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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 1147/2012

RAKHI GUPTA Plaintiff
Through Mr.F.K. Jha, Adv.
versus

ZAHOOOR AHMAD & ORS Defendant
Through Mr.Varun Goswami, Adv.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

ORDER

% 29.11.2012

I.A. No. 15133/2012(O. 7 Rule 11 of CPC)

By this order, I shall dispose of the application filed by defendant No.1 under *Order 7 Rule 11 of Code of Civil Procedure, 1908* seeking rejection of plaint, on the ground that the present suit filed by the plaintiff is barred by Section 6 of the Hindu Succession Act, 1956.

Addressing arguments on the present application, Mr. Varun Goswami, counsel for the defendant no.1 submits that succession in the present matter first opened on 26.11.1968, on the death of plaintiff's grandfather, Shri Bhuleshwar Nath, and reopened on 31.12.92 at the time of death of the father of the plaintiff. Counsel submits that the amended Hindu Succession Act, 1956 came into effect on 9.9.2005 and therefore, the plaintiff being the daughter of Late Shri Ram Shankar had no right to

claim share in the subject property, as her right to succession reopened only on 31.12.1992. The other contention raised by the counsel is that the property in question was sold by the defendant no.2 in favour of defendant no.1 on 22.6.1998 and the said alienation and transfer of the said property in favour of defendant no.1, by defendant no.2 now cannot be reopened at the instance of the plaintiff who derived no right in the subject property as per the law as stood on that date. In support of his arguments, counsel for the defendant no.1 has placed reliance on the following judgments:

1. *Smt. Bhagirathi & Ors. V. S. Manivanan & Ors.*, AIR 2008 Madras 250 (DB)
2. *Mukesh & others V. Bharat Singh & others*, 149 (2008) DLT 114
3. *Valliammal V. Muniyappan*, 2008 (4) C.T.C. 773
4. *Sadashiv V. Chandrakant*, 2011(5) BomCR 726
5. *Vaishali V. Satish*, AIR 2012 Bom 101,

Counsel for the plaintiff on the other hand, refuting the contentions raised by the Counsel for the defendant, submits that the plaintiff being the legal heir of late Shri Ram Shankar has every right to maintain the present suit as the property in question is ancestral property which came into the hands of defendant no.2, after the demise of her father Late Shri Ram Shankar. Counsel also submits that the plaintiff for the first time came to know about the said illegal sale deed dated 22.6.1998 executed by the defendant no.2 in favour of defendant no.1 on 1.8.2011, and prior to that, the plaintiff remained under a bona fide impression that the property belongs to all the legal heirs left by her father. In support of his arguments, counsel for the plaintiff has placed reliance on the judgment of the Apex Court in the case of

Prema V. Nanje Gowda & Ors, IV (2011) SLT 231.

I have heard learned counsel for the parties at considerable length and given my thoughtful consideration to the arguments advanced by them.

Before dealing with the aforesaid contentions raised by Counsel for the parties, it would be appropriate to give a brief conspectus of the facts involved in the present case. The plaintiff has filed the present suit for partition, rendition of accounts, declaration, possession and permanent injunction against the defendants, mainly on the allegation that plaintiff is the co-sharer to the extent of 1/7th share in the joint family property bearing nos. 9817 to 9821, Gali Zameer Wali, Nawab Ganj, Azad Market, Delhi, which she has inherited from her father late Shri Ram Shankar. It is the case of the plaintiff that earlier the grandfather of the plaintiff was the sole and absolute owner of the suit property and after his demise the father of the plaintiff became the sole and absolute owner of the subject property. It is also the case of the plaintiff that after the death of her father the plaintiff along with other legal heirs became co-owner in the subject property, having 1/7th share each in the subject property. It is also the case of the plaintiff that on 1.8.2011, she came to know that her mother, defendant no.2 has illegally sold the said ancestral property in favour of the defendant no.1 vide registered sale deed dated 22.6.1998 and GPA dated 22.6.1998. It is also the case of the plaintiff that the plaintiff was minor at the time of demise of her father as well as at the time when the sale deed dated 22.6.1998 was executed by the defendant no.2

in favour of defendant no.1, and therefore she could not take any steps to claim her right in respect of the subject property. It is also the case of the plaintiff that late Shri Ram Shankar did not execute any will either registered or unregistered in favour of any of the legal heirs and therefore her mother could not have sold the subject property, based on the alleged Will of her husband late Shri Ram Shankar. It is also the case of the plaintiff that this fact was never known to her that the subject property had already been sold by defendant no.2 in favour of defendant no.1, as she was under the impression that her mother had rented out the said premises and in return was procuring rent from the tenants and her right in the subject property remained protected. According to the plaintiff she had sent a legal notice dated 04.08.2011 to all the defendants to claim her right in respect of her 1/7th share in the subject property and despite that the defendants did not act upon the request of the plaintiff.

The plaintiff in the present suit has claimed a decree of declaration to declare the sale deed dated 22.6.1998 as null and void. The plaintiff has also claimed a decree of partition in order to partition the subject property by metes and bounds and thereafter for handing over of 1/7th share of the plaintiff in the subject property. The plaintiff has also claimed a decree of permanent injunction to restrain these defendants from creating any further right or interest in the subject property.

