

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

SECOND APPEAL NO. 840 OF 2018

1. Rajendra S/o. Baburao Khairnar,
Age : 56 years, Occu. Service,
R/o. Soyagaon, Tq.Soyagaon,
Dist. Aurangabad.

2. Sanjay S/o.Baburao Khairnar,
Age : 52 years, Occu. Agri.,
R/o. Soyagaon, Tq.Soyagaon,
Dist. Aurangabad.

3. Dilip S/o. Baburao Khairnar,
Age : 50 years, Occu. Agri.,
R/o. Soyagaon, Tq. Soyagaon,
Dist. Aurangabad.

4. Sumangal Rajendra Nerpagar,
Age : years, Occu. Household,
R/o. Amdada, Tq. Bhadgaon,
Dist. Jalgaon.

5. Sushilabai Baburao Khairnar,
Age : 73 years, Occu. Household,
R/o. Soyagaon, Tq.Soyagaon,
Dist. Aurangabad.

... Appellants
(Ori. defendants)

VERSUS

1. Indumati Sharad Nikam,
Age : 73 years, Occu. Household,
R/o. Subhadra Nagar, Takli Road,
Near Raghunandan Mangal Karyalaya,
Post- Kopargaon, Dist. Ahmednagar.

2. Vatsalabai Ramesh Chintaman,
Age : Major, Occu. Household,
R/o. PWD Karyalaya, Jalna Road,
Aurangabad.

... Respondents
(Ori. Plaintiff & Deft. No. 6)

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Mr Ashutosh S. Kulkarni h/f Mr J. V. Deshpande, Advocate for the appellants

Mr Shivraj V. Deshmukh a/w Mr Nilesh R. Avhad, Advocate for respondent No. 1
Mr H. P. Jadhav, Advocate for respondent No. 2

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CORAM : A. M. DHAVAL, J.
DATE : 30TH NOVEMBER, 2018.

ORAL JUDGMENT:-

1. Considering the narrow controversy involved, by consent of the parties the matter is taken up for final disposal.
2. Heard Mr Ashutosh S. Kulkarni, learned counsel for the appellants. He submits that, the suit property is admittedly ancestral property of deceased Sandu, who was father of plaintiff, defendant No. 6 and one Baburao. Defendants No. 1 to 5 are legal heirs of deceased Baburao. Sandu died in 1968 and his wife Dwarkabai died in 2000. The plaintiff (daughter) filed suit for partition claiming 1/3rd share.
3. Mr Ashutosh S. Kulkarni argued that, admittedly the suit property is ancestral property and since deceased Sandu died in 1968, there would be notional partition at that time and the amended provisions of Hindu Succession (Amendment) Act, 2005 (hereinafter referred to "Hindu Succession Act") would not be

applicable. The plaintiff and defendant No. 6 cannot claim as lady co-parceners. Both the courts have not considered this legal position as explained in the judgment of Hon'ble Apex Court in **Prakash & Ors. Vs. Phulavati & Ors.** reported in **AIR 2016 SC 769**. He submits that, the property should be divided as per notional partitions and the shares should be redetermined.

4. Per contra, Mr Shivraj Deshmukh & Mr H. P. Jadhav, learned advocates for the respondents, submitted that, as per Hindu Succession (Amendment) Act, 2005 the plaintiffs and defendant No. 6 are entitled for 1/3rd share each.

5. The substantial question of law framed is as follows.

Whether both the lower courts erred in determining the shares of the parties?

.... I answer it in the affirmative and hold that the plaintiffs and defendant No.6 are entitled for 2/9th share each whereas, the appellants are entitled for 5/9th share together.

REASONS

6. The facts are not much in dispute. The land from Gut No. 94 adm. 7H 76R. at Soygaon was inherited by Sandu Khairnar in partition between him and his brothers. Sandu was having one son Baburao and two daughters namely; Indumati & Vatsalabai (the plaintiff & defendant No.6). He died in 1968 while his wife

Dwarkabai died in 2000. As held in Prakash's case (*supra*), the provisions of Hindu Succession Act would not be applicable when Sandu has died much prior to enactment of amended provisions. As per old law, there would be notional partition between the deceased Sandu, his wife Dwarkabai and deceased Baburao. Each would get $1/3^{\text{rd}}$ share.

7. Thereafter, $1/3^{\text{rd}}$ share of Sandu would be further partitioned between his wife, son and two daughters. Thus, each of them would get $1/12^{\text{th}}$ share. Thus, share of Dwarkabai & Baburao would be $1/3^{\text{rd}} + 1/12^{\text{th}}$ i.e. $5/12^{\text{th}}$ and two daughters would get $1/12^{\text{th}}$ share each on death of Sandu. On death of Dwarkabai, her $5/12^{\text{th}}$ share would be equally divided among her son and two daughters i.e. $5/36^{\text{th}}$ each. Thus, the share of two daughters would be $1/12^{\text{th}} + 5/36^{\text{th}} = 2/9^{\text{th}}$. The share of legal heirs of Baburao would be $5/9^{\text{th}}$.

8. Both the courts below erred in calculating the shares and not following binding precedents of the Apex Court with regard to notional partition and non-applicability of provisions of Hindu Succession Act, 2005 to the parties in whose case the father has died before the said act came into force.

9. In view of this, the substantial question of law is answered accordingly.

10. The appeal is allowed. The judgment and decree of both the courts below are set aside and modified.

11. The suit is partly decreed and it is held that, the plaintiff and defendant No. 6 are entitled for 2/9th share each. While the appellants herein-original defendants No. 1 to 5 would be entitled for 5/9th share together. The decree shall be sent to the Collector for effecting partition u/s 54 of CPC.

12. In view of the uncertain legal position, the parties shall bear their own costs of this appeal.

[A. M. DHAVAL]
JUDGE

Punde