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

**SECOND APPEAL NO. 404 OF 2015
WITH
CIVIL APPLICATION NO. 9957 of 2015
IN
SECOND APPEAL NO. 404 of 2015**

Chhaya w/o Sambhaji Rasal,
age 34 years occupation agriculture
R/o Manjarsumbha Taluka and Dist. Beed.

... APPELLANT
(Original defendant No.2)

VERSUS

1. Shakuntalabai w/o Ramrao Rasal,
age 65 years occupation household
R/o Manjarsumbha Taluka and Dist. Beed

2. Sow. Sangita w/o Ashok Kalkute,
age 36 years occupation household
R/o Manjarsumbha Taluka and Dist. Beed

(Original plaintiffs)

3. Shivraj s/o Ramrao Rasal,
age 31 years occupation agriculture
R/o Manjarsumbha Taluka and Dist. Beed.

(Original defendant No.1)

...RESPONDENTS

Mr C.V. Dharurkar, Advocate, for appellant,
Mr H.V. Tungar, Advocate for respondents No.1 to 3.

**CORAM : N.W. SAMBRE, J.
DATE : 7th July, 2017**

ORAL ORDER

Ramrao Rasal, common nucleus, died in 1991, leaving behind

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him Mrs. Shakuntala, his wife, Sambhaji & Shivaji, his sons, and Sangita, his daughter. Sambhaji was married to Chhaya.

2. Widow Shakuntala and daughter Sangita filed suit being Regular Civil Suit No. 292 of 2003 in the Court of Civil Judge (Junior Division), Beed, for partition and separate possession of the suit properties, which includes the agricultural and house properties.

3. The claim in the suit is based on 1994 Maharashtra Amendment to the Hindu Succession Act, incorporating by Section 29-A conferring right on married daughter to seek partition in the ancestral property.

4. The said suit was resisted by the defendant No.2, widow of Sambhaji, by filing written statement, thereby denying the claim of the respondents No.1 & 2/original plaintiffs. Respondent No.3/original defendant No.1, who is son of plaintiff No.1 and brother of plaintiff No.2, did not contest the suit claim. Whereas, the wife of other brother, who was defendant No.2, vide written statement Exh. 28 admitted the relationship. It is claimed by her that since 1981, the plaintiffs are not cultivating the land. It is further claimed that plaintiff No.1 had relinquished her share since 1991 and plaintiff No.2 is residing with her husband at Bramhagaon Tal. Washi Dist. Osmanabad. It is further

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claimed that after death of Ramrao, plaintiff No.1 had mutated the suit property in the name of deceased Sambhaji, her son, and as such, she has relinquished her right in the suit property.

5. The Trial Court framed issues at Exh. 31 and answered the issue of suit property being ancestral property in affirmative. The burden was shifted upon present appellant/original defendant No.2 to prove that plaintiff No.1 relinquished her share in suit property in favour of her two sons, Shivaji and Sambhaji. Said issue was answered against present appellant/original defendant No.2. The Trial Court decreed the suit, vide its judgment and decree dated April 16, 2008, thereby declaring that the present respondent No.1/original plaintiff No.1 has $\frac{3}{8}^{\text{th}}$ share and plaintiff No.2 has $\frac{1}{4}^{\text{th}}$ share in the suit property.

6. The appellant feeling aggrieved, preferred appeal being Regular Civil Appeal No. 136 of 2008 in the Court of learned District Judge at Beed, who dismissed the appeal, vide Judgment and decree dated January 19, 2015. However, certain modifications are ordered by the learned District Judge in the original decree. It is held that plaintiff No.1 would have $\frac{3}{8}^{\text{th}}$ share and plaintiff No.2 will get $\frac{1}{4}^{\text{th}}$ share. Defendant No.1-son is held to be entitled to $\frac{1}{4}^{\text{th}}$ share and defendant No.2/widow of deceased Sambhaji i.e. present appellant is held to be

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entitled for 1/8th share, in the suit property. As such, this second appeal by original defendant No.2.

7. Shri Dharurkar, learned Counsel for the appellant, would invite attention of this Court on important and factual evidence of date of death of Ramrao on August 12, 1991, marriage of Sangita i.e. plaintiff No.2, in 1995 and 1994 Maharashtra State Amendment with effect from 22nd June 1994 by incorporating Section 29-A in the Hindu Succession Act, 1956. He would also invite attention of this Court to the date of filing the suit on October 16, 1963.

8. In the aforesaid backdrop, according to him, the provisions of Section 29-A of the Hindu Succession Act are held to be mandatory and in support thereof he would rely upon judgment of the Division Bench of this Court in the matter of **Badrinarayan Shankar Bhandari etc. etc. Vs. Omprakash Shankar Bhandari etc. etc.** , reported in **AIR 2014 BOM 151** . , particularly, paragraph 48. He would then urge that in Paragraph 48 of the said judgment, it is held that all the partitions, which were effected prior to the Amendment of 1994, may be notional in nature, are safe, and as such, in the present case, the Court must presume that after the death of Ramrao or before his death, there was a notional partition between the parties. According to him, notional

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partition between Ramrao, his wife-plaintiff No.1, his two sons Shivaji and Sambhaji, is an issue, which is lost sight by both the Courts below while decreeing the suit and granting share to plaintiff No.2 Sangita. According to him, the said share is required to be ignored from the judgment in question.

