

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

**REVIEW APPLICATION NO.247 OF 2017
IN
SECOND APPEAL NO. 235 OF 2014**

1. Bhanudas S/o Ananda Adsure
Age : 72 years, Occ : Agri.,
2. Mathurabai W/o Bhanudas Adsure
Age : 67 years, Occ : Household,
3. Raosaheb S/o Bhanudas Adsure
Age : 39 years, Occu : Agri.,
All R/o Warwandi, Tq. Rahuri,
Dist. Ahmednagar

APPLICANTS
(ORIG.DEFT.NOS.2 TO 4)

VERSUS

1. Swapnali Bhausahab Adsure
Age : 19 years, Occu : Education,
2. Sau.Sarita Bhausahab Adsure
Age : 37 years, Occu : Labourer,

Both At present R/o Kolhar, Tq.Rahata,
Dist. Ahmednagar
3. Bhausahab S/o Bhanudas Adsure
Age : 42 years, Occu : Agri.,
R/o Warwandi, Tq.Rahuri,
Dist. Ahmednagar
4. Hirabai Gangadhar More
Age : 52 years, Occu : Household,
R/o Wambori, Tq.Rahuri,
Dist. Ahmednagar

RESPONDENTS
(OPP.NOS.1 AND 2 – ORI.PLAINTIFFS &
OPP.NOS. 3 AND 4-ORIGINAL DEFENDANTS)

Mr V. R. Dhorde, Advocate for the Applicants;
 Mr V. D. Sapkal, Advocate holding for Mr A.B.Jagtap, Advocate for
 Respondent Nos. 1 and 2

CORAM : NITIN W. SAMBRE, J.

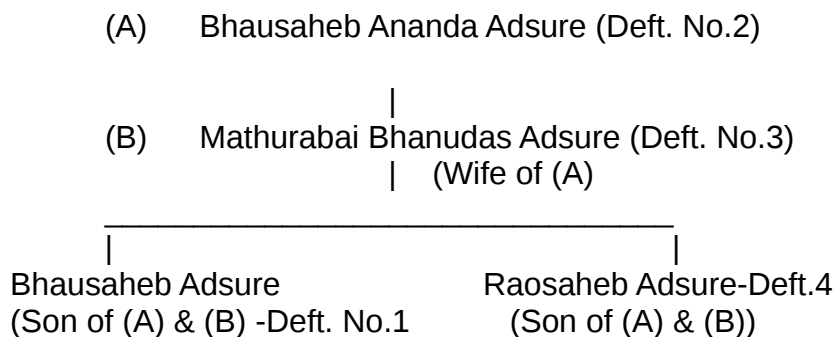
DATE : 21st November, 2017

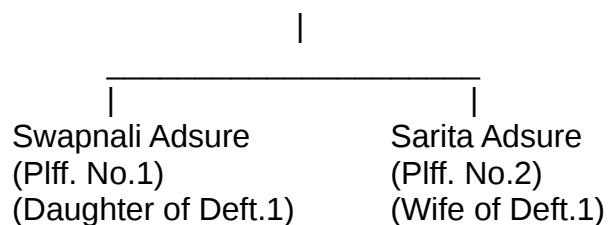
ORAL ORDER:

By judgment and decree dated 23rd June, 2015, this Court has dismissed Second Appeal No.235 of 2014, thereby endorsing the judgment and decree passed by the Trial Court in Regular Civil Suit No.211 of 2000, which was for partition, possession and perpetual injunction. Said dismissal is sought to be reviewed under present application.

2. Special Leave Petition preferred by the applicants was disposed of as withdrawn with liberty to file review application.

3. For the purpose of understanding the factual matrix at a glance, the family tree is required to be looked into, which is as under:-





4. Plaintiffs Swapnali and Sarita, who are daughter and wife respectively, of defendant No.1-Bhausahab, sought partition of the properties. The suit came to be decreed as under :-

“1. The suit is decreed with costs.

2. It is declared that the plaintiffs are having $1/12^{\text{th}}$ share each and separate possession thereof in the suit properties.

3. It is further declared that the defendant Nos. 1 to 4 are having $1/4^{\text{th}}$ share each in the suit properties.

4. The defendants are hereby restrained by perpetual injunction from creating third party interest in the suit properties till the suit properties are partitioned.

5. The decree be sent to the Collector, Ahmednagar for effecting partition of the suit properties as per Sec.54 of the Code of Civil Procedure.

6. Preliminary decree be drawn up accordingly.”

Both the plaintiffs were held to be entitled to 1/12th share, whereas defendants No.1 to 4 were given 1/4th share each in the suit properties.

