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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.440 OF 2015

Leelavati Baburao Chaudhari
Age - 64 years, Occ - Household
R/o 12, Visemala, HPT College Road,
Nashik, District - Nashik

APPELLANT

VERSUS

1. Pitambar Shridhar Attarde
Age - 67 years, Occ - Agriculture
R/o Behind Supreme Tyre,
Saduba Nagar, Old Nashirabad Road,
Jalgaon Taluka and District - Jalgaon
2. Pandurang Shridhar Attarde
(Since deceased through legal representatives)
- 2A. Satish Pandurang Attarde,
Age - 42 years, Occ - Service
- 2B. Subhash Pandurang Attarde,
Age - 48 years, Occ - Service
- 2C. Nirmala Prakash Chaudhari,
Age - 45 years, Occ - Service
- 2D. Sushila Pandurang Attarde,
Age - 70 years, Occ - Household
- Respondents No.2A to 2D
R/o 1/145/1, Sadoba Nagar
Old Nashirabad Road, Jalgaon
Taluka & District - Jalgaon
3. Tulshiram Shridhar Attarde
Age - 63 years, Occ - Agriculture
R/o Plot No.368, Sadderpura,
Badam Galli, Vitthal Peth, Jalgaon
Taluka & District - Jalgaon

RESPONDENTS

4. Barsu Budha Patil,
Age – Major, Occ – Business
R/o Saduba nagar Hira Pipe Road,
Old Nashirabad road, Jalgaon
Taluka & District – Jalgaon
5. Chudaman Vitthal Rane
(Since deceased through legal representatives)
 - 5A. Sheela Chudaman Rane
Age – 53 years, Occ – Household
 - 5B. Kum. Dipti Chudaman Rane
Age – 23 years, Occ – Education
 - 5C. Kum. Trupti Chudaman Rane
Age – 19 years, Occ – Education

Respondents No.5A to 5C
R/o 213, 'Dnyaneshwari'
Adarsha Nagar, Jalgaon
Taluka & District – Jalgaon
6. Prakash Jagananth Chaudhari,
Age – 56 years Occ – Service
R/o Plot No.2, Saduba Nagar
Old Nashirabad Road, Jalgaon
Taluka & District – Jalgaon
7. Durgadas Barsu Patil,
Age – 57 years, Occ – Business,
R/o Saduba nagar, Hira Pipe Road,
Old Nashirabad Road, Jalgaon
Taluka & District – Jalgaon
8. Sheshrao Barsu Patil,
Age – 63 years, Occ – Business
R/o Saduba Nagar, Hipra Pipe Road
Old Nashirabad Road, Jalgaon
Taluka & District – Jalgaon
9. Khadke and Chaudhari Pvt. Ltd.,
Laxmanbhau Nagar,
In front of S. T. Workshop,

Old Nashirabad road, Jalgaon
Taluka and District – Jalgaon

10. Maheshkumar Sharma
(Since deceased through Legal Representatives)

10A. Zimudevi Maheshkumar Sharma
Age – 48 years, Occ – Household

10B. Gopal Maheshkumar Sharma
Age – 25 years, Occ – Business

10C. Rajani Maheshkumar Sharma
Age – 22 years, Occ – Education

10D. Mamta Maheshkumar Sharma
Age – 18 years, Occ – Education

Respondents No.10A to 10D
R/o Pot No.35, Chimukale Balaji Mandir
Road, Ayodhya Nagar, Jalgaon
Taluka and District – Jalgaon

11. Sau. Jyotsna Mukund Khadke
Age – 48 years, Occ – Household
R/o Saduba Nagar,
Old Nashirabad Road, Jalgaon
Taluka and District – Jalgaon

12. Prakash Vishnu Kolhe,
Age – Major, Occ – Service

13. Suresh Vishnu Kolhe
Age – Major, Occ – Service

14. Vijay Vishnu Kolhe,
Age – Major, Occ – Business

15. Jagdish Vishnu Kolhe,
Age – Major, Occ – Business

Respondents No.12 to 15
R/o Parbhat Printing Press,
Bhavani Peth, Jalgaon,

Taluka and District – Jalgaon

16. Sau. Chamelibai Bhaskar Khadke
Age – 58 years, Occ – Household
17. Sarlabai Vilas Rane
(Since deceased through Legal Representatives)
 - 17A. Komal Vilas Rane
Age – Major, Occ – Education
 - 17B. Vilas Trimbak Rane,
Age – 49 years, Occ – Service

