cure the omission."*

12. I have heard learned Advocate Mr. M. G. Patil for the plaintiffs and learned Advocate Mr. B. B. Nalawade for the defendants, at length.

13. Before proceeding further, let us equip ourselves with the understanding of certain legal principles which would play a pivotal role in deciding the present suit.

14. <u>Presumption of jointness; burden of proving partition.</u> The Hon'ble Supreme Court of India in case of, ***<u>Bhagwati Prasad Sah & Ors. v/s. Dulhin Rameshwari Kuer & Ors, 1951 SCC 486</u>*** held that: *Under Hindu law the presumption is that a family continues joint, and the burden of proving that a partition has taken place, and of proving it in the terms alleged, lies upon the party who sets it up*. The Hon'ble Supreme Court of India in case of, ***<u>Roshan Singh v/s. Zile Singh, (2018) 14 SCC 814</u>*** further held that: *A partition may lawfully be effected orally; no writing and no registration is required, and a memorandum which merely records a partition already made does not require registration.*

15. <u>Severance of status is not the same thing as division by metes and bounds.</u> An arrangement by which coparceners begin to cultivate separately, or take rough portions for convenience, may establish that the joint status has ceased. It does not, without more, establish that defined shares have been carved out on the ground. A declaration of ownership of a specified area within specified boundaries presupposes a division by metes and bounds, capable of identification.

16. Certainty of decrees. A decree must be certain and capable of execution. A declaratory decree which fixes the identity and extent of a holding must rest upon material which permits the Court to say, with precision, which land is being declared. A decree founded on an approximation is no decree at all. It does not end litigation, it multiplies it.

17. With this understanding, let us dive into the pleadings and evidence brought by both the sides to find answers to each individual issue.

ISSUE NO. 1:- *(Gut Nos. 50, 51 and 52- 24.25 R)*

18. Arun (PW1) deposed (Exh. 11) that Gut Nos. 50, 51 and 52 were purchased by his father out of joint family income. They are adjacent and lie north to south. In the year 2004 they were treated as one block and divided east-west into four strips of 24.25 R each. Plaintiff No. 2 relinquished her rights against cash and ornaments given at her marriage. He and the defendants have been in possession of their respective strips since the aforesaid partition.

19. In cross-examination, he made the following admissions: (a) the partitions of Gut Nos. 50, 51 and 52 have been made approximately. (b) Gut No. 52 was given for mother. (c) Minabai and they four brothers got Gut No.52 mutated in their names. (d) The relinquishment deed executed by Minabai has not been filed in Court. He cannot file the relinquishment deed executed by Minabai. (e) There was no need to show the well in Gut No. 50 and therefore it is not mentioned in the suit. (f) He has been residing at Aurangabad since the year 1991. He denied the suggestions that no partitions had taken place, that the areas shown in his affidavit were false, and that the boundaries were false.

20. Vishwas (DW1) deposed (Exh.34) that Gut Nos. 50, 51 and 52 are ancestral. Gut No. 50 was purchased by the father in his name. Gut No. 52 was purchased in the name of the mother Shevantabai and was kept aside for her maintenance during her lifetime and she subsisted on its income. On her death on 06.02.2020 Mutation Entry No. 1001 was effected and the names of all five children came on the 7/12 extract. After the father's death in the year 1999 there were rough/vague shares in divided in the year 2001. The areas and boundaries pleaded are false.

21. In cross-examination he made the following admissions: (a) His ancestral suit property is Gut Nos. 50, 51, 52, 43 and 25 only. (b) The suit properties were purchased by his father out of the income of the joint family. (c) Gut No. 50 was purchased by his father in his name as nominal. (d) Gut Nos. 50, 51, 52 are north-south gats. (e) Apart from marriage expenses no lands were given to his sister Mina. The sister has a share in the suit property. (f) Legal partitions of the suit property have not taken place. (g) Since the land in Gut No. 50 is rough/vague, he cannot say on how much land he cultivates. He sowed wheat on his individual 20 to 22 gunthe in Gut Nos. 50, 51 and 52. The wheat of the other brothers is also sown in these three guts. (h) Apart from Gut No. 62, oral partitions of the other guts took place and each is in possession of his own. Measurement of these areas has not taken place. (i) In Gut Nos. 50, 51, 52 plaintiff No. 1 has a share of 22 R.

