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

CIVIL REVISION APPLICATION NO.637 OF 2016

- | | | |
|--|---|--------------------|
| 1. Shri. Sarjerao Dhondiba Sarode |] | |
| age: 48 years, Occn. Agriculturist |] | |
| |] | |
| 2. Shri.Ramdas Dhondiba Sarode |] | |
| age: 34 years, Occn. Agriculturist |] | |
| |] | |
| 3. Smt. Sarsabai Dhondiba Sarode, |] | |
| age: 61 years, Occn. Housewife. |] | |
| |] | |
| Nos. 1 to 3 r/at Saradwadi, Tal.Shirur |] | <u>Petitioners</u> |
| District: Pune |] | Original |
| |] | Defendant |
| 4. Smt. Asha Namdev Durge |] | Nos |
| age: 55 years, Occn.Household |] | 1 to 6. |
| r/at Red New Colony, Ghodnadi, |] | |
| Tal. Shirur, District: pune |] | |
| |] | |
| 5. Smt. Mangal Raosaheb Shinde |] | |
| age: 36 years, Occn. Household |] | |
| r/at Borhade Mala |] | |
| Tal.Shirur, District: Pune |] | |
| |] | |
| 6.Smt. Sunita Ramdas Choudhary |] | |
| age: 30 years Occ. Household |] | |
| r/at Kohakadi, Tal.Parner |] | |
| District : Ahmednagar |] | |

V/s.

- | | | |
|---------------------------------|---|-----------------------|
| 1. Smt. Kamal Kerubhau Pachange |] | |
| age: 54 yrs. Occn.Household, |] | |
| r/at and Post Dhokasangavi |] | Respondent |
| Tal. Shirur, District: Pune |] | <u>Nos. 1 & 2</u> |
| |] | Original |
| 2. Smt. Suman Sureshrao Gaikwad |] | Plaintiffs. |

age: 50 years, Occn. Household	]
r/at & post Shirur, Revenue Colony,	]
Tal. Shirur, District: Pune.	]
	]
3.Smt. Changunabai Thakaji Nimonkar	]
age: 62 yrs, Occn.Household	]
r/at Ganji Bhoyare, Tal., Parner	]
District: Ahmednagar	]
	]
4. Shri. Vitthal Maruti Sarode,	]
age: 72 years, Occn.Agriculturist	]
	]
5. Shri.Kundalik Maruti Sarote	]
age: 70 years, Occn. Agriculturist	]
	]
6. Shri.Dnyandev Maruti Sarode	]
age: 67 years, occn. Retired Bank Officer	]
	]
7. Shri. Bhaskar Maruti Sarode	]
age: 62 years, Occn.Agriculturist	]
	]
8. Shri.Mahadev Maruti Sarode,	]
age: 69 years, Occn.Agriculturist	]
	]
9. Shri.Narayan Maruti Sarote	]
age: 57 years, Occn.Medical Practitioner	]
	]
10. Shri.Pandurang Bhaguji Sarode	]
age: 72 years, Occn.Agriculturist	]
	]
11. Shri.Kisan Bhaguji Sarode	]
age: 70 years, Occn. Agriculturist	]
	]
12. Shri.Nivrutti Bhaguji Sarode	]
age: 77 years, Occn. Agriculturist	]
	]
13. Shri.Sopan Dinkar Sarode	]
age: 48 years, Occn. Agriculturist	]
	]
14. Shri. Vilas Dinkar Sarode	]
age: 47 years, Occn. Agriculturist	]
	]
15. Shri.Sunil Dinkar Sarode	]

Respondents.
Nos. 3 to 18
Original
Defendant
Nos.
7 to 22

age: 44 years, Occn. Agriculturist	]
	]
16. Smt. Krishnabi Dinkar Sarode	]
age: 68 years, Occn. Household	]
	]
17. Shri. Manik Vitthal Sarode	]
age: 50 years, Occn. Agriculturist	]
	]
18. Shri. Tukaram Kundalik Sarode	]
age: 50 years, Occn. Agriculturist	]
	]
all are residing at: Saradwai, Tal. Shirur	]
District: Pune.	]

Mr. Prathmesh B. Bhargude, for the Petitioners.
Mr. A. V. Borwankar, for the Respondent Nos. 1 & 2
Mr. Kaustubh N. Marathe, for respondent Nos. 4 to 9.
Mr. Mandar Soman, for respondent Nos. 17 and 18.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

CLOSED FOR ORDER ON : 5th MARCH, 2018.