Respondents No.16, 17A and 17B
R/o 311, Vitthal Peth, Jalgaon
Taluka and District – Jalgaon

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Mr. Vijay B. Patil, Advocate for the appellant
Mr. A.R.Vaidya h/f Mr. B.S.Deshmukh, Advocate for respondents
No.2A to 2D
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 22nd MARCH, 2017

ORAL JUDGMENT :

1. Heard learned advocates for the appearing parties.
2. It is plaintiff's second appeal being unsuccessful in two stages hitherto, questioning legality and validity of decisions rendered by trial and appellate courts, purporting to pose a question -

“ Whether disposition of property received in partition among father and sons, by father, by a will only between

two sons, is possible while nature of property before partition being coparcenery ?”

3. Shorn of unnecessary details, factual position which has not been disputed is that - property inherited by the father had been partitioned in 1978 among father and three sons, under which there were four equal divisions, each male member of coparcenery getting one fourth share. In furtherance of said partition, entries were taken in revenue record and accordingly members of the family had been enjoying the partitioned properties, as their separate properties. Subsequently, the father had executed a registered will dated 19th November, 1990 bequeathing property received in partition to only two out of his three sons. After death of father, the bequeathed property was recorded in revenue offices according to the wishes expressed in the will and as such, said property bequeathed to them was being enjoyed by the two sons.

4. Regular Civil Suit No. 132 of 2001 came to be instituted by present appellant – married daughter of aforesaid deceased father seeking partition and separate possession in respect of the property inherited by her deceased father.

5. In the meanwhile, it appears that quite a few transactions

have taken place. Brothers of the plaintiff have dealt with certain properties.

6. The defendants, in written statement, resisted claims of the plaintiff giving rise to issues - as to whether the plaintiff is entitled to declaration of having one twenty fourth share in suit properties; whether she is entitled to partition and separate possession and whether she is further entitled to declaration that sale deeds executed by brothers in favour of third persons to be illegal and void. All the issues were decided in the negative against the plaintiff by trial court.

7. A proceeding therefrom had been carried to district court bearing Regular Civil Appeal No.161 of 2007. In the appeal, the appellate court had taken up points for determination *viz*; whether there was any property left to be partitioned by deceased father of plaintiff; whether will executed by deceased father in respect of his share of partitioned property was legal and whether sale deeds executed by defendants No.1 to 3 were illegal and not binding on the plaintiff and whether the plaintiff is entitled to partition.

8. The appellate court has considered that no property had been left to be partitioned by deceased father of the plaintiff, the

will executed by him, in respect of his one fourth share in the inherited property, to be legal and had given negative findings in respect of declaration sought about sale deeds executed by brothers of the plaintiff being illegal and not binding and about entitlement of the plaintiff to partition and separate possession of suit properties. The appeal, as such, came to be dismissed under judgment and order dated 16th July, 2015.

9. Learned advocate for the appellant Mr. Vijay B. Patil, submits that both the courts have committed grave error in absolutely declining claim of the plaintiff for partition and separate possession and the same ought to have been considered at least in respect of one fourth share taken by deceased father in partition which had taken place in 1978. Learned advocate submits that while nature of property being ancestral is not in dispute, when it had been inherited by deceased father, having regard to amendments to Hindu Succession Act, 1956, one in 1994 in Maharashtra, and the other of section 6 in 2005, daughter being accorded status of a coparcener, the will executed by father would not affect rights accrued to the plaintiff as a coparcener. He submits that in any case, one fourth share of the inherited property having fallen to deceased father's share, its nature being ancestral, while the

plaintiff being alive, disposition of his share by father is not proper and would be illegal.

