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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.607 OF 2013.

- | | |
|------------------------------------|---------------------|
| 1. Ratnamala Vilas More |] |
| Age : adult, Occn.Agri |] |
| a/p Bavi, Tal. Madha, Dist.Solapur |] |
| |] |
| 2. Maya Tanaji Pawar, |] <u>Appellants</u> |
| age: 45 yrs, Occn.Agriculture, |] Ori. plaintiffs. |
| r/oRopale, Tal.Pandharpur |] |
| District: Solapur. |] |

V/s.

- | | |
|-------------------------------------|---|
| 1. Tanaji Machindra Pawar |] |
| age: 50 yrs.Occn.Agri. |] |
| |] |
| 2. Ashabai Tanaji Pawar |] |
| age: 40 yrs. Occn.Agri. |] |
| |] |
| 3. Siddheshwar TanajiPawar |] |
| age:17 yrs.occn.Agri. |] |
| |] |
| 4. Bhudheshwar Tanaji Pawar |] |
| age: 15 yrs, Occn.Agri. |] |
| |] |
| respondent Nos. 3 & 4 minor through |] |
| natural guardian respondent No.2 |] |
| |] |
| 5. Dhanaji Machindra Pawar |] |
| age; 48 yrs. Occn.Agri. |] |
| |] |
| 6. Pandit Dhanaji Pawar |] |
| age: 23 yrs. Occn. Agri. |] |
| |] |
| 7. Chhaya Dhanaji Pawar |] |

age:42 yrs.Occn.Agri.	]	
	]	
Nos. 1 to 7 r/o Mendhapur,	]	
Tal.Pandharpur, Dist.Solapur	]	
	]	
8. Machindra Bhau Pawar (deceased)	]	
Through legal heirs	]	
	]	
8A. Sangita Bharat Mahadik	]	
Age: adult, occn.agri.	]	
r/o Mahadik Wadi, Post.Shegaon	]	
Tal. Jath, Dist.Sangli	]	
	]	
8B. Sakhubai Subhash Mahadik	]	
age: adult, Occn.Agri.	]	
r/o Mahadik Wadi, Post.Shegaon	]	
Tal. Jath, Dist.Sangli	]	
	]	
8C. Sindhubai Hanmant Gund	]	
age:adult,occn.Agri.	]	
a/p Ashti,Tal.Mohol,Dist.Solapur	]	
	]	
8D.Indubai Gowardhan Bhosale	]	
age:adult,Occn.Agri.	]	
a/p Papri, Tal.Mohol,Dist.Solapur	]	
	]	
8E. Padmini Laxman Yadav	]	
age:adult.Occn.Agri.	]	
a/p Bhutashte,Tal.Madha,Dist.Solapur	]	Respondents
	]	
8ee.Lamibai Hanmant Patil	]	
age:adult,Occn.Agri.	]	
r/o Wagholi,Tal. Malshiras	]	
Dist.Solapur	]	
	]	
8P. Kaveeta Rangnath Sathe	]	
age:adult Occn.Agri.	]	
r/o Bibi Darphal,Tal.South Solapur	]	
Dist.Solapur	]	
	]	
8-F. Mahadev Shamrao Gund (died)	]	
through legal heirs	]	
8F(1) Smt. Nandabai Mahadeo Gund	]	