JUDGMENT PRONOUNCED ON : 14th MARCH 2018.

JUDGMENT

1] Heard learned counsel for the petitioners and learned counsel for the respondents.

2] Rule.

3] Rule is made returnable forthwith with the consent of learned counsel for both the parties and the Revision Application is taken up for final hearing.

4] This Revision Application, filed under Section 115 of Code of Civil Procedure, takes an exception to the order dated 1.8.2016, passed by the 5th Additional Judge, Small Causes Court, Pune below Exh. 25 in Special Civil Suit No.1196 of 2014.

5] The petitioners herein are the original defendant Nos. 1 to 6. Application at Exh.25 was filed by them under Order VII Rule 11(a) and (d) of Code of Civil Procedure, on the ground that the suit does not disclose the cause of action and the suit is apparently barred by the principle of *res-judicata* under Section 11 of Code of Civil Procedure. The trial Court, however, after hearing, learned counsel for both the parties, was pleased to reject the said application and hence the instant Revision Application, to set aside the said order.

6] Facts of the litigation are to the effect that, respondent Nos. 1 & 2, have filed this suit before the trial Court for partition and separate possession of their share in the ancestral joint family properties. They are the daughters of original defendant No.8, who is respondent No.4 in this Revision Application. The defendant No.8 Vitthal, alongwith his brothers and mother had earlier filed the suit bearing R.C.S.No.82 of 1991, in the Court of Civil Judge Junior Division at Ghodnadi, District Pune, for partition and separate possession of their share in the suit properties, which were agricultural lands and also the house property. In that suit, present

petitioners had raised a specific contention that the partition of the ancestral joint family properties has already been effected in the year 1958 and since then all the co-sharers are cultivating their respective shares and also residing separately. Accordingly, issue No.4 was framed in the said suit as to “Whether the present petitioners prove that the partition of the ancestral properties has already been effected in the year 1958?”. In the said suit, both parties led oral as well as documentary evidence and on the basis of the same, the trial Court was pleased to answer that issue in the affirmative and to dismiss the said suit vide its judgment and order dated 9.10.2000.

7] Being aggrieved by the said judgment and order, Civil Appeal No.1013 of 2000 was preferred by the plaintiffs in that suit and in the said appeal, same point was framed for determination as to, “Whether the defendants prove that the partition of ancestral properties has been effected or not?” The Appellate Court also confirmed the finding of the trial Court and held that the partition of landed property has already been effected between the three brothers in the year 1958 and same was acted upon. This point was, thus, answered in affirmative as “proved” and accordingly appeal came to be dismissed so far as partition of agricultural lands was concerned. However, as regards house properties, it was held that

the plaintiffs were entitled to get partition and separate possession of their share.

8] This judgment of the Appellate Court dated 28th March, 2003, was challenged by the original plaintiffs of that suit in Second Appeal No.49 of 2005 and this Court vide its order dated 31st March, 2005, was pleased to hold as follows:-

“After having heard counsel for the parties, I am satisfied that the findings recorded by the Appellate Court are based on legal evidence. There is no perversity in the findings of the Appellate Court. No substantial question of law arises. The Second Appeal is dismissed with no order as to costs”.

9] Thus, the earlier suit which was filed by defendant No.8 Vitthal alongwith his other brothers, for partition of the agricultural lands came to be dismissed upto this Court, holding that the partition of the lands has already been effected in the year 1958 and also acted upon.

10] Now this present suit is filed by respondent Nos. 1 & 2, who are the daughters of defendant No.8, who has filed the earlier suit alongwith his brothers. In the present suit, respondent Nos. 1 and 2 are again claiming the partition and separate possession of their share in the agricultural lands and further seeking the relief that the

earlier orders passed in R.C.S.No.82 of 1991 and further orders thereon be set aside.

11] In this suit, they have contended that they being the daughters of defendant No.8, they are entitled to have shares in the suit properties as they are the coparceners. It is further contended that no such partition, as alleged by defendants in that suit, was effected by a registered instrument or by a decree of Court and therefore, they are entitled to get partition and separate possession of their shares. The same contentions which were raised by their father in the earlier suit, as to how there was no partition by metes and bounds in the year 1958, are raised by them in this suit also, contending inter-alia that at the most, it was an understanding arrived at between the family members, which cannot be construed as partition; the family still continues to be joint and hence as the decree in the earlier suit was obtained by committing fraud upon the Court, the said decree cannot be binding on them. They are still entitled to get partition and separate possession of their share.