10. In support of his submissions, learned advocate purports to rely on a decision of the Supreme Court in the case of “*Rohit Chauhan V/s Surinder Singh and Others*” reported in 2013 DGLS (SC) 545 : 2013 AIR (SC) 3525, particularly paragraphs No.10 and 11 thereunder, reading, thus -

“ 10. Mr. L.Nageshwar Rao, learned Senior Counsel appearing on behalf of the plaintiff-appellant submits that at the time when the plaintiff's father Gulab Singh got the property in partition, it was his separate property vis- à-vis his relations but after the birth of the plaintiff on 25th of March, 1982, plaintiff acquired interest in the property as a coparcener. Mr. Satinder S. Gulati, learned Counsel appearing on behalf of the defendant- respondents, however, submits that once the property fell into the share of the plaintiff's father Gulab Singh, it lost the character of a coparcenary property and the said status will not change on the birth of the plaintiff. He points out that even if plaintiff Rohit Chauhan was born at the time of partition between defendant no. 2, his father and brothers, plaintiff would not have got any share under Section 8 of the Hindu Succession Act. In support of the submission he has placed reliance on a judgment of this Court in the case of *Bhanwar Singh V. Puran*, (2008) 3 SCC 87 and our attention has been drawn to the following passage from the said judgment:

“13. Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed as Class I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stripes, as also tenants-in-common and not as joint tenants.”

11. We have bestowed our consideration to the rival submission and

we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of M. Yogendra V. Leelamma N., (2009) 15 SCC 184, in which it has been held as follows:

“29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid. ”

11. He further draws attention to judgment in the case of “*Devisingh Balaramsingh Raghuwanshi and Others V/s Smt. Shailabai Rajendrasingh Raghuwanshi and Others*” reported in 1996 (2) Bom. C. R. 183 decided by division bench of this court at Nagpur, making reference to paragraphs No. 90 to 94 thereunder, reading, thus -

“ 90. If the Will (Exh. 265) is not accepted as a valid document, the interest of Rajendrasingh in the ancestral property in his hands would devolve upon his wife i.e. the plaintiff and his mother Hirabai i.e. the

defendant No. 2 in equal shares. Thus, the specifications of shares given hereinbefore would show that in the ancestral property allotted to the share of Rajendrasingh in the family partition effected on 1-10-1952, the plaintiff will have 5/6th share and 1/6th share would go to Hirabai in the said property.

91. Apart from the above ground of challenge to the Will (Exh. 265) viz. about the valid execution of the Will and the suspicious circumstances surrounding the same, the learned Counsel for the plaintiff has challenged the Will (Exh. 265) as invalid also on the ground that the testator Rajendrasingh had an undivided interest in the coparcenary property governed by Mitakshara Law which he is not entitled to and which is not capable of being disposed by testamentary disposition by him. Even otherwise, he has contended that assuming that he can do so, in view of our finding that it is only his interest to the extent 1/3rd share in the property allotted to him on family partition effected on 1-10-1952 which is capable of being disposed of by him by testamentary disposition since he has disposed by Will (Exh. 265) the whole of the property allotted to his share in the aforesaid family partition effected on 1-10-1952, the said Will (Exh. 265) is illegal and cannot be sustained.

91A. As regards the first question, the contention urged on behalf of the plaintiff that the deceased Rajendrasingh is not entitled to dispose of his undivided interest in the coparcenary property governed by Mitakshara Law or the said property is not capable of being disposed of by testamentary disposition, cannot be upheld in view of the clear provision of Section 30 of the Hindu Succession Act, 1956. Section 30 deals with the question of testamentary succession. It provides that any Hindu can dispose of by Will or other testamentary disposition any property, which is capable of being disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for time being in force. The explanation to the said section particularly shows that the interest of a male Hindu in a Mitakshara coparcenary property is deemed to be property capable of being disposed of by him within the meaning of the said Section 30. It is, therefore, clear that the deceased Rajendrasingh was entitled to dispose of his undivided interest in a Mitakshara coparcenary property by Will or other testamentary disposition.

92. As regards the question of Mitakshara coparcenary property, we have already pointed out that the property in the hands of Rajendrasingh allotted to him in the family partition effected on 1-10-1952 would be coparcenary property belonging to him and his son Jagjitsingh. We have also pointed out hereinbefore that after the death of Jagjitsingh share of Rajendrasingh in the said property would be 1/3rd and that of his wife i.e. the plaintiff would be 2/3rd in view of the provisions of Section 6 of the Hindu Succession Act, 1956. Therefore, if at all, it is his aforesaid 1/3rd share in the property allotted to him on family partition effected on 1-10-1952 which the deceased Rajendrasingh can dispose of by his Will

in view of the provisions of Section 30 of the said Act. The disposition of the whole of the said property made by him as per his Will Exh. 265 in thus clearly illegal and cannot be sustained.