22. Karbhari (DW2) deposed to the same effect in his affidavit at Exh. 39. In cross-examination he stated that he cannot say whether there are east-west partitions in Gut Nos. 50, 51 and 52. He himself cultivates the land in Gut Nos. 50, 51 and 52 falling to his share. He cannot say how much land falls to his share in this gut. He sowed one bag of maize on 20 to 22 gunthe. He gave the following admissions: (a) Defendant No. 1's land lies to the north and Defendant No. 2's to the south of his land, and (b) adjoining Defendant No.1's land on the north is the plaintiff's land. He could not state who held the land to the east or west and whether he is in possession of 24.5 gunthe or not.

23. Perused the 7/12 of Gut No. 50 (Exh. 21), the 7/12 extract of Gut No. 51 (Exh. 22), the 7/12 extract of Gat No. 52 (Exh. 23) and the Mutation Entry No. 1001 dated 17.10.2020 (Exh. 29).

24. First things first, the composite block, as claimed by the plaintiffs, did not exist as a divisible unit in the year 2004. This fact is, in the present case, decisive in view of section 14(1) of the Hindu Succession Act, 1956. As per the said provision, property possessed by a female Hindu is held by her as full owner and not as a limited owner. On her intestate death, Section 15(1)(a) read with Section 16 thereof directs devolution firstly upon her sons and daughters and her husband, who take simultaneously and in equal shares.

25. The 7/12 extract of Gut No. 52 (Exh. 23) read with the Mutation Entry No. 1001 dated 17.10.2020 (Exh. 29) clearly establish that Gut No. 52 stood in the name of the mother Shevantabai who died on 06.02.2020, and only thereafter, by Mutation Entry No. 1001 dated 17.10.2020, the names of her five children came on the record. Thus, whatever interest plaintiff No. 1 and the defendants have in Gut No. 52 devolved upon them by intestate succession under Section 15(1)(a) read with Section 16 of the Hindu Succession Act, 1956, in the year 2020. It could not have been partitioned in the year 2004, when it was the mother's absolute property and she was alive and in enjoyment of it.

26. Apart from the above mentioned documentary evidence, it is seen that Arun (PW1) himself admitted that Gut No. 52 was given for mother and that it was mutated in the names of the sister and the four brothers. Further, Vishwas (DW1) also stated that Gut No. 52 was set apart for the mother's maintenance and that she lived on its income. Both these, the admission of Arun (PW1) and the statement of Vishwas (DW1) are consistent with the documents at Exh. 23 and Exh. 29. The plaintiffs' pleading that the three guts were treated as one block and divided in the year 2004, therefore proceeds on a factual foundation which their own evidence destroys.

27. The buck does not stop here. It is further seen that, the recorded areas of Gut Nos. 50, 51 and 52 are 32 R, 31 R and 32 R, respectively, which totals down to 95 R. If 95 R is divided into four equal strips then each would get 23.75 R, which is less than what the plaintiffs claim to have been given each to the share of plaintiff No.1 and defendant Nos.1 to 3. Calculated the other way, four equal strips of 24.25 R would require 97 R which is more than the recorded areas for these three guts. The plaint, therefore, distributes 2 R of land more than the actual land seen in the revenue records. Neither the plaint nor the evidence of Arun (PW1) offers any explanation for the said arithmetic mismatch.

28. Moving further, the 7/12 extract at Exh. 21 shows that Gut No. 50 is in the sole name of defendant No.1. The 7/12 extract at Exh. 22 shows that Gut No. 51 is in the joint names of Arun (PW1), Karbhari (DW2) and Gulabrao (Defendant No.2). The 7/12 extract at Exh. 23 shows that Gut No. 52 in the names of five persons including plaintiff No. 2. To cut four continuous east-west strips across three parcels of land which are north-south and held by three different sets of holders would involve exchanges and adjustments *inter se*. However, the plaint is completely silent on any such exchanges and adjustments. Further, the sketch in paragraph No.5 of the plaint does not show where one gut ends and the other begins. Therefore, the plaintiffs' own documents contradict the case presented by the plaint and its sketch.