12] If in this backdrop, the issue of *res-judicata* raised by petitioner is to be decided, then in considered opinion of this Court, therefore, even a cursory glance to the averments made in the plaint and the reliefs claimed in this suit and the pleadings and the reliefs claimed by defendant No.8 in the earlier suit, is more than sufficient

to show that the plaintiffs of this suit, being the daughters and legal heirs of plaintiff of that suit and also claiming under the same title, present suit is apparently and clearly barred by the principles of *res-judicata*. It is pertinent to note that in this suit, they are claiming through their father, that is defendant No.8. They are not claiming any independent right over the suit properties, which they cannot, but their entire claim is based on the right of their father in the suit property. Therefore, even a bare perusal of the plaint in this suit, and the plaint of earlier suit and the judgment and orders passed therein, goes to show that the present suit clearly attracts the bar of *res-judicata* under Section 11 of Code of Civil Procedure, which lays down that:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
(emphasis supplied)

13] The dispute raised in the present suit that there was no such partition effected in the year 1958 or it was not acted upon and

therefore, plaintiffs are having the right to claim partition of their share in the agricultural lands, has already been decided finally upto this Court. Thus, the issue raised in the present suit has been “directly and substantially in issue” in the earlier suit, which was again between the same parties, under whom they or any of them claim, litigating under the same title. The plaintiffs in the present suit are claiming under defendant No.8 and litigating under the same title and therefore, it has to be held that the decision of the earlier suit acts as *res-judicata* for the present suit.

14] According to learned counsel for respondents/plaintiffs, however, the issue of *res-judicata* being a mixed question of law and facts, as held by this Court, in the case of *Kisanrao Raghvendrarao Kulkarni -vs- Sunil Vyankatrao Kulkarni and ors*, [2013 (3) Mh. L.J. 526] and also by the Apex Court, in case of *Vaish Aggarwal Panchayat -vs- Inder Kumar and ors* MANU/SC/927/2015, said issue cannot be decided at this preliminary stage and that too on the application filed under Order VII rule 11 (d) of CPC, for rejection of the plaint. It is urged that for deciding the said issue, the pleadings and issues raised in the earlier suit, including the judgment passed therein is required to be considered and therefore, the said issue should not be decided at the threshold.

15] It is true that normally the issue of *res-judicata* being a mixed question of facts and law, cannot be decided at the interim stage, but the use of the word, “normally” indicates that the said proposition of law is not too wide to preclude the Court from deciding the said issue at preliminary stage, even in a case, where on the face of it, it is apparent that the suit is barred by *res-judicata*.

16] In the present case, the judgments of the trial Court, Appellate Court and this Court, in the earlier suit are produced on record. The perusal of those judgments coupled with the averments made by the plaintiffs, in the present plaint giving the details of the earlier litigation, is more than sufficient to show that the issue, which was directly and substantially raised and decided in that suit, is again raised as direct and substantial issue in this suit and that too, by the legal heirs of one of the plaintiffs of that suit. Therefore, here, no further evidence is necessary at all to decide the issue of *res-judicata*. Hence, it cannot be said that this issue requires further consideration and it cannot be decided by this Court at the interim stage, in view of the fact that apparently the suit is clearly barred by principle of *res-judicata*, on the own showing of plaintiffs in view of the details of earlier litigation given in this plaint itself. If for deciding the issue of *res-judicata*, the Court is required to consider the pleadings or evidence in the earlier suit, then only, it may be necessary to defer

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the hearing and decision on that issue till final hearing of the suit but that is not the case here. Here on the very documents produced by the plaintiffs and own averments made by the plaintiffs in the plaint, bar of *res-judicata* clearly becomes applicable and therefore, on this very ground itself, the plaint is liable to be rejected.