93. The next question which arises for consideration is whether the Will Exh. 265 can be held to be valid to the extent of the aforesaid 1/3rd share of the deceased Rajendrasingh in the property allotted to him on family partition effected on 1-10-1952. In considering the said question it has to be seen that the Rules enacted in the Indian Succession Act, 1925 are made applicable by Section 30 of the Hindu Succession Act, 1956 to the Wills or other testamentary disposition of property made by any Hindu. It is a primary rule of construction of Will that it must be interpreted according to the intention of the testator which has to be primarily gathered from the words used by him in the Will. Section 81 of the Indian Succession Act, 1925 makes an extrinsic evidence to ascertain the intention of the testator inadmissible in case of patent ambiguity or deficiency on the face of a Will. Section 87 of the said Act requires that the intention of the testator should not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible. Section 89 of the said Act then provides that Will or bequest not expressive of any definite intention is void for uncertainty.

94. In the light of the relevant rules of construction of a Will, if we examine the Will (Exh. 265) made by the deceased Rajendrasingh, it is clear from the said Will that the deceased Rajendrasingh has disposed of by his testamentary disposition the whole of his property allotted to him on family partition on 1-10-1952 which as we have shown hereinbefore is a patent defect and illegality in the said Will. Further the testator Rajendrasingh had given specific shares in property to his nephew Surjitsingh the defendant No. 4 and his wife i.e. the plaintiff. However, as regards the specific shares given to his wife, he has created only a life estate in her and the property allotted by him to her in the said Will has to vest in his nephew Surjitsingh after her death or if she remarries. She cannot alienate the property bequeathed to her by him. The main purpose in allotting the property to her is to provide her maintenance during her life time. Thus ultimately under the Will it is his nephew Surjitsingh who becomes the owner of the entire property allotted to the share of the testator Rajendrasingh in the family partition effected on 1-10-1952. The allotment of shares to the said nephew Surjitsingh and to the plaintiff do not show in what proportions, if any, they are allotted. ”

12. However, both aforesaid decisions appear to be dealing with altogether different contexts and it is difficult to draw any analogy from the same, as would seem to be applicable to facts

and circumstances of present case. The Supreme Court decision in the case of "*Rohit Chauhan*" (*supra*) deals with birth of a son after partition had taken place among father and other members of coparcenery and father dealing with whole of the property derived under partition of coparcenery property. There also it has been clearly mentioned that if the disposition of the property had taken place before birth of the son, that would not have been affected by subsequent birth of the son. Whereas, the other citation relates to a different factual scenario and would hardly have any nexus with the present matter.

13. It is clearly emerging factual and legal position in the matter that there had been partition among father and three sons in 1978 whereunder each of them received one fourth share in the inherited coparcenery property and that in 1990, the father under a registered will, had bequeathed his one fourth separate share received in partition, to only two sons. The third son though being alive, had not received anything under the bequest. Father of the plaintiff died in 1991. Thereafter, the properties bequeathed were being enjoyed by the two sons as their independent properties. That enjoyment had never been questioned by the third son. The Maharashtra amendment to Hindu Succession Act had been effective since 1994 and

amendment to section 6 to Hindu Succession Act had been made effective from 2005. Disposition of the property by the father of the plaintiff, as such, obviously has been before 20th day of December, 2004. On partition, the property had become separate property of father and as such, he had an absolute right to deal with the same and which he did by executing a registered will, which appears to have been acted upon. Coparcenery nature of the property had ceased to continue upon partition of the properties among the partitioning members of the coparcenery, since 1978. It is not the case that any male member had been born after 1978 to deceased father in order to lay claim to any share in the property. Father admittedly had executed will of his partitioned separate share in 1990 and in 1991, he has expired. Disposition of suit property among coparceners then had taken place before Maharashtra Amendment of 1994 to Hindu Succession Act, 1956. Even if it is assumed that amendment to section 6 of the Hindu Succession Act, is retroactive, the legislature has already made its intention clear that disposition of properties made before 20th December, 2004 would remain unaffected.

14. In the circumstances, although learned advocate Mr. Patil has exerted himself very strenuously, it does not appear that it is

likely to yield any fruitful result in favour of the appellant.

15. Second appeal is devoid of any substance and the same, as such, stands dismissed. Question as framed stands answered accordingly.

16. In view of aforesaid Civil Application No. 10880 of 2015 stands disposed of.

[SUNIL P. DESHMUKH, J.]

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