29. The pleadings and the evidence of both sides makes one thing certain that the arrangement was rough and unmeasured. Arun (PW1) admits the partitions were made rough/approximate. Vishwas (DW1) says the shares were rough/vague, the measurement of these areas has not taken place, and that the land in Gut No. 50 is rough/vague so that he cannot say how much he cultivates. Karbhari (DW2) says he cannot say how much land falls to his share, and cannot say whether they possess 24.5 R. On this material, this Court is satisfied that there was a severance of status and an arrangement for separate cultivation of rough portions. This Court is equally satisfied that there was no division by metes and bounds. As discussed above, the two are not the same, and; only the latter will support the declaration sought.

30. On perusing 7/12 extracts at Exh. 21 and 22 it can be seen that Exh. 21 shows a well in Gut No. 50 and Exh. 22 shows the right of Gut No. 51 to take water from that well. In a town like Khultabad, a well is the most valuable source of irrigation a land can possess. The alleged oral partition is completely silent about it. Arun (PW1) had the opportunity to explain the same in his cross-examination but all he stated is that: the well is not mentioned in this case as there was no need for the same. In all likelihood, an arrangement which leaves the well and the rights to fetch water therefrom undivided is not a final and completed partition.

31. Moving to another important aspect touching the present point, which is, the relinquishment of rights in the ancestral properties by plaintiff No. 2. The plaint talks about a relinquishment deed executed by plaintiff No. 2. However, the same is not filed on record. Plaintiff No. 1 has conceded that he cannot file it. Plaintiff No. 2 has not entered the witness box. Although the plaint is signed by her but the verification clause at the end of the plaint does not bear her signature. Similarly, the affidavit supporting the plaint is filed only by plaintiff No. 1. What further adds to it is the 7/12 extract at Exh. 23 relating to Gut No. 52 which shows the name of plaintiff No. 2 entered in October 2020. And Vishwas (DW1) in his cross-examination admitted that she has a share in the suit property. This is material because, Vishwas (DW1) too, would have benefitted from a relinquishment deed by his sister, if there was one.

32. The best evidence with the plaintiffs' to prove the relinquishment was either to file the relinquishment deed on record or examine plaintiff No. 2 in the Court. However, the plaintiffs' have opted the other way for reasons best known to them. Section 114 illustration (g) of the Indian Evidence Act, 1872 permits the Court to presume that evidence which could be and is not produced would, if produced, be unfavourable to the person withholding it. The Hon'ble Supreme Court of India in case of, ***Gopal Krishnaji Ketkar v. Mohamed Haji Latif, 1968 SCC OnLine SC 63*** held that, *"Where a party has in his power the best evidence and withholds it, the Court is entitled to draw an adverse inference"*. Section 91 thereof forbids proof of the terms of a written transaction otherwise than by the document itself. Therefore, this Court draws the inference that the relinquishment pleaded by the plaintiffs did not take place.

33. During the course of the argument, the learned Advocate for the plaintiffs placed heavy reliance on the admission of Vishwas (DW1) that "apart from Gut No. 62, oral partitions of the other guts took place and each is in possession of his own", and on Karbhari's (DW2) admission that he cultivates the land falling to his share. On the basis on these admissions, he submitted that the defendants have admitted the partition and they are retracting from it merely for the greed of more land. This Court is unable to accept this submission as these admissions, in absence of recognizable portions of land partitioned, only establish separate possession for the convenience of cultivation between the brothers.

34. To conclude the issue under consideration, this Court observes that although the plaintiffs have established that Gut Nos. 50, 51 and 52 are the joint family properties of the plaintiffs and the defendants, but, they have failed to prove that plaintiff No. 1 is the owner of a defined area of 24.25 R comprised therein as shown in paragraph No. 5 of the plaint. Ergo, Issue No. 1 is answered in the negative.

ISSUE NO. 2:- *(Gut No. 43- 48 R)*

35. Arun (PW1) deposed that Gut No. 43 was purchased by their father. Thereafter, Mutation Entry No. 249 was sanctioned. After the death of their father, heirship Mutation Entry No. 540 was effected. The recorded area is 1 H 80 R shown as joint. In the year 2004, it was partitioned north-south with plaintiff No. 1 taking 48 R, defendant No. 1 44 R, defendant No.2 45 R and defendant No. 3 44 R, and that each is in possession accordingly.