17] Now coming to the cause of action for filing this suit, the case of respondents/plaintiffs is that, they are seeking partition and separate possession of their share in the suit property, in their independent right as coparceners. It is submitted that, in view of the amendment made in Section 6 of the Hindu Succession Act, 1956 by Amendment Act of 2005, they have become coparceners. Hence, they are entitled to get partition of their share on their independent right. It is submitted by learned counsel for respondents/plaintiffs that the averments made in the plaint are germane to decide the application under Order VII Rule 11 of CPC and these averments show that the cause of action for filing of the suit arose on 1st December, 2014, when the plaintiffs, for the first time came to know about the orders passed in earlier suit in respect of partition between their family members. Therefore, it is urged that a clear cause of action is disclosed in the plaint, further stating that the decree passed in the earlier suit was obtained by fraud and therefore that decree is also sought to be set aside. According to learned counsel for

respondents/plaintiffs, therefore, on the plain reading of the plaint, as the cause of action is disclosed, the plaint cannot be rejected.

18] However, in this respect, as rightly submitted by learned counsel for the petitioners, in order to ascertain whether there is real cause of action for filing of the suit or not, there has to be “meaningful” and not “formal” reading of the plaint. The court has further to see, whether the plaint discloses a clear right to sue or the clever drafting of the plaint has merely created the illusion of the cause of action. As observed by the Apex Court in case of *T. Arivandandam -vs- T.V. Satyapal and another* [(1977) 4 SCC 467],

“The learned Munsif must remember that if on a meaningful- not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An Activist Judge is the answer to irresponsible law suits”. (emphasis supplied)

19] Following this judgment in *T. Arivandandam -vs- T.V. Satyapal and anr (supra)*, in *I.T.C. Ltd -vs Debts Recovery Appellate Tribunal* [(1998) 2 SCC 70], also it was held that,

“clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. The ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7 Rule 11(a). In as much as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on “fraud”, the Bank cannot take shelter under the words “fraud” or “misrepresentation” used in the plaint”.

20] Thus, the emphasis of the Court has to be on finding that the plaint discloses a clear right to sue. If it does not, then such plaint cannot survive and it has to be nipped in bud. The Hon'ble Apex Court has, in case of *Church of Christ Charitable Trust and Educational Charitable Society -vs- Ponnamman Educational Trust [(2012) 8 SCC 706]*, also after reproducing the above said observations in case of *T. Arivandandam -vs- T.V. Satyapal (supra)*, held in paragraph No.13 that:-

“While scrutinizing the plaint averments, it is the bounden duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts, which taken with the law applicable to them, gives the plaintiff the right to relief against the defendant”.

21] Here in the case, therefore, it is necessary to see whether the meaningful reading of the plaint discloses that the plaintiffs in this suit have the right to relief against the defendants and the cause of action, as given by the plaintiffs is real cause of action or it is merely a illusory cause of action.

22] The cause of action given by the plaintiffs in the plaint is that it arose, when they got knowledge of the various orders passed in the earlier suit. Now, once it is held that they are claiming through the plaintiff of that suit, whatever orders are passed in that suit, being binding on them, they cannot contend that their knowledge about said orders gave them the cause of action to file the present suit. As regards the bundle of other material facts which according to them, constitute the cause of action for filing this suit, those are the facts same which were pleaded in the earlier suit, by their father, about there being no partition in the year 1958. Hence those facts cannot now give rise to fresh cause of action.

23] As regards the contention of the plaintiffs about their non joinder in the earlier suit, at the time when the suit was filed in the year 1991 they were not having any right of coparceners in the suit property. Their own father has filed the said suit, therefore, he was very much alive and hence they cannot contend that they were necessary parties to that suit. If on their own showing, that they are

claiming through their father and as their father was very much representing their interests, they are estopped from contending that for their non joinder in the earlier suit, the judgment and orders therein are vitiated.

24] It is pertinent to note that when the Second Appeal in that suit came to be dismissed by this Court on 31st March, 2005, at that time also, the present plaintiffs were not having any independent right in the suit property as coparceners. They are claiming their right in the suit property on the basis of amendment made in Section 6 of the Hindu Succession Act, 1956 with effect from 9.9.2005. However, the scope of amended section 6 of the Hindu Succession Act has already been explained and set at rest by various decisions of this Court and the Apex Court. It is in addition to the fact that Proviso of sub section (1) to section 6 of the Hindu Succession (Amendment) Act, is very clear to state that this amendment in section 6 of the Act does not affect or invalidate the partition that had already taken place before the 20th day of December, 2004. For ready reference, Section 6 of Hindu Succession Act, as amended by the Amendment Act, 2005 and which is in force w.e.f 9th September, 2005 can be reproduced as under:-

“6.Devolution of interest in co-parcenary property (1)

On and from the commencement of the Hindu Succession

(Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall -

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son;

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

Provided that nothing contained in this sub section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th Day of December, 2004”.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) 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 testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter; and

(c) the share of the predeceased child of a predeceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act,

2005 (39 of 2005), nothing contained in this sub-section shall affect

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 (39 of 2005) had not been enacted.