age: 35 yrs. Occn. Agri.	]
r/o Ashti, Tal. Mohol, Dist. Solapur	]
	]
8F(2) Ganesh Mahadev Gund	]
age: 9 yrs. occn. Agri.	]
minor, through G.A.L. Mother Nandabai	]
Mahadev Gund, (respondent no. 8F(1))	]
	]
8F(3) Rohan Mahadeo Gund	]
age: 9 yrs. Occn. Agri.	]
minor, through G.A.L. Mother Nandabai	]
Mahadev Gund, (respondent no. 8F(1))	]
	]
8(bh) Somnath Shamrao Gund	]
age: adult. Occn. Agri.	]
r/o Ashti, Tal. Mohol, Dist. Solapur	]
	]
8(dh) Renuka Shamrao Gund	]
age: adult. occn. Agri.	]
r/o Ashti, Tal. Mohol, Dist. Solapur	]
	]
9. Malan Machindra Pawar	]
(died) L.R. Respondent Nos. 1, 5 & 8 (a) to 8(h)	]
	]
9A. Kurundas Bajrang Pawar	]
age: adult. Ocn. Agri.	]
	]
10. Satyawar Bajrang Pawar	]
age: adult, Occn. Agri.	] Respondents.
	]
11. Gowardhan Bajrang Pawar	]
age: adult, Occn. Agri.	]
	]
12. Arun Bajrang Pawar	]
age: adult, Occn. Agri.	]
	]
13. Bibishan Bajrang Pawar	]
age: adult, Occn. Agri.	]
	]
14. Shankar Shivaji Lawate	]
age: adult, Occn. Agri.	]
	]
15. Sambhaji Shivaji Lawate	]

- age:adult, Occn.Agri.]
16. Ramlakhan Shivaji Lawate,]
- Minor through guardian mother Bhamabai]
- Shivaji Lawate.]
- All 10 to 16 are r/o Mendhapur]
- Tal. Pandharpur, Dist.Solapur]
17. Sharda Vithal Dongre]
- age: adult Occn.Agri.]
- R/o Mendhapur, Tal.Pandharpur,Dist.Solapur]
18. Suresh Tukaram Chavan]
- age: adult Occn.Agri.]
- R/o Mendhapur, Tal.Pandharpur,Dist.Solapur]
19. Fulabai Maruti Surve]
- age: adult, Occn.agri.]
- r/o Modnimb,Tal. Madha, Dist.Solapur]
20. Purshottam D. Jdhav (**stands abated**)]
21. Jyotiram Bhagwat Mahadik (**stands abated**)]
22. Rukhmini Bajrang Mahadik (**stands abated**)] Respondents.
23. Rukini Mahadev Bhosale (**stands abated**)]
24. Suryakant Bhagwat Sawant]
- age: adult. Occn.Agri.]
25. Shobha Tanaji Bhosale (**stands abated**)]
26. Anil Bhagwat Sawant]
- Age: adult.occn.Agri.]
- All Nos. 21 to 27 r/o Gursale]
- Al. Pandharpur, District. Solapur]

Mr. Sandeep S. Salunke, for the appellants.

Mr. Ajay Joshi, for respondent Nos. 1 to 4.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

CLOSED FOR ORDER ON : 26.06.2018

JUDGMENT PRONOUNCED ON : 28th JUNE, 2018.

JUDGMENT :

1] Heard learned counsel for the appellant and respondent Nos. 1 to 4.

2] Admit.

3] With consent of both the learned counsels, appeal is taken up for final hearing at the stage of admission itself.

4] This appeal takes an exception to the judgment and decree dated 8.4.2013 passed by Ad Hoc District Judge, Pandharpur, in Civil Appeal No.129 of 2007, which was directed against the judgment and decree dated 17.4.2007, passed by the III Joint Civil Judge Junior Division, Pandharpur in R.C.S.No.276 of 1998.

5] The said suit was filed by the present appellants for partition and separate possession of their share in the joint family properties. It is their case that the appellant No.2 is the wife of respondent No.1. Appellant No.1 is their daughter. Respondent No.8,

since deceased, was the father of respondent No.1. Respondent No.4 is the second wife of respondent No.1. Respondent Nos. 2 and 3 are the children born to respondent Nos. 1 and 4, out of the wedlock.