36. In cross-examination, he denied the suggestion that the division in Gut No. 43 was Defendant No. 1 getting 39 R, Defendant No. 2 getting 35 R, Defendant No.3 getting 35 R, and him getting 60 R. He denied that he had grabbed 60 R and that he had retained excess area without measurement. He was then confronted with the Mutation Entry dated 14.10.2010, seeing which he answered that: "In Gut No. 43, in

Mutation Entry No. 640 dated 14.10.2010, it is recorded that Vishwas, Arun, Karbhari, Minatai Chavhan, Shevantabai Gangadhar and Gulabrao alias Balu shall have equal shares, it is incorrect.” According to him, their grandfather had measured and given the land at that time, and therefore equal distribution did not take place.

37. Vishwas (DW1) deposed that Gut No. 43 is their ancestral property. It has Mutation Entry No. 249. After their father’s death Mutation Entry No. 640 was effected. The area is 1 H 80 R, and that rough/vague partitions took place in the year 2001. In cross-examination, he denied that plaintiff No. 1 is in possession of 48 gunthe in Gut No. 43. Plaintiff No. 1 has 44 gunthe of land in Gut No. 43 and is in possession of excess area. No suit has been filed against plaintiff No. 1 in respect of the excess area in his possession. In Gut No. 43 he has presently sown wheat on 38 gunthe. The area of 38 gunthe has been in his possession since the year 2001. In Gut No. 43 the plaintiff is in possession of approximately 65 gunthe.

38. Karbhari’s (DW2) adopted the defence version and his chief-examination is in line with Vishwas (DW1) and thus, not repeated for the sake of brevity. In cross-examination, he stated that he has 44 gunthe of land in Gut No. 43 and then volunteered to say that it is 35 gunthe. He further admitted that he did not get an occasion to see the documents of Gut No. 43 and therefore he has no information about that land. He further stated that in Gut No. 43 all of them have separate shares. He denied that the plaintiff has 48 gunthe therein. According to him, everyone has 44 gunthe each. He denied that partitions took place between the brothers but volunteered to say that among them there were rough/vague partitions. He admitted that all the brothers have shares in the suit property.

39. The relevant document covering this issue is the 7/12 extract of Gut No. 43 at Exh. 25 which shows an area of 1 H 80 R held by plaintiff No. 1 and defendant Nos. 1 to 3, jointly. Their names appear to have made its way through Mutation Entry No. 544.

40. Section 157 of The Maharashtra Land Revenue Code, 1966 raises a presumption that an entry in the record of rights or a certified mutation entry is true until the contrary is proved. The Hon'ble Supreme Court of India in case of, ***Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co., (2019) 3 SCC 191*** held that, *"The presumption is rebuttable, and it must be balanced against the equally settled proposition that revenue entries are made for fiscal purposes and neither create nor extinguish title".*

41. Applying the said section and the above ruling to the case in hand, Gut No. 43 is a joint area as per the 7/12 extract filed at Exh. 25 by the plaintiffs. The plaintiffs have not led any evidence to displace the said presumption. As seen in the cross-examination of plaintiff No. 1, the Mutation Entry dated 14.10.2010 recorded that plaintiff No. 1 and defendant Nos. 1 to 3 have equal shares in Gut No. 43. Although, plaintiff No. 1 termed it as incorrect but, there is no explanation regarding such entry being made in the year 2010 when the alleged oral partition took place long back in the year 2004. There is no word on any action taken by him to challenge the said mutation entry in the revenue office upon its knowledge. The 7/12 extract at Exh. 25 of Gut No. 43 is filed by the plaintiffs themselves and therefore, they cannot claim ignorance. Therefore, as apparent from the record, the plaintiffs have no plausible explanation for the same and the same is counted against them.

42. Moving further, while dealing with Issue No. 1, this Court has highlighted the arithmetic error in the alleged distribution of land as against the recorded area available in the composite block of Gut Nos. 50, 51 and 52, which the plaintiffs appear to have carried to Gut No. 43 as well. It is seen that the recorded area for Gut No. 43 is 180 R. However, what the plaintiffs pass on to divide totals to 181 R. The rough/vague partition which the defendants claim for Gut No. 43 does not coincide with the recorded area of 180 R either. This clearly indicates that no measured partition has ever taken place between the plaintiffs and the defendants.