Explanation.—For the purposes of clause (a), the expression “son”, “grandson” or “great-grandson” shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005).

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.—For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]”

25] Thus, the plain reading of the Proviso to sub section (1) of section 6 of the Act, makes it clear that the right given to a daughter as coparcener in the joint family property by way of Amendment Act

of 2005, cannot be available, if there is already any disposition or alienation, including any partition or testamentary disposition of property, which had taken place before the 20th day of December, 2004. Explanation to the Section further clarifies that such partition should be made by execution of a registered deed of partition or effected by a decree of a Court.

26] While considering the effect of this Amended Section 6 of the Act, the Full Bench of this Court, has in the case of *Badrinarayan S Bhandari and ors -vs- Omprakash Shankar Bhandari [(2014) (5) Mh. L.J. 434]*. held in paragraph No. 42 to 45 that:-

“42. Two conditions necessary for applicability of Amended [Section 6\(1\)](#) are :

- (i) The daughter of the coparcener (daughter claiming benefit of amended [Section 6](#)) should be alive on the date of amendment coming into force;
- (ii) The property in question must be available on the date of the commencement of the Act as coparcenary property.

Proviso to [Section 6\(1\)](#) reads as under:-

“Provided that nothing contained in this sub- section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.”

43. It is significant to note that amended Bill was introduced in Rajya Sabha on 20 December 2004 and therefore Parliament saved all dispositions or alienations including

partition and testamentary disposition of property, which had taken place before introduction of the Bill in Rajya Sabha, but even registered partition deeds and the partitions obtained by decree of Court after 20 December 2004 are not saved. Otherwise some people might have executed such registered partition deeds or obtained collusive decrees of the Court between 20 December 2004 and 8 September 2005 to deprive daughters of their rights in the coparcenary property by removing the property in question from the stock of coparcenary property, thus changing the nature of the property by such device.

Similarly, sub-section (5) of [Section 6](#) makes it clear that nothing in amended section shall apply to a partition which was effected before 20 December 2004.

44. Learned counsel for the appellants would, however, submit that explanation to [Section 6](#) clearly provides that partition means any partition made by execution of a deed duly registered under the [Registration Act](#), 1908 or a partition effected by a decree of a Court and therefore, if an oral partition had taken place before 20 December 2004, such partition would not be saved either by the proviso to sub-section (1) or sub-section (5) of [Section 6](#).

It is, therefore, submitted that oral partition effected of coparcenary property even if effected in the year 1957, would not be saved and therefore [Section 6](#) must be held to be retrospective with effect from 17 June 1956.

45. Though the argument may prima facie appear to be attractive, it does not recognize the distinction between an oral partition or partition by unregistered document which is not followed by partition by metes and bounds on the one

hand and oral partition or 47 of 72 SA.566.2011 partition by unregistered document which was acted upon by physical partition of the properties by metes and bounds and entries made in the public record about such physical partition by entering the names of sharers as individual owner/s in the concerned public record, (such as records of the Municipal Corporation or the Property Registers maintained by the Government) on the other hand. It is only where an oral partition or partition by unregistered document is not followed by partition by metes and bounds, evidenced by entries in the public records that a daughter would be in a position to contend that the property still remains coparcenary property on the date of coming into force of the [Amendment Act](#). Thus for the Amended [Section 6](#) to apply, not only the daughter should be alive on the date of commencement of the [Amendment Act](#), but also the property should be coparcenary property on the date of the commencement of the Act i.e. 9 September 2005 or at least on 20 December 2004, when the Amendment Bill was introduced in Rajya Sabha. (emphasis supplied)

27] This legal position is further considered and confirmed by the Apex Court in the case of *Prakash and ors v-s- Phulavati and ors* [(20016) 2 SCC 36], and again in the case of *Danamma @ Suman Surpur and anr -vs- Amar and ors* [2018 SCC online SC 63]. In paragraph 22 of the judgment of this latest decision, it was

categorically held that the Proviso to Section 6(1) and sub section (5) of section 6 clearly intend to exclude the transactions referred to therein, which may have taken place prior to 20-12-2004 on which date the Bill was introduced. In paragraph No.22 and 23 it has been held that :-

“22. In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20-12-2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20-12-2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the amendment in Sections 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20-12-2004. In no case statutory notional partition even after 20-12-2004 could be covered by the Explanation or the proviso in question.