6] It is the case of the appellants that as the appellant No.2 was not treated properly by respondent No.1, she was constrained to reside separately from him. Earlier her name was entered into the joint family property bearing gat No.240. However, respondent No.1 her husband without taking her consent, has entered the said land in the name of respondent Nos. 2 and 3 whereas, the land bearing Gat No.119 is entered in the name of respondent No.5. Not only that, on 7.8.1996 respondent No.8 her father-in-law had filed application for entering the name of other respondents in the 7x12 extracts of the suit properties. Accordingly Mutation Entry bearing No.2731 was certified, as a result of which, the names of respondent Nos. 2, 3, 5 and 6 were entered in the 7x12 extracts of other joint family properties. Moreover, in order to deprive the appellants of their shares, in the joint family properties, respondent No.1 has not kept any property in his name. In view thereof, appellants were constrained to file this suit for partition and separate possession of their share in the joint family properties.

7] This suit came to be resisted by respondent No.1, mainly on the ground that as there is no partition between him and his father

respondent No.8, appellants have no right to sue for partition of the joint family properties. It was contended that appellant No.2 was only entitled to ask for maintenance during the life time of her husband and she has no right to get share in the property. It is denied that the names of other respondents were entered into record of rights of the suit lands to avoid the shares of appellants. It is submitted that it was done only by way of family arrangement. In sum and substance, therefore, the right of the appellants to claim relief of partition was challenged, as respondent No.1 was still residing in the joint family with respondent No.8 his father.

8] On the respective pleadings of the parties, the trial Court framed the necessary issues. In support of their case, appellant No.2 examined herself. However, respondents had not led any oral or documentary evidence on record.

9] On appreciation of the evidence on record, the trial Court arrived at a finding that all the suit properties are the ancestral joint family properties and the appellants are entitled to get partition of their separate share in the suit property. One of the contentions raised by respondents in the course of cross examination of the appellant No.2, that the lands bearing Block No.401 and 398 situated at Gursale were not the ancestral joint family property as it was purchased by respondent No.8 along with four other co-owners and

therefore, it was his self acquired property, was also rejected by the trial Court. The trial Court further held that the joint family properties are already partitioned by respondent No.8. Accordingly the names of other respondents are entered into revenue record. Therefore, the contention that there was no partition between respondent No.1 and respondent No.8 cannot be accepted. The trial Court also held that the appellant No.1 being the daughter, is entitled to sue for partition, in view of the amended section 6 of the Hindu Succession Act, 1956. In the said partition, appellant No.2 being the legally wedded wife of respondent No.1 is also entitled to have her share carved out.

10] The first Appellate Court, however, reversed this well reasoned judgment of the trial Court on two counts. Firstly that the appellant No.1 being a daughter, born prior to amendment to Section 6 of the Hindu Succession Act, 1956 came into effect, she is not a co-parcener and has hence no right to claim share in the joint family property of her father. For recording this finding the appellate court has relied upon the judgment of this Court in the case of **Vaishali Satish Ganorkar -vs- Satish Kesharao Ganorkar**, [2012 Mh L.J. (3) 669]. It was further held that by the appellate Court that in view of Article 307 of the Hindu law by Mulla, during the life time of respondent No.8, with whom respondent No.1 was still residing in the

joint family as there is no proof of partition, the appellants cannot sue for partition. The appellate Court, therefore, allowed the appeal and dismissed the suit.

11] Being aggrieved thereby, this Second Appeal is preferred on the following substantial questions of law.

1. Whether appellant No.1 being the daughter of respondent No.1, is entitled to get share in the joint family property?
2. If yes, whether in the proposed partition, appellant No.2 wife can also get her share partitioned during the life time of her husband?
3. Whether the suit lands at Gursale which were admittedly purchased by respondent No.8 alongwith other co-owners form part of co-parcenary or joint family property?
4. Whether there is proof of partition between respondent Nos. 1 and 8 and if not, whether appellants can claim partition in view of Article 307 of the Hindu Succession law by Mulla?

12] According to learned counsel for the appellants, though the first appellate Court has rejected the claim of appellant No.1 daughter in the joint family properties by placing reliance on the judgment of Vaishali Ganorkar -vs- Satish Ganorkar (supra), in view of the judgment of the Apex Court, in the case of **Prakash -vs- Phulavati [(2016) 2 SCC 36]**, the said judgment being expressly

overruled that finding of the appellate Court needs to be quashed and set aside.

