

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

WRIT PETITION NO. 6889 OF 2013  
WITH  
CIVIL APPLICATION NO. 3288 OF 2015

Shivraj s/o Bhagwantrao Deshmukh  
Age-58 years, occup: Agriculture,  
R/o Dharmabad, Tal: Dharmabad,  
District – Nanded,

At present residing at Mudhol, ..... Petitioner/ Orig.  
Tal: Mudhol, Dist. Adilabad (A.P.) defendant no.1

**versus**

01. Santoshi @ Pallavi d/o Shivraj Deshmukh,  
Age-19 years, occup: Education,
02. Madhavi d/o Shivraj Deshmukh,  
Age 20 years, occup: Education,
03. Geetanjali d/o Shivraj Deshmukh,  
Age-22 years, occup: Education,
04. Sullochana w/o Shivraj Deshmukh,  
Age-19 years, occup : Education

(All the respondents resident of Mudhol ... Respondents/  
Tal: Mudhol, Dist. Adilabad, presently Orig. Plaintiffs  
residing at Dharmabad, Tal; Dharmabad, No. 1 to 4  
Dist: Nanded)

05. Vajjnathappa s/o Bhujangrao Tamshette,  
Age 70 years, occup : Agriculture,  
R/o Charthana, Tal : Jintur,  
Dist: Parbhani
06. Manikarmila w/o Vajjnathappa Nagore,  
Age: 55 years, occup. Household,  
R/o Karshi Savathi Colony, Opp. Kaman,  
Tal & Dist : Parbhani.
07. Someshwar s/o Narayan Patil Kargaonkar,  
Age : 39 years, occup. Agriculture  
R/o Chitliputli, Tal & Dist. Jalna

08. Madhav s/o Narayan Patil Kargaonkar,  
Age : 48 years, occup. Agriculture,  
R/o Chitliputli, Tal & Dist. Jalna
09. Narayan s/o Santoba Patil Kargaonkar, ... Respondents/  
Age : 79 years, occup : Agriculture, Orig.Defts.No.  
R/o Chitliputli, Tal & Dist. Jalna 2 to 6

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Mr. S.S. Chapalgaonkar, Advocate for petitioner  
Mr. A.G. Godhamgaonkar, Adv. for respondents no.1 to 4  
Mr. S.S. Gangakhedkar, Advocate for respondent no. 6  
Mr. K.M. Nagarkar, Advocate for respondents no. 7 to 9

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CORAM : SUNIL P. DESHMUKH, J.  
20th August, 2015

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard learned counsel for respective parties finally, by consent.

2. Petitioner-original defendant no. 1 takes exception to order on Exhibit-268 in special civil suit no. 12 of 2000 passed on 10-07-2013, under which, Civil Judge, Senior Division, Biloli has rejected said application by defendant no. 1 seeking rejection of plaint pursuant to Order VII, rule 11(d) of Code of Civil Procedure, 1908 claiming that suit has incurred bar under provisions of law.

3. At the outset, learned counsel Mr. Chapalgaonkar for petitioner points out that respondent no.4 Sulochana who is plaintiff no. 4 in the suit is no more and as such seeks leave to delete her name from the array of respondents. There is no

dispute about the same. Hence, leave granted. Respondent no. 4 as such stands deleted from the array of respondents. Bearing in mind that, petitioners no. 1 to 3 are daughters of plaintiff no. 4 and defendant no. 1 would facilitate appreciation of matter.

4. Petitioner is the original defendant no. 1 in aforesaid special civil suit filed by respondents no. 1 to 3 along with their mother (deleted respondent no. 4) seeking partition of properties in the suit and also claiming declarations in respect of certain alienations and further some other declarations in respect of the suit properties. Respondents no. 5 to 9 are original defendants no. 2 to 6 in the suit.

5. Defendant no. 1 appeared in the suit and filed written statement, denying claims made under the plaint on various grounds. Subsequently, application at Exhibit-268 came to be filed by present petitioner-defendant no. 1, purporting the same to be under Order VII, Rule 11(d) of the Code of Civil Procedure, contending that the suit is barred having regard to amendments to the Hindu Succession Act, 1956, particularly of section 6 in 2005 and 29-A in 1994 of the Act. According to petitioner, under the amended provisions, plaintiffs are not at all entitled to claim any share in the suit properties.

