

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 260 OF 2015

Uttam Krushna Kamble

Age : 76 Yrs., Occ. Agril.,

R/o : Koregaonwadi, Tq.

Omeerga, Dist. Latur.

.... APPELLANT/

[ORI. DEFT. NO. 1]

V E R S U S

1. Sarubai Tulshiram Karnure

Age : 58 Yrs., Occ. Household,

R/o : Koregaonwadi, Tal.

Omerga, Dist. Osmanabad.

2. Parubai Laxman Lavate

Age : 56 Yrs., Occ. Household,

R/o : Koregaonwadi, Tal.

Omerga, Dist. Osmanabad.

3. Chayabai Shankar Kamble

Age : 41 Yrs., Occ. Household,

R/o : Koregaonwadi, Tal.

Omerga, Dist. Osmanabad.

[dismissed vide Court's order
dated 08/09/2015].

4. Islambee Abbas Malage
Age : Major, Occ. Agril.
& Business, R/o : Tal.
Omerga, Dist. Osmanabad.

5. Vivekanand Amrutrao Nawale
Age : Major, Occ. Agril.,
R/o : Kasgi, Tal. Omerga,
Dist. Osmanabad.

.... **RESPONDENTS/**
[ORI. PLAINTIFFS]

.....
Mr. P.V.Barde, Advocate for Appellant.
Mr. N.L.Jadhav, Advocate for R.No. 1.

.....

CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 11th MARCH, 2016

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JUDGMENT :

1. The Appeal is '**admitted**'. Notice after admission made returnable forthwith. By consent heard both sides for final disposal.

2. Original defendant No. 1 of R.C.S. No. 118/2006, which was pending in the Court of the Civil Judge [Jr. Division], Udgir and who was appellant in R.C.A. No.

11/2009 which was pending in the Court of the District Judge – 1, Udgir, has filed the present Appeal to challenge the decision of the trial Court and first appellate Court. The Suit filed by the present respondent No. 1 for relief of partition and separate possession is decided in his favour. 2/9th share was given by the trial Court to respondent No. 1 in the suit properties. In the first appeal of defendant No. 1, the District Court has increased the share of respondent No. 1 to make it 1/3rd.

3. Plaintiff and defendant No. 2 are sisters of defendant No. 1. Defendant Nos. 3 to 5 are purchasers from defendant No. 1 of some portion of suit properties. At the initial stage of the Suit, defendant No. 4 was deleted from the Suit by withdrawing the Suit against him. The Courts below have protected defendant No. 5, other purchaser, by giving the portion purchased by him from defendant No. 1 to the share of defendant No. 1. Thus, the purchasers are automatically protected by the courts below and the remaining share in the suit properties is available for partition and possession.

4. The Suit was filed in respect of following lands :

[i] G.No. 9/1 admeasuring 1 H. 39 R.

[ii] G.No. 9/4/2 admeasuring 36 R.

[iii] G.No. 9/5 bounded as -

towards West - Land of Madhav Ranga Mane

towards South
and North - Land of defendant.

[iv] G.No. 10/4 admeasuring 3 H. 38 R.

All the lands are situated at Koregaonwadi,
Tahsil Omerga.

5. It is the case of plaintiff Sarubai/respondent No. 1 herein that the suit properties were with her father as ancestral properties and the mother of plaintiff is also dead. Father died prior to the year 1994.

6. It is the case of plaintiff Sarubai that defendant No. 1, her brother, is addicted to bad vices and so she asked the defendants to partition the suit properties and to give her share. It is contended that defendant denied to give her share and so the Suit was required to be filed.

7. Defendant No. 1 admitted the relationship with plaintiff Sarubai but he denied the other contentions. He contended that the suit property bearing G.No. 9/4/2 was purchased by him from one Vasant under registered sale deed in the year 1998. It is his case that G.No. 9/5 was also purchased by him, though he has not given year of the purchase. Thus, it is the case of defendant No. 1 that the two suit properties are his self-acquired properties.

8. It is the case of defendant No. 1 that R.C.S. No. 58/1990 was filed against him by one Shrimant Sadashiv Kamble in respect of G.No. 9/4/2 and he was required to spend huge amount on this litigation. He contended that he was required to spend ₹ 25,000/- and he also sustained loss in the brick kiln business of the family.

9. Defendant No. 5 filed Written Statement and contended that the property viz. G.No. 10/4 admeasuring 2 H. 43 R. was sold by defendant No. 1 to him for legal necessity and since the date of purchase he has been in possession. He requested the Court to protect his interest by allotting the property purchased by him to the share of

defendant No. 1.

10. Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. The trial Court held that the suit properties were ancestral properties of father of the plaintiff. The trial Court held that defendant No. 1 has failed to prove that the suit properties viz. G.No. 9/4/2 and G.No. 9/5 are his self-acquired properties. The trial Court had given the share of $\frac{2}{9}$ th as per the provisions of Hindu Succession Act, which was in force prior to the amendment of 1994. The trial Court held that the aforesaid 2 properties were purchasers by defendant No. 1 from the income of ancestral property and he had no other source of income and so they need to be treated as joint family properties, ancestral properties, and they were available for partition.

11. The District Court gave $\frac{1}{3}$ th share each to defendant No. 1 and defendant No. 2, sister of defendant No. 1, by relying on Full Bench decision of this Court, in which the interpretation of provision of Section 6 of the Hindu Succession Act, as amended in the year 2006, was made by the Full Bench. This case is reported as **2014 (5) Mh.L.J. -**

434 [Badrinarayan Shankar Bhandari & Ors. Vs. Omprakash Shankar Bhandari]. In the Appeal, learned counsel for the appellant/defendant No. 1 placed reliance on the case decided by the Apex Court subsequent to the aforesaid decision viz. 2015 AIR SCW – 6160 [Prakash & Ors. Vs. Phulavati & Ors.] decided on 16/10/2015. He submitted that the provisions of the amended Act of 2005 have no retrospective effect in view of the decision given by the Apex Court and so the trial Court had given proper shares to the plaintiff and defendant No. 2. He also submitted that the decision of the trial Court was not challenged by the plaintiff and defendant No. 2 and so in the Appeal filed by defendant No. 1, the share could not have been increased by the first appellate court.

12. On the basis of the aforesaid submissions, learned counsel for the appellant submitted that the substantial question of law needs to be formulated and decided which is as follows :

Whether the plaintiff and defendant No. 2 are entitled to the shares in terms of Section 6 of the Hindu

*Succession Act as amended by the Act No.
39/2005 ?*

13. In the case cited supra, the Apex Court has laid down as follows :

“ The rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the explanation.

The legislature has expressly made the Amendment applicable on and from its commencement and only if death of the coparcener in question is after the Amendment. Thus, no other interpretation is possible in view of express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20th December, 2004 unaffected can also not lead to the inference that the daughter

could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6 (5) by being limited to a transaction of partition effected after 20th December, 2004. Notional partition, by its very nature, is not covered either under proviso or under sub-section 5 or under the Explanation. ”

14. The learned counsel for the appellant submitted that share given by trial Court can be maintained. In view of the ratio of the aforesaid case, only 2/9th share can be given to the plaintiff and defendant No. 2 each. In support of the contention that the District Court could not have enhanced the share in the First Appeal, as no Appeal was filed, reliance was placed by the learned counsel for the appellant on the case reported as **1982 AIR (SC) 98 [Choudhary Sahu: Surajbali Sah Vs. State of Bihar]**. There is no need to go into the technicalities in view of the aforesaid case of the

Supreme Court recently decided. The plaintiff and defendant No. 2 can not get equal share with the brother in view of the facts and circumstances of the present case.

15. Reliance was placed by the learned counsel for the appellant on the case reported as *AIR 2007 Supreme Court – 1062 [Dhanalakshmi & Ors. Vs. P.Mohan & Ors.]* and it was submitted that the purchasers need to be protected. It is already observed that the purchasers are protected by the trial Court and also the first appellate court and this decision is not challenged by the original plaintiff. So, there is no need to go into the details of merit on that point. Thus, the property purchased by defendant No. 5 will remain with him and in equitable partition this property will be considered as the property allotted to the share of defendant No. 1. The market value of this property on the date of the partition will be ascertained and accordingly share will be given to the plaintiff and defendant No. 2 in this property and, therefore, shares in other properties will have to be adjusted. Similarly, if some property was sold to defendant No. 4 prior to the date of the Suit, this property will be protected and the price of the share of the plaintiff

and defendant No. 2 will be ascertained and accordingly the equitable partition will be effected.

16. So, the aforesaid substantial question of law is answered in the negative and following order is made.

- [i] The Appeal is partly allowed.
- [ii] The Judgment and Decree of R.C.A. No. 11/2009 is set aside to the extent of the relief granted by the first appellate Court to the original plaintiff by increasing her share from $\frac{2}{9}^{\text{th}}$ to make it to $\frac{1}{3}^{\text{rd}}$. The plaintiff and defendant No. 2 will be entitled to only $\frac{2}{9}^{\text{th}}$ share each in the suit property.
- [iii] Rights of the defendant No. 5 will be protected. Similarly, rights of defendant No. 4 to whom probably some property was sold prior to the date of the Suit will be protected when equitable partition is made.
- [iv] The amount, if any deposited in the trial Court for getting stay is to be kept in the trial Court and is to be considered during execution proceeding when question of mesne profits or satisfaction of decree arises.

[v] Decree is to be prepared accordingly.

[T.V.NALAWADE, J.]

KNP/S.A. 260.2015 - [J]