43. It does not stop here. The Mutation Entry dated 14.10.2010 also contradicts the oral partition as alleged by the plaintiffs. It records equal shares between plaintiff No.1 and the defendants which is exactly opposite to the unequal shares pleaded by the plaintiffs. Not just that, it records six sharers, including the mother Shevantabai and plaintiff No.2. And, as already mentioned, it is of the year 2010, six years after the partition which the plaintiff says was made in the year 2004 and acted upon ever since. Had a partition as pleaded was really occurred in the year 2004, the revenue record of the year 2010 would have reflected it, or the entry would at least not be contradictory to what had happened in the year 2004. And even if such entry was made mistakenly, at the least plaintiff No. 1 would have objected it. But the same has not happened. The only thing plaintiff No. 1 has to say on this is- it is incorrect. This cannot be accepted.

44. It is a settled position of law that in ancestral property four sons take equally. The plaint offers no explanation why plaintiff No. 1 alone received 48 gunthe while his brothers received less than him. When he was confronted with this in his cross-examination, he stated that the grandfather had measured and given the land and that equal distribution therefore did not take place. This fact is introduced for the first time in his cross-examination. It is directly contrary to his own pleading and his own evidence affidavit, as they say that Gut No. 43 was purchased by his father under a sale deed after which Mutation Entry No. 249 was effected. He has not led any evidence about any measurement or allotment by the grandfather. He has not filed any document or examined any witness on this. Therefore, a case set up for the first time in the witness box, contrary to the pleadings and unsupported by any evidence, cannot be accepted.

45. During the course of the argument, the learned Advocate for the plaintiffs stressed on the admission given by Vishwas (DW1) that plaintiff No. 1 is in possession of approximately 65 gunthe in Gut No. 43 and submitted that it concludes the matter in the plaintiffs' favour. However, it is imperative to clarify that an admission of possession of about 65 gunthe is not an admission of ownership of 48 gunthe as pleaded. On the other hand, it goes against plaintiff No. 1 as it does not correspond to his pleaded share of 48 gunthe in Gut No. 43. This dispute regarding who holds what shows that the arrangement between the plaintiffs and the defendants is unsettled and thus, it is not a concluded partition.

46. To conclude the issue under consideration, this Court observes that although the plaintiffs have established that Gut No. 43 is the joint family properties of the plaintiffs and the defendants, but, they have failed to prove that plaintiff No. 1 is the owner of a defined area of 48 R comprised therein as shown in paragraph No. 6 of the plaint. Ergo, Issue No. 2 is answered in the negative.

ISSUE NO. 3:- *(Gut No. 62- 4 R)*

47. Arun (PW1) deposed that his father purchased 16 R in Gut

No. 62 in the name of defendant No. 1 under a sale deed on the basis of which Mutation Entry No. 472 was sanctioned. The purchase in defendant No. 1's name is nominal. The land was divided in the year 2004 into four shares of 4 R each. Consequently, each brother is in possession of his 4 R.

48. In cross-examination, he denied all the adverse suggestions put to him to claim that Gut No. 62 is self acquired property of defendant No. 1. He admitted that he does not know what crop defendant No. 1 took last year on Gut No. 62. He also denied that he was speaking falsely because he did not know the boundaries and area of Gut No. 62.

49. Vishwas (DW1) deposed that he purchased the whole of Gut No. 62 himself, from his own funds, after the brothers had separated and after the rough/vague partition of the ancestral properties. The entire parcel is in his possession and cultivation. No partition of it has taken place. Neither the plaintiffs nor defendant Nos. 2 and 3 have any right in it. In cross-examination, he admitted that his father's only business was agriculture. He stated that apart from Gut No. 62, the other suit properties were purchased by his father out of agricultural income. He has not filed any document to show that he purchased Gut No. 62 out of his own income. He also admitted that Gut No. 50 was purchased by his father in his name as nominal. He denied that Gut No. 62 was purchased out of the income of all the brothers, it is joint family property and only the land was put in his name.

50. Karbhari (DW2) supported Vishwas (DW1) on his claim of self acquired property. In cross-examination, he stated that he cannot say how much area there is in Gut No. 62. He cannot say when it was purchased. He has not seen the area in Gut No. 62. He has no information about Gut No. 62.

51. The documents bearing on this issue are the 7/12 extract of Gut No. 62 at Exh. 24, showing an area of 16 R standing in the sole name of Defendant No. 1 Vishwas (DW1) and Mutation Entry No. 472 at Exh. 27 recording the purchase of the 16 R in Gut No. 62 by Defendant No. 1 Vishwas (DW1) under a sale deed of the year 2003 for a consideration of Rs. 25,000/- (rupees twenty-five thousand only). Both these documents are produced and proved by the plaintiffs.