The controversy in hand relates to interpretation of Section 6 of

the Hindu Succession Act, 1956 which was amended under Act 39 of 2005

and the same reads as under:

"6. Devolution of interest in coparcenary property.—(1) *On and from the commencement of the Hindu Succession (Amendment) Act, 2005*, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—*

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—*

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:*

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—*

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation. —For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.*

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation. —For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]"

The aforesaid amendment in Section 6 of the Hindu Succession Act brought revolutionary change to remove the discrimination as it existed in the unamended provision by conferring equal rights to the daughters at par with the rights as that of the sons in the Hindu Mitakshara coparcenary property. The said amended provision came into effect from 9.9.2005 and from this date the daughters in the Hindu Joint family became entitled to the same rights and liabilities in the joint family property as that of a son. By the said

amendment the legislature has conferred substantive rights in favour of the daughters. It may be mentioned here that prior to the said amendment the daughters had no right in the coparcenary property by virtue of her birth in Mitakshara family. Therefore, there cannot arise any dispute so far the right of a daughter in coparcenary property pursuant to the said amendment is concerned. The core issue which is under examination in the present case before the court is whether any daughter born in Mitakshara family prior to the introduction of the said amendment in Section 6 of the Hindu Succession Act, 1956 is entitled to reopen the succession, alienation or partition which had taken place before 20.12.2004, merely because such a daughter is governed by the Mitakshara law and was born in the family before the said amendment. The answer to this legal question has been given in catena of judgments by the various High Courts but the recent judgment of the Hon'ble Supreme Court in the case of ***Ganduri Koteswaramma & Anr. Vs. Chakiri Yanadi & Anr.*** (2011) 9 SCC 788 is worth mentioning in this context, wherein the Hon'ble Supreme Court has delineated the categories where new Section 6 of Hindu Succession Act, 1956 would not be applicable. The Apex Court in relevant paragraphs 11 and 12 held as under:

"11. The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in

the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.

12. The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara Law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before December 20, 2004; and (ii) where testamentary disposition of property has been made before December 20, 2004. Sub-section (5) of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been effected before December 20, 2004. For the purposes of new Section 6 it is explained that 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non- applicability of the Section, what is relevant is to find out whether the partition has been effected before December 20, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on March 19, 1999 and amended on September 27, 2003 deprives the appellants of the benefits of 2005 Amendment Act although final decree for partition has not yet been passed."

From the above judgment it is quite clear that this right accrues to the daughter born in Mitakshara family only "on and from" the commencement of the amendment Act i.e. 9 September 2005. The basis of the right is, therefore, the commencement of the amended Act. This is the natural ingredient of a coparcenary interest that a coparcenary interest is acquired by virtue of birth and from the moment of birth. This acquisition (not devolution) which until the amendment Act was the right and entitlement only of a son in a coparcenary property, by the amendment has also been conferred on the daughter of the Joint Hindu Family. The words 'on' and 'from' show and suggest that, on a date prior

to the Act coming into force the daughter would not be included as a coparcener. Consequently, all daughters born to the coparceners in the Joint Hindu Family would from the date of amendment of Section 6 become a coparcener, with same rights and liabilities at par with the sons. The aforesaid section was enacted for removing the gender discrimination and the provisions are not expressly made retrospective by the legislature.

Applying the said legal position to the facts of the present case, it is manifest that the plaintiff who claims herself to be a co-sharer to the extent of 1/7th share in the joint family property at par with the other legal heirs left behind by her father late Shri Ram Shankar is not entitled to any right or share in the subject property as the property in question was sold by defendant no.2 in favour of defendant no.1 on 22.6.1998 that is much prior to 20th December 2004 as envisaged in sub section (5) of Section 6 of the Amended Hindu Succession Act, 1956. A mere fact that the plaintiff came to know about the execution of the sale deed dated 22.6.1998 somewhere in August'2011 will not help the case of the plaintiff, as on the date of the execution of the said sale deed the plaintiff had no right in the coparcenary property under the pre-amended Section 6 of Hindu Succession Act. The judgment in the case of **Prema vs. Nanje Gowda & Ors. IV (2011) SLT 231 SC**, relied upon by the counsel for the plaintiff, will also not come to the rescue of the plaintiff as in the facts of the said case final partition decree was yet to be passed and after referring to the Hon'ble Supreme Court's judgment in

the case of *Phoolchand V. GopalLal*, AIR 1967 SC 1470, the court took a view that as final decree proceedings are pending, the daughter has every right to seek enhancement of her share, whereas, in the facts of the present case the subject property was sold by the defendant no.2 through sale deed dated 22.6.98 and such an alienation of the property by a lawful title holder in favour of the defendant no.1 cannot be reopened at the instance of the plaintiff. Such an interpretation as canvassed by the counsel for the plaintiff cannot be accepted by this court, as it would not only be against the spirit of the said amended provision but will result in reopening the succession and alienation, which had taken place much before the said amendment came into effect.

In the light of the above discussion, this court finds merit in the present application moved by the defendant no.1. The suit filed by the plaintiff is clearly hit by the amended provision of Section 6 of Hindu Succession Act and therefore, the plaint in the present suit is liable to be rejected under Order 7 Rule 11 of CPC.

Accordingly the application filed by the defendant No.1 under Order 7 Rule 11 CPC stands allowed. The plaint in the present suit is hereby rejected. There are no orders as to cost.

KAILASH GAMBHIR, J

NOVEMBER 29, 2012
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