6. It is contended on behalf of the petitioner that the amendment to Hindu Succession Act relating to Maharashtra State is not beneficial to plaintiffs. Defendant no. 1 being the sole heir of deceased Bhagwantrao, there are no co-parceners left and in such a case, question of right in favour of the plaintiffs pursuant to the amendments either of 1994 or those in 2005 would not arise. It is further contended that the amendment of 2005 to the Hindu Succession Act, is not applicable in the present case, for, suit is filed in the year 2000 and thus amended provisions of 2005 would not relate back to the date of institution of the suit.

7. Plaintiffs filed their say at Exhibit-270, opposing application of defendant no.1 under Exhibit-268. It is contended on behalf of the plaintiffs that the amendments to the provisions cannot be parochially considered as is sought to be done by the defendant no. 1. It has been contended that with the introduction of Hindu Succession Act, 1956 and amendments to the same from time to time, the scope of right to partition has been widening and has further been increased by amendments. It is contended that plaintiffs no.1 to 3 – daughters of defendant no. 1 were unmarried while the suit was instituted in 2000. According to plaintiffs, under the amendments to the Act, daughters are entitled to equal share in the ancestral

properties / joint family properties as that of their father or, for that matter, son.

8. After considering rival contentions and taking into account the decisions rendered by various courts, the trial court by impugned order rejected the request of defendant no. 1 under Exhibit-268.

9. Mr. Chapalgaonkar, learned counsel appearing on behalf of the petitioner refers to section 6 of the amended Hindu Succession Act and particularly lays stress on the words '*on*' or '*after*' 09-09-2005 and purports to contend that since all the plaintiffs were born before commencement of amended provisions which is 09-09-2005, the benefit of said amended section would not be available to them. He submits even otherwise those amended provisions would not have benefited the plaintiffs, for, the suit has been instituted in the year 2000.

10. Respondent No. 6 is a purchaser of property from petitioner. It is being contended by Mr. Gangakhedkar, learned advocate appearing for respondent no. 6 that disposition of property in favour of his client having already taken place before the date of enforcement of amended provisions i.e. 09-09-2005 and such disposition being saved under the provisions referred to hereinabove, the suit for partition of such property would not

be maintainable. According to him, such disposition of property cannot form subject-matter of partition now.

11. Mr. Gangakhedkar goes on to submit that Chapter II-A upon amendment of 1994 was inserted under Maharashtra Amendment Act 39 of 1994. Section 29-A with clause (v) thereunder reads as under;

***“ 29-A. Equal right to daughter in coparcenary property-  
Notwithstanding anything contained in section 6 of this Act-***  
*(i) .....  
(ii) .....  
(iii) .....  
(iv) .....  
(v) nothing in clause (ii) shall apply to a partition which has  
been effected before the date of the commencement of the Hindu  
Succession (Maharashtra Amendment) Act, 1994. ”,*

and submits that, that would not affect transfers which have been effected prior to 1994.

12. Learned counsel for petitioner as well as respondent no. 6 further contend that chapter II-A is titled “ Succession by survivorship ” and in present case plaintiffs no. 1 to 3's father is still alive and is defendant no.1 in the suit. Him being alive, this chapter would be wholly inapplicable in the case of plaintiffs. It is being contended that, therefore, a suit with reference to chapter II-A inserted in the Act as has been filed in the year 2000 itself is not maintainable and would be barred pursuant to rule 11(d) of Order VII of the Code of Civil Procedure.

13. Learned counsel for respondent no. 6 refers to a decision of division bench of this court in the case of *Vaishali Satish Ganorkar vs. Satish Kesharao Ganorkar*, reported in 2012 (3) *Mh.L.J.* 669 : *AIR 2012 Bom. 101*, particularly head notes A and B thereof which, according to him, hold that daughters of coparceners are not statutorily given any right as coparceners *ipso facto* before devolution of interest and no interest can devolve in a coparcenary property except on the death of coparcener and further that section 6 as amended is not applicable retrospectively.

14. However, further, learned counsel for petitioner and respondent no. 6 fairly refer to a decision in *Badrinarayan Shankar Bhandari vs. Omprakash Shankar Bhandari* reported in *AIR 2014 Bombay 151*, by the full bench declaring aforesaid decision in *Vaishali Ganorkar's* case *per incuriam*. They further fairly refer to relevant portion in the judgment in *Badrinarayan Shankar Bhandari's* case (*supra*) particularly paragraphs number 53 and 57 thereof.