52. The case pleaded by the plaintiffs regarding Gut No. 62 is impossible on their own showing for the reasons that follows. The plaint says the father purchased Gut No. 62 in the name of defendant No. 1. The plaint itself, in paragraph No. 3, avers that the father is dead. In cross-examination, Arun (PW1) gives the date of death as 30.10.1999, whereas, Vishwas (DW1) and Karbhari (DW2) as 21.10.1999. The Mutation Entry No. 472 (Exh. 27), produced and proved by the plaintiffs, records a sale of the year 2003. Now, a man who died in the year 1999 cannot purchase a land in the year 2003. Therefore, the foundational averment on which the entire claim to Gut No. 62 rests is falsified by the plaintiffs' own documents. This is not a mere discrepancy but a complete collapse of the foundation on which the subsequent pleading, *qua* Gut No. 62, stands.

53. A careful perusal of the cross-examination of the defence witnesses shows that the plaintiffs have tried to put an alternative case which is not pleaded. They are seen to have been trying to push a case that the father's only occupation was agriculture, the family had no other source of income and defendant No. 1 has produced no proof of any independent means.

54. Even if this Court overlooks the fact that the plaintiffs' have undertaken to put a case *sans* pleading, the same does not place the burden on the defendants. The Hon'ble Supreme Court of India in case of, ***D. S. Lakshmaiah v. L. Balasubramanyam, (2003) 10 SCC 310*** held that, *"there is no presumption that property acquired in the name of a member of a joint family is joint family property merely because the family is joint. The burden lies on the person asserting it, and he must first prove that the joint family possessed a nucleus of income or property sufficient to make the acquisition. Only if that is proved does the onus shift to the individual to show that the acquisition was made without the aid of joint funds".*

55. Applying the above principle in this case, the plaintiffs had first to establish a nucleus. They had to first establish that the joint family possessed income or property sufficient to make the acquisition in the year 2003. However, to show the same the plaintiffs led no evidence at all. There is no evidence to show any family fund to pay the consideration of Rs. 25,000/- (rupees twenty-five thousand only). Thus, the onus did not shift to defendant No. 1. Therefore, defendant No. 1's failure to show sufficient means of income to purchase Gut No. 62 cannot fulfill the requirement of evidence from the plaintiffs.

56. Moving further, where it is alleged that the ostensible owner is not the real owner, the burden lies on the party so alleging, and is to be judged upon the touchstones laid down by the Hon'ble Supreme Court of India in case of, ***Jaydayal Poddar v. Bibi Hazra, (1974) 1 SCC 3.*** The Hon'ble Supreme Court laid down the following tests: (i) the source whence the purchase money came; (ii) the nature and possession of the property after the purchase; (iii) the motive for giving the transaction a benami colour; (iv) the position of the parties and their relationship; (v) the custody of the title deeds after the sale; and (vi) the conduct of the parties in dealing with the property. Of these, the source of the purchase money is the crucial test.

57. When the questions raised above is applied to the facts of the case in hand then it can be seen that, *firstly*, the plaintiffs' have not led any evidence to show that the joint family had Rs. 25,000/- (rupees twenty-five thousand only) for purchasing Gut No. 62 in the year 2004. *Secondly*, the 7/12 extract (Exh. 24) shows a single cultivation entry in the record of crops for the whole of 16 R standing in the name of Defendant No. 1 Vishwas (DW1). *Thirdly*, there is no word regarding the motive to purchase Gut No. 62 in the name of defendant No.1. *Fourthly*, admittedly plaintiff No. 1 and defendant Nos. 1 to 3 are brothers and plaintiff No. 2 is their sister. *Fifthly*, although not exhibited but, defendant No. 1 has produced the original sale deed along with the list of document at Exh. 14 which shows that the title deed was in his possession. *Lastly*, Mutation Entry No. 472 was certified in defendant No. 1's sole name and the plaintiffs did not challenge it. The only inference that can be drawn from above is that the plaintiffs have failed to stand the test laid down in *Jaydayal Poddar (supra)* and eventually, failed to prove that the transaction of purchase of Gut No. 62 was done by the family with defendant No. 1 as only its face.

