

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

Second Appeal No. 0224 of 2019

District : Ahmednagar

1. Sudhakar Kashinath Mokal,
Age : 55 years,
Occupation : Agriculture,
R/o. Madhi, Taluka Kopargaon,
Dist. Ahmednagar.
2. Yamunabai Ananda Pawar,
Age : 62 years,
Occupation : Household,
R/o. Baragaon Nandur,
Taluka Rahuri,
Dist. Ahmednagar.
3. Mandabai Ramesh Wagh,
Age : 50 years,
Occupation : Agriculture,
R/o. Panchale,
Taluka Sinnar,
Dist. Nashik.

.. Appellants
(Original
defendants)

versus

1. Namita Sudhakar Mokal,
Age : 24 years,
Occupation : Household.
2. Kantabai Sudhakar Mokal,
Age : 50 years,
Occupation : Household.

Both R/o. Aradgaon,
Taluka Rahuri,
Dist. Ahmednagar.
3. Kamalbai Dagdu Shirsath,
deceased through legal heirs :

3A. Raju Dagu Shirsath,
Age : 40 years,
Occupation : Service.

3B. Dagu Shivram Shirsath,
Age : 60 years,
Occupation : Agriculture.

Respondents no.3A & 3B
R/o. Chas, Taluka Sinnar,
Dist. Nashik.

.. Respondents
(Original
plaintiffs)

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*Mr. Shailesh S. Chapalgaonkar, Advocate, for the
appellants.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 10TH APRIL 2019

ORAL ORDER :

01. Present appeal has been filed by the original defendants no.01, 02 and 04. Respondents no.01 and 02 had filed Regular Civil Suit No. 31 of 2009 for partition and separate possession. Original respondent no.03 was defendant no.03 in the suit. What is not in dispute is the relationship between the parties. Plaintiff no.01 is the daughter of defendant no.01 and plaintiff no.02 is the wife of defendant no.01. The agricultural lands bearing Gut nos. 346, 337, 389, 326 and 128 situated at village Madhi Bk., Taluka Kopargaon, District Ahmednagar, including the house situated in Gut no.128 were the ancestral properties of the plaintiff and defendants.

It was stated that the matrimonial dispute is going on between plaintiff no.02 and defendant no.01. Plaintiffs had filed maintenance application and then in the revision maintenance was enhanced. It is stated that the defendant no.01 did not deposit any amount. He filed divorce proceedings bearing H.M.P. No. 82 of 1996, but it was dismissed. Plaintiff no.02 had filed a criminal complaint bearing Criminal Complaint No. 279/1991 under Section 494 of the Code of Criminal Procedure, 1973. It is stated that the plaintiffs have share in the suit property and when they learnt that defendant no.01 had solemnized third marriage and is trying to alienate the suit property in the name of illegitimate children, they have filed the suit.

02. Defendant no.01 had contested the suit and according to him, the pedigree is incomplete. There was no cause of action for the plaintiffs to claim partition. It appears that the defendants no.02 to 04 were added subsequently. They have also contested the suit by filing written statement. They admitted that the suit properties were ancestral property though stood in the name of defendant no.01. It was stated that the plaintiffs have no *locus standi* to file suit and it was contended that in Regular Civil Suit No. 179 of 1990, the suit properties went to their share.

03. Taking into consideration the rival contentions, issues came to be framed. Learned trial Court held that the suit properties are the ancestral as well as joint family properties. However, it was held that the plaintiffs have no share or they cannot claim partition in the suit property. The suit was dismissed. It will not be out of place to mention here, that the main reason as to why the suit was dismissed was, according to the trial Court, that plaintiff no.02 would be the coparcener. But then Section 6 of the Hindu Succession Act, as amended in 2005, gives right to the daughter from the commencement of the Act and it was observed that the devolution of her interest should be 'on and from' 09th September 2005 and as defendant no.01 is alive, there cannot be devolution of share in the coparcenery.

04. Thereafter, original plaintiffs filed Regular Civil Appeal No. 63 of 2014 before District Court, Kopargaon. The appeal was heard by the learned District Judge-2, Kopargaon and after hearing both sides, the appeal was allowed. The judgment and decree passed by the learned trial Court was set aside. It was declared that the plaintiffs are having 1/6th share each. Defendant no.01 is having 7/24th share and defendants no.02, 03 and 04 are having 1/8th share each in the suit properties. It was also declared that the plaintiffs' share in Gut

no.128 would be subject to the judgment and order passed by this Court in Writ Petition No. 5702 of 2014. Now, defendants no.01, 02 and 04 have filed present second appeal challenging the judgment and decree passed by the first appellate Court.

05. Heard learned Advocate for the appellants. He submitted that the first appellate Court has not appreciated the facts and the law properly. Since no coparcener has expired, share in the coparcenery cannot devolve on plaintiff no.01. Plaintiff no.02 is the wife of defendant no.01 and, therefore, she cannot be considered as coparcener. Therefore, according to the learned Advocate for the appellants, there are substantial questions of law involved in the matter.

06. Considering the submissions as well as the judgments by both the Courts below, it is not even necessary to issue notice to the respondents. It appears that the learned trial Court has misinterpreted Section 6 of the Hindu Succession Act as amended in 2005. Plaintiff no.01 became coparcener along with defendant no.01 and by way of said amendment, she got the equal right. It appears that defendant no.01 is not having son. But then, he would have had son, then by virtue of the amendment, the daughter would have also got the same share as of son by birth. Therefore, the meaning of "on and

from" in Section 6 of the Hindu Successioin Act cannot be interpreted to say that unless a coparcener expires, others will not get any share or any share will not devolve on them. Further, when the partition is to be made on the basis of the fact that the daughter has become coparcener, then definitely the mother would get a share in the property. Plaintiff no.02, though cannot be said to be coparcener, she has a share in the property. Therefore, whatever shares have been calculated and the reason given for that calculation by the learned first appellate Court are correct. There is no substantial question of law involved in this case.

07. In the light of above, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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