13] Per contra, according to learned counsel for the respondents, in view of the amendment to section 6 of Hindu Succession Act, appellant No.1 can have interest at the most in co-parcenary property, but not in the joint family properties. Herein the case, according to him, so far as the lands situated at Gursale are concerned, they are not the co-parcenary properties, but they are the joint family property and there is distinction between the co-parcenary property and the joint family property. To substantiate his submission, learned counsel for the respondents has relied upon the judgment of the Apex Court, in the case of **Uttam -vs- Saubhag Singh and others [(2016) 4 SCC 68]**.

14] However, in my considered opinion, the facts of the said case were totally different. In that case on the death of one Jagannath Singh in the year 1973, the property which was ancestral property in the hands of Jagannath Singh and other co-parceners, devolved by succession under Section 8 of the Hindu Succession Act. This being the case, it was held that the property ceased to be the joint family property on the death of Jagannath Singh and other co-parceners and his widow held the property as tenants in common and not joint tenants. This being the case, on the date of birth of the appellant in

the year 1977, the said ancestral property not being the joint family property, it was held that the suit for partition would not be maintainable.

15] As against it, in the present case, there is no question of appellant No.1, being born after the death of respondent No.8. The suit was filed at the time when respondent No.8 was very much alive and the property continued to be the joint co-parcenary property.

16] As regards the entitlement and share of the appellant No.1 in the suit property, now in view of the law laid down by the Apex Court, in the case of *Prakash -vs- Phulavati* (supra), which is further confirmed and reaffirmed by the Hon'ble Supreme Court, in the case of **Dhanamma Alias Suman Surpur and anr -vs- Amar and ors [(2018) 3 SCC 343]**, the legal position is unequivocal that now a daughter of a co-parcener acquires by birth the status of co-parcener in her own right in the same manner as the son. One of the incidents of co-parcenary, being the right of a co-parcener to seek severance of status, even a daughter can now avail right to partition. It was categorically held in this judgment that,

“Even when the daughters are born prior to enactment of Hindu Succession Act 1956, in view of the amendment to Section 6 of the said Act in the year 2005, they also acquire the status of a co-parcener by virtue of birth and

hence they are entitled to sue for partition”.

It was further held that,

“The amended provision of Section 6 of the Hindu Succession Act, statutorily recognizes the rights of daughter as co-parcener since birth, as the Section uses the words “in the same manner as the son”.

17] It is, therefore, apparent that both the son and daughter having been conferred the right of being “co-parceners by birth”, and the right to partition being inherent in the co-parcenary property, it can be availed of by any co-parcener, even a daughter who is also co-parcener. Therefore, as regards the right of appellant No.1 of suing for partition of her share in the suit property, the legal position now being fairly well crystallized, the finding of the appellate Court denying her the said right, being against this legal position, is required to be quashed and set aside.

18] Once it is held that appellant No.1, being the co-parcener by birth has right to sue for partition, it follows that in the said partition, appellant No.2 who is legally wedded wife of respondent No.1 is also entitled to claim partition and separate possession of her share in the joint family property.

19] The next question for consideration is, about the

applicability of Article 307 of Hindu Law by Mulla. The appellate court has placed much reliance on this provision which is applicable for Mumbai and according to which the son is not entitled to sue for partition if father is joint with his own father, brother or other coparceners and son can enforce partition against his father only if father is separated from them.

20] According to learned counsel for respondents, herein the case, there is no proof that partition amongst respondent Nos. 1, 5 and 8 had taken place earlier. In such situation, appellant No.1, who is a daughter and having no more rights than that of a son, cannot sue for partition.