58. In addition to what is discussed above, the conduct of defendant Nos. 2 and 3 is telling. If the plaintiffs' case were true, Gut No. 62 was divided into four shares and defendant Nos. 2 and 3 would each be entitled to 4 R. However, none of them has claimed it. They had an easier route to support the plaintiffs and claim 4 R from defendant No. 1 which would have benefitted them. Them not siding with the plaintiffs therefore, shows badly on the plaintiffs' case.

59. Apart from this, although the plaintiffs claimed that plaintiff

No. 1 is in possession of 4 R in Gut No. 62, however, there is no evidence to substantiate their claim. As per the 7/12 extract (Exh. 24) and the stand of defendant Nos. 2 and 3 it is evident that defendant No. 1 is in possession of the entire 16 R of Gut No. 62. The proviso to Section 34 of the Specific Relief Act, 1963 forbids a declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Plaintiff No. 1 was able to sue for partition and separate possession of Gut No. 62. He has omitted to do so. Therefore, his plea for bare declaration does not survive.

60. To conclude the issue under consideration, this Court observes that the plaintiffs have failed to prove that Gut No. 62 ad measuring 16 R is joint family property and that plaintiff No. 1 is the owner of a defined area of 4 R comprised therein as shown in paragraph No. 7 of the plaint. Ergo, Issue No. 3 is answered in the negative.

ISSUE NO. 4:- *(Possession)*

61. The question that we are taking up under the present issue for determination, has already been solved while discussing Issues Nos. 1 to 3. As regards Gut Nos. 50, 51 and 52 it is established that plaintiff No. 1 and defendant Nos. 1 to 3 are in separate cultivating possession of rough portions thereof. However, the possession of the specific area of 24.25 R is not proved. As regards Gut No. 43, separate cultivating possession is established, however, the possession of plaintiff No.1 over 48 R as pleaded is not proved. As regards Gut No. 62, the possession of plaintiff No. 1 over 4 R of Gut No. 62 is disproved.

62. To conclude the issue under consideration, this Court observes that separate cultivating possession by plaintiff No. 1 of undefined portions in Gut Nos. 43, 50, 51 and 52 is proved. Possession of the specific areas as pleaded is not proved. Possession of 4 R in Gut No. 62 is disproved. Ergo, Issue No. 4 is answered partly in the affirmative and partly in the negative.

ISSUE NO. 5:- *(Entitlement to the declaration)*

63. Section 34 of The Specific Relief Act, 1963 empowers the Court to declare a person entitled to a legal character or to a right as to property. Two limitations are built into it. The relief is discretionary- the section says the Court "may" declare. And the proviso forbids a declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to seek it. The Hon'ble Supreme Court of India in cases of, ***Ram Saran & Another v. Smt. Ganga Devi, (1973) 2 SCC 60*** and ***Vinay Krishna v. Keshav Chandra, 1993 Supp (3) SCC 129*** held that, *"A plaintiff out of possession who sues for a bare declaration without asking for possession falls foul of the proviso"*.

64. It follows from the findings on Issue Nos. 1 to 4 that the plaintiffs are not entitled to the declarations as prayed for. Ergo, Issue No. 5 is answered in the negative.

ISSUE NO. 6:- *(Order & decree)*

65. In light of the above discussion, observation and findings on the issues, the suit deserves to be dismissed. It is an age-old axiom of Civil Jurisprudence that costs shall follow the suit. This suit is no exception to the well settled principle. Convincingly, I conclude by passing the following order.

<u>O R D E R</u>

1. The suit is dismissed with costs.

2. A decree be drawn up accordingly.

(Judgment dictated and pronounced in open Court.)

Digitally signed by ALOK ASHOK PANDEY
Date: 2026.07.31 15:12:25 +0530

Khultabad
July 31, 2026

(Alok A. Pandey)
Jt. Civil Judge Junior Division
Khultabad

<u>CERTIFICATE</u>

I affirm that the contents of this P.D.F. file are same, word to word, as per the original order/judgment/evidence.

Name of the Stenographer	:	N.D.Narwade
Court	:	Jt. Civil Judge, J. D. and J.M.F.C., Khultabad.
Date	:	31.07.2026
Order signed by the presiding officer on	:	31.07.2026
Order uploaded on	:	31.07.2026