15. Mr. Godhamgaonkar, learned counsel appearing on behalf of respondents no. 1 to 4 opposes contentions of petitioner and respondent no. 6 and contends that in view of the position as

has been expositioned in the latest ruling of full bench in Badrinarayan's case (supra), the matter has been rendered without any substance. It is submitted by him that Chapter II-A captioned " Succession by survivorship " is a title relevant for additional right explained in clause (i) of Section 29-A which reads as under;

**" 29-A. Equal right to daughter in coparcenary property-**

*Notwithstanding anything contained in section 6 of this Act-*

*(i) In a joint Hindu family governed by the mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship, and shall be subject to the same liabilities and disabilities in respect thereto as the son. "*

16. According to Mr. Godhamgaonkar, dominant intention under aforesaid provision is to confer a right of coparcener on a daughter including right to claim by survivorship and as a corollary, reference has also been made to that the same liabilities and disabilities would also be incurred since the daughters after amendments are being treated as coparceners and the right to claim partition has also come along with the same. Once a daughter is declared as coparcener, coparcener's right to claim partition even according to uncodified law has

remained unshattered all through. He submits that there is no substance in Exhibit-268.

17. Mr. Chapalgaonkar and Mr. Gangakhedkar, learned counsel for petitioner and respondent no. 6 further refer to the gazette of India, Part II published by Ministry of Law and Justice on 13-05-2015 receiving assent of the President to the enactment titled " The Repeal and Amending Act, 2015 " which contains in its first schedule, Act No.39 of 2005 i.e. Hindu Succession (Amendment) Act repealing said Act. According to them this being the position, the right accrued pursuant to section 5 of the Act stands razed to the ground and no claim on that count is sustainable.

18. Mr. Godhamgaonkar, however, points out that aforesaid gazette only refers to receiving assent but it does not refer to the date of enforcement. According to him, the Act cannot be said to have been enforced and Chapter II-A inserted in 1994 in the Act cannot be said to have been repealed under said enactment. He, therefore, submits that there is no substance in the contentions of petitioner and respondent no. 6 in this respect.

19. The purport appears to repeal the amending Acts and does not appear to undo the amendments to the subsisting main

enactments since the amendments would form the part of main enactments.

20. Additionally, section 4 of said repealing and amending Act, 2005 reads thus;

*" 4. The repeal by this Act of any enactment shall not affect any Act in which such enactment has been applied, incorporated or referred to;*

*and this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title or obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or things;*

*nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;*

*nor shall the repeal by this Act of any enactment provide or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force. "*

However, perusal of said section further shows that right accrued, or acquired, or incurred or any remedies or proceedings in respect of repealed act have been saved. The opening words of section 4 indicate that the repeal of the Act shall not affect the Act in which such enactment has been applied, or incorporated or referred to. As such it is only amended Act which appears to have been repealed.

21. Taking into account the factual position in the present matter that the plaintiffs are the daughters of defendant no. 1 and further that none of them had got married prior to 1994, their rights sought to be enforced as co-parcener has been put to trial in the suit. Paragraphs no. 53 and 57 of the ruling in *Badrinarayan's case [AIR 2014 Bombay 151]* relied on by Mr. Chapalgaonkar for petitioner clearly shows that a right as a coparcener may be available to be asserted by the persons born even before enforcement date of amended Act i.e. 09-09-2005. Other contentions in respect of disposition of property prior to 09-09-2005 is a matter of evidence that may come up before the court. The enactments and the provisions thereunder as a whole would not lead to a situation wherein it can be said that such proceedings are precluded, prohibited or have been barred. Prima facie, these provisions do not appear to foreclose the remedies which have been pending since 2000. The provisions

and the latest enactment do not appear to affect the present case.

22. Taking into account aforesaid and on perusal of elaborately referred judgment of the trial court, request under writ petition does not require indulgence. The order impugned does not appear to be illegal or perverse and there is no error of jurisdiction.

23. Writ petition stands dismissed. Rule stands discharged. It is open for the parties to take up all defences before the trial court as have now been argued before this court, including about enforcement of latest enactment.

24. Civil application no. 3288 of 2015 by respondents no. 1 to 4 – original plaintiffs seeking hearing of writ petition does not survive and stands disposed of as such.

SUNIL P. DESHMUKH, J.

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