9. In addition, he would also urge that though Sangita is married in 1995, it is only after the death of Ramrao in 1991, the cause of action for claiming the share in the suit property arose to Sangita. According to him, as such, the legal position as was existing in 1991, does not confer any right in plaintiff No.2 Sangita to claim partition of the suit property. By inviting attention of this Court to the judgment of the Apex Court in the matter of **Anar Devi and others Vs. Parmeshwari Devi and others**, reported in **AIR 2006 SC 3332** he would urge that the Court has to presume notional partition between the parties immediately after the death of Ramrao. He would then further urge that even if there is a decree, the same is preliminary decree and can be amended at any point of time before the said decree is given shape of final decree.

10. Per contra, Shri Tungar, learned Counsel for the respondents, would urge that Section 29-A of the Hindu Succession Act provides for

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qualifications in seeking benefit of partition by married daughter. According to him, Section 29-A is brought in statute book by virtue of Amendment, giving effect from 22nd June 1994. The suit in question came to be filed in 2003, and as such, plaintiff Sangita has every right to claim share in the suit property.

11. According to him, there cannot be doubt as to qualifications which could be read down in provisions of Section 29-A of Hindu Succession Act, so as to accept theory of appellant as regards the presumption of notional partition and non-entitlement of the share to plaintiff Sangita.

12. Considering the rival submissions of the parties, it is required to be noted from the proceedings, as are recorded by both the Courts below, that Ramrao died on August 12, 1991, whereas his daughter Sangita-plaintiff No.2, admittedly, got married in 1995. The suit in question is filed by the respondents/plaintiffs on October 16, 2003.

13. So as to consider the entitlement of plaintiff No.2 Sangita under the provisions of amended Section 29-A of the Hindu Succession Act for share in the ancestral property, the qualifications prescribed thereunder are required to be appreciated. Section 29-A of the Hindu Succession Act, 1956 reads, thus:

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29A Equal rights to daughter in coparcenary property. — Notwithstanding anything contained in section 6 of this Act—

(i) in a joint Hindu family governed by 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;

(ii) at a partition in such a joint Hindu family the coparcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son:

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter.

Provided further that the share allottable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) 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, as property capable of being disposed of by her by will or other testamentary disposition;

(iv) Nothing in clause (ii) shall apply to a daughter married

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prior to or to a partition which had been effected before the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

14. After reading the said provision, it is to be noted that the claim of the appellant that there was a notional partition after the death of Ramrao, is an issue, which in fact, never was pleaded in written statement nor established so in the evidence by either of the parties.

15. The contention of the appellant that this Court while reading down the provisions of section 29-A of the Hindu Succession Act, must infer that after death of Ramrao, common nucleus, notional partition took place between his surviving heirs excluding daughter Sangita, and the alleged partition neither provided in any of the provisions nor by any legal fiction such presumption can be asserted.

16. If the pleadings of appellant/defendant No.2 are appreciated in the written statement in respect of relinquishment of share by plaintiff No.1 in favour of her two sons and plea of partition was never raised, in such an eventuality, it is really difficult to accept claim of the appellant that there was a notional partition prior to 1994 Amendment, and such notional partition pursuant to the incorporation of section 29-A or

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section 6 of the Hindu Succession Act, 1956, as amended in 2005, protects the same.

17. In view of the above, claim of the appellant that this Court must pre-suppose and draw inference that there was notional partition, is liable to be rejected.

18. The next plea submitted by learned counsel for the appellant is that no right is accrued in favour of plaintiff Sangita for filing of the suit after the Amendment of 1994, particularly in 2003, when the suit was filed, as her right to claim partition is qua the death of her father Ramrao, who expired on August 12, 1991.

19. So far as said submissions are concerned, it is required to be noted that right to claim partition in favour of plaintiff No.2 is by virtue of conferment of statutory right by Amendment of 1994 to the Hindu Succession Act. As such, death of Ramrao in 1991 will be of hardly any consequences when plaintiff No2 filed a suit for partition in 2003. It cannot be inferred from the provision of section 29-A by stretching to such an extent that the right to file suit claiming partition in the property of deceased father accrues only at the time of death of deceased and not by virtue of conferment of legal right in 1994.

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20. In the aforesaid backdrop, in my opinion, the appeal, which is against concurrent findings, is devoid of merit. Hence the appeal stands dismissed.

21. In view of disposal of the Second Appeal, Civil Application, if any, stands disposed of.

(N.W. SAMBRE, J.)

pjm