21] However, in this respect also, on facts it is a categorical finding recorded by the trial Court, which is based on the documents on record proving that the family arrangement was already made, on the basis of which different lands were entered into the names of various co-parceners. By the Mutation Entry No.2731(Exh.16), the suit properties bearing Gat Nos.69, 244/2 and 70 were earlier given to the share of appellant No.2. Not only that, on the application of respondent No.8, by the Mutation Entry (Exh.17), the names of his separated sons are also entered into record of rights. Respondent No.1 himself has entered the names of his two sons, that is respondent Nos. 2 & 3 in the lands received to his share, bearing Gat

No.60, 59, 244/1. The Mutation Entry (Exh.17) further shows that the lands bearing Gat No.90, 99, 549 and 244/2 are already given to the share of respondent No.5 Dhanaji, the brother of Respondent No.1.

22] Thus, the trial Court has rightly held that the suit properties are already partitioned amongst the legal heirs of respondent No.8 Machindra, viz: respondent No.1 and his other coparceners. The father of respondent No.1 namely respondent No.8-Machinra, has already applied to the Revenue authorities stating that his sons are living separately and therefore to enter their names in the 7x12 extracts of the suit properties. As stated above, even the name of appellant No.2 was also entered in the 7x12 extract when she was having cordial relations with respondent No.1, though later on the said name was deleted and the names of respondent Nos. 2 and 3 were entered to the said land. Thus, the fact remains that there was prior partition.

23] This fact is admitted by respondent No.1 also in the Criminal Proceeding bearing Misc. Application No.302 of 1992, which was filed by the appellant No.2 for enhancement of maintenance. In that proceeding respondent No.1 categorically deposed that he is residing separately from his brothers and father. The Mutation Entries Exh.16, 17, 18 and 19 are the proof of the fact of partition.

Therefore, as rightly held by the trial Court, only with an intention to deny share of appellants in the suit properties, this contention is raised that respondent No.1 is still in the joint family with his father and there is no partition. The trial Court has discarded the same, the appellate Court has, however, committed an error accepting the same and denied the appellants their rightful share in the suit properties.

24] This brings me to the last question as to the nature of the suit lands situated at Gursale. Admittedly, the said lands were purchased by respondent No.8 alongwith four other co-owners. It may be true that appellant No.2 in her cross examination has deposed that she cannot tell whether these lands were ancestral property or was self acquired property of respondent No.1, but as observed by the trial Court, the fact remains that absolutely no evidence is produced on record by respondent No.8 to show that he has any other source of income than the income from the joint family property. Therefore, assuming that he has purchased them, as they are purchased from the income of the joint family properties, it has to be held that the appellants are having share in the said lands also.

25] It is pertinent to note that in their written statement, respondents have not challenged the case put up by the appellants that all these properties including the lands situate at Gursale are ancestral properties of the appellants and respondents. No specific

contention was raised that these lands at Gursale being purchased by respondent No.8, they do not form the part of joint family property and they were his self acquired property, purchased from the income derived from any independent source. None of the respondent has entered into the witness box to prove that respondent No.8 has any independent source of income from which he has purchased these lands.

26] Hence, reliance placed by learned counsel for the respondents on the judgment of the Apex Court, in the case of **D. S. Lakshmaiah and another -vs- Balasubramanyam and another [(2003) 10 SCC 310]**, is misplaced one. It may be true that, as held in this judgment, the initial burden of establishing that there was any nucleus in the the form of any income, was on the appellants. However, here in the case appellants had discharged that burden as there was sufficient income from the joint family property. It was for the respondents to prove that respondent No.8 was having independent income. Hence, it has to be held that as he was in possession of sufficient joint family properties, the income from it could form the nucleus. In the absence of any such evidence on record, the trial Court has rightly held that the suit lands situate at Gursale also form part of joint family property and therefore, appellants are entitled to have share therein.

27] To sum up therefore, this appeal needs to be allowed by setting aside the judgment and decree passed by the first appellate Court and restoring the judgment and decree passed by the trial Court, according to which the suit filed by the appellants for partition and separate possession is decreed

28] As a result, the Second appeal is allowed with costs.

29] The judgment and order passed by the first Appellate Court is set aside and the judgment and decree passed by the trial Court is restored.

[DR.SHALINI PHANSALKAR-JOSHI, J.]