(emphasis supplied)

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living

coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

(emphasis supplied)

28] Thus, as per legal position set out above, the partitions which have been effected before 20.12.2004 as per the law then applicable, are unaffected on account of Amendment in section 6 of the Act.

29] It is true that as per Explanation to Section 6(5), such partition must be made by execution of a deed of partition duly registered under the Registration Act, 1908 or a partition effected by a decree of a Court. In the present case, in the earlier suit, as stated above, it is categorically held by all the three Courts upto this Court, that the partition of ancestral joint family properties has already been effected and has also been acted upon in the year 1958 itself. Therefore, there is clearly a binding judicial pronouncement made in the earlier litigation, clinchingly holding that the partition of the ancestral landed property has been effected and acted upon in the year 1958 that is much prior to Amendment Act of 2005 came into effect or the Bill was introduced in the parliament on 20.12.2004.

Therefore, in this case the respondents/plaintiffs cannot claim any right or share in the suit property, on basis of section (6) (1) of the Amended Hindu Succession Act, 2005. Hence, the cause of action given by them for filing of this suit for partition, is, thus, totally illusory and not the real cause of action, as it does not disclose the right to sue.

30] Learned counsel for respondents/plaintiffs has tried to rely upon the judgment of Karnataka High Court, in the case of *Smt. Lalita B.S. and ors -vs- Smt. Lakshmiddevamma in Regular First Appeal No.168 of 2009 dated 31st January, 2013* to submit that whether the plaintiffs have right or not by virtue of section 6(5) of the Hindu Succession Act as amended in 2005, cannot be considered at this stage for rejecting for plaint under Order VII Rule 11(a) of CPC.

31] However, the facts of the said case show that the suit for partition and separate possession was filed by the daughters on the ground that their father has died intestate on 6.3.1985, leaving behind their mother i.e. defendant No.1, thereafter she has also died on 13.8.2011. Therefore, they claimed that they are entitled for 1/8th share in the suit property. At that stage when defendant challenged the claim of plaintiffs' 1/8th share and the issue was raised about applicability of proviso of Section 6(5) of the Hindu Succession Act, it

was rightly held that the said issue needs consideration and hence the plaint cannot be rejected on that ground.

32] However, in the instant case, on the own showing of the respondents/plaintiffs, being the daughters of defendant No.8, who is yet alive and having regard to the earlier litigation, in which it is unequivocally held that the partition has been effected by metes and bounds in the year 1958 itself and it was also acted upon, the Proviso to Section 6 (1) clearly comes into play and it rather makes it clear that the plaintiffs have no right or share in the suit property. In such situation, there is no real cause of action for filing the suit, either for seeking the partition or even for challenging the earlier decree. Merely on the basis of some illusory cause of action if the plaintiffs are seeking the partition of the properties at the instance of their father defendant No.8, who is supporting them in this Revision Application also, then as observed by the Apex Court in case of *T. Arivandandam -vs- T.V. Satyapal and anr (supra)*, it is clearly an abuse of process of law, as the suit itself is vexatious, as not disclosing clear right to sue or even the cause of action; hence such suit needs to be nipped in the bud at this stage itself. There remains nothing further to litigate or to decide and therefore, the plaint in the present suit is liable to be rejected, not only on the ground that the suit is apparently barred by principle of *res-judicata* but also on the

ground that it does not disclose the real cause of action or any right to sue and only the illusory cause of action is pleaded. The impugned order, therefore, passed by the trial Court needs to be quashed and set aside.

33] Accordingly, the Revision Application is allowed.

34] The impugned order passed by the trial Court is quashed and set side. As a result the application filed by present petitioners -defendants for rejection of the plaint under Order VII Rule 11(a) and (d) of CPC, is allowed. The plaint is rejected on the ground of suit being barred by principles of *res-judicata* and for not disclosing the real cause of action.

35] Rule is made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]