5. The review of the judgment rendered by this court on 23rd June, 2015 is sought by defendants No.2 to 4 i.e. applicants herein, on the ground that the suit at the behest of plaintiff Swapnali, being minor, was not maintainable in view of the provisions of clauses 306 and 307 of the Hindu Codified Law. It is also claimed that mother Sarita is not entitled for any share in the properties, particularly when no succession is provided in the light of the provisions of Hindu Succession Act. It is also claimed that minor daughter Swapnali and Sarita, who are plaintiffs will be entitled to equal share from the share allotted to defendant No.1 Bhausahab, and Swapnali cannot be termed as a co-parcener, to mean having entitlement in law to claim partition. It is further urged by the learned counsel appearing on behalf of the applicants that in view of the provisions of clause 314, wife Sarita has to be held to be not entitled to the share.

6. Per contra, learned counsel for respondents No. 1 and 2 – original plaintiffs would urge that the judgment delivered by the learned trial court which is confirmed in the second appeal does not warrant any interference, particularly in review jurisdiction. He would submit that the

original holder of the land Bhanudas, his wife Mathurabai, sons Bhausaheb and Raosaheb if are held to be entitled to 1/4th share, daughter Swapnali, during the survivorship of Bhausaheb and her grandfather Bhanudas is entitled to claim share in the properties as that of a son, pursuant to the provisions of Sections 4 and 6 of the Hindu Succession Act. Learned Counsel then would urge that if a share is to be allotted to Mathurabai, wife of Bhanudas, the fact remains that Sarita is equally entitled to claim share. According to him, the cause which prompted to file the suit is required to be taken into account, viz. defendant No.1-Bhausaheb had driven away plaintiffs and refused to maintain them.

7. Considered the aforesaid submissions in the light of the findings recorded by the Courts below.

8. The Courts below held that each of the plaintiffs, viz. Sarita and Swapnali are entitled to 1/12th share after carving out 1/4th share each to the defendants. Defendant No.1 is father and husband of plaintiffs No.1 and 2 respectively and defendants No.2 and 3 happen to be the father and mother of defendant No.1, whereas defendant No.4 is brother of defendant No.1. In view of said relationship, though it is sought to be claimed that the suit at the behest of the minor is not maintainable, which issue was never canvassed when the second appeal was argued,

however, if considered at this stage in review jurisdiction, the cause as is cited has prompted to file the suit in question. Admittedly, the suit is instituted in 2000 i.e. after 1994 State Amendment to the Hindu Succession Act. By virtue of said amendment, it was always open for a daughter to claim to be successor to the properties in an undivided family, provided the partition is not opened. Same appears to be the case in hand. As such, by virtue of the same, the suit at the behest of a minor daughter, who claimed to have been driven out by defendant No.1, was very much maintainable. If the suit at the behest of the daughter being a co-parcener is held to be maintainable, Mr Dhorde has rightly invited attention of this court to the issue of maintainability of such suit at the behest of the wife, particularly having regard to the provisions of clause 314 of the Hindu Codified Law.

9. So far as the shares allotted by the trial court to each of the plaintiffs, which appears to be a bone of contention in the present application are concerned, what is ordered by the trial court is, all the four defendants were given $\frac{1}{4}$ th share in the properties and in addition thereto, carved out $\frac{1}{12}$ th share each to the plaintiffs i.e. daughter Swapnali and wife Sarita of defendant no.1 Bhaurao. Though the learned Counsel appearing on behalf of the applicants has tried to impress upon the Court to carve out such share out of the share of Bhausahab, still if such submission is accepted, then it has to be held that mother of Bhausahab

i.e. defendant No.3 Mathurabai, mother of defendants No.1 and 4 and wife of defendant No.2 will also be not entitled to any share in the suit properties. To this, learned Counsel appearing on behalf of the applicants responded by submitting that if grand-daughter seeks partition, then grand-mother defendant no.3 will be entitled to equal share. As such, applicant no.2 on one hand being wife of applicant no.1 claims to be entitled to share, however, is not ready and willing to give share to plaintiff no.2 wife of defendant no.1, though both are similarly situated.

10. Defendants no.1 to 4 have filed their common written statement at Exh.13 and additional written statement at Exh.145. All these defendants have come out with a common defence, which was appreciated by the Courts below, so also this Court while dismissing the Second Appeal. So far as the application for review is concerned, defendant no.1 is not in the array of applicants before this Court, who by his conduct has accepted the judgment in the Second Appeal wherein he was one of the appellants. In the wake of the fact that all the defendants have raised a common defence vide written statements at Exh.13 and 145, the act on the part of defendants no.2 to 4 questioning the allocation of share, whether is open for consideration, particularly when the similarly placed defendant no.1 has acquiesced the judgment of all the three Courts, is required to be appreciated.

11. So far as allotment of shares is concerned, though the shares of each of the parties to the suit are carved out, still allocation of such shares from the existing properties is a matter to be considered in execution which is to be carried out through precept to be sent to the Tahsildar, who is required to report final execution of the decree depending upon location and availability of land, which issue, in my opinion, cannot be gone into at this stage. However, suffice it to say that the shares as are allocated to the plaintiffs, in second appellate jurisdiction do not call for any interference, particularly in review jurisdiction. Thus, review application lacks merit and stands dismissed.

(NITIN W. SAMBRE, J.)

amj