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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.28 OF 2019
WITH
CIVIL APPLICATION NO.1309 OF 2019

Vishwanath s/o Sopan Pilgure = APPELLANT
(Orig.Deft.No.1)

VERSUS

1. Kalubai w/o Bhimrao Ganapure
and Ors. = RESPONDENTS
(Orig.Plaintiffs)

Mr.Ameya N Sabnis, Advocate for Appellant;

Mr.VD Gunale, Adv. For Respondent No.1;

Mr.GD Kale, Advocate for Intervenor.

CORAM : SMT.VIBHA KANKANWADI, J.

RESERVED ON : 01/09/2021

PRONOUNCED ON : 02/12/2021

PER COURT :-

1. Present appeal has been filed by original defendant No.1 to challenge concurrent judgments and decrees passed by the Courts below.

2. Present Respondent Nos.1 and 2 (original plaintiffs) filed Regular Civil Suit No.116/2008 (Old RCS No.174/2004) before Civil Judge, Junior Division, Deoni, District Latur for partition and separate possession. The learned Trial Court

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decreed the suit on 23.12.2011 and held that plaintiffs have 7/15th share; Defendant No.1 is having 6/15th share and defendants Nos.2 and 3 are having 1/15th share each in the suit lands. Original defendant No.1 thereafter challenged the said judgment and decree by filing Regular Civil Appeal No.5/2012 before the District Judge-1, Udgir, District Latur. The said appeal came to be dismissed on 25.10.2018. Hence, present Second Appeal.

3. Heard learned Advocates appearing for the respective parties.

4. It has been vehemently submitted on behalf of the appellant (original deft.No.1) that both the Courts below have not considered the evidence properly. The relationship has not been denied, but it is to be noted that original owner – Sopan had expired in the year 1983, who was survived by plaintiff No.2 – widow; defendant No.1 – son; plaintiff No.1 and defendant Nos.2 and 3 – daughters. According to the plaintiffs, the suit property were ancestral and joint family properties

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and no partition had taken place. However, deft.No.1 had come with a specific case that there was oral partition between deceased Sopan and defendant No.1 in the year 1984. In fact, the plaintiffs had given a wrong year of death of Sopan in the year 1983, but he died later. Death extract has been produced at Exhibit-88. As per that death extract, he expired on 20.1.1987. In the said partition, the defendant received Survey No.7/3. He made improvements in the said land. Survey No.4/2 was given to deceased Sopan and plaintiff No.2. However, after death of Sopan, now defendant No.1 has become owner of the same. Defendant No.1 had purchased land Survey No.4/3 and 3/2. Those are the self-acquired properties. Under such circumstance, no property was left by Sopan, which could be said to be either ancestral or joint family property. The Trial Court held that defendant No.1 has failed to prove previous partition and then came to the conclusion that all the parties have share in the suit properties. The first Appellate Court also took the same view. Even now, the daughters cannot get benefit of Amendment to the Hindu Succession Act, in the year 2005, i.e.

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Section 6 of the said Act, as admittedly, plaintiff Nos.1, and deft.Nos. 2 and 3 were married even prior to 1994. Section 29-A of the Hindu Succession Act, which was Maharashtra Amendment, made a specific provision and gave right to unmarried daughter/s after the said Act came into force w.e.f. 22nd June, 1994. Though now all the daughters have been made co-parceners; yet we are required to see that Section 29-A of the Hindu Succession Act, i.e. Maharashtra Amendment, had received assent of Hon'ble President of India in view of Article 254(2) of Constitution of India. After Section 6 of the Hindu Succession Act was amended by the Central enactment, the Centre has not repealed Section 29-A of the Hindu Succession Act. Further, he has also taken support to Section 6 of the General Clauses Act in order to support his contention to canvass that Section 29-A of the Hindu Succession Act is still in force and would prevail as it is, thereby it will not give equal share to the daughters, who were married prior to 1994. It was submitted that in view of this legal position canvassed, substantial questions of law are arising in this case, requiring admission of

the Second Appeal.

5. Per contra, learned Advocate appearing for Respondent No.1, i.e. original plaintiff No.1, supported the reasons given by both the Courts below and submitted that since the Trial Court has held that the suit properties are ancestral and joint family properties, the plaintiffs and defendants have share in the same. It was also tried to be submitted that in view of recent pronouncements on the point in the case of *Vineeta Sharma Vs. Rakesh Sharma and Ors.*, (AIR 2020 SC 3717), the daughters have equal share and it is not even necessary that father should be alive. No substantial questions of law are arising in this case.

6. At the outset, it is to be noted that after the pronouncement of the decree by the Trial Court, the appellant had not challenged computation of share either by way of separate appeal or by way of cross-objection. Even calculation of share made by the Trial Court has been upheld by the first Appellate Court. Now, before this Court also,

there is no such attempt by the original plaintiffs. Further, if at all right exists, then it can be so agitated before the Executing Court also.

7. The main point, that has been now tried to be contended, is that Section 29-A of the Hindu Succession Act is still in operation and, therefore, the married daughters, i.e. those daughters, who were married prior to 1994, will not get any share either in the ancestral or joint family property. No doubt, the said provision, i.e. Section 29-A of the Hindu Succession Act, had received the assent from the Hon'ble the President of India and definitely, it would be in view of Article 254(2) of the Constitution of India. A limited right was given to the daughter earlier and, therefore, in order to widen the scope and the rights, along with and after certain States made amendment; the Maharashtra State amended the law and gave right to the daughter equivalent to sons by making her co-parcener. However, it was limited to those daughters, who were unmarried at the time of coming into force of the said provision. It can

be seen that that provision, i.e. Section 29-A of the Hindu Succession Act, can be said to be repugnant to the earlier Act or old Hindu Law then prevailing and, therefore, it can be said that the assent of the Hon'ble President of India was necessary in view of the sub-clause(2) of the same provision.

8. In Kaiser-I-Hind Pvt. Ltd. And Ors. Etc. Vs National Textile Corporation Ltd. And Ors. - AIR 2002 SC 3404 (Full Bench), following are the observations made by the Hon'ble Apex Court, -

".....For the State law to prevail, following requirements must be satisfied -

(1) law made by the legislature of a State should be with respect to one of the matters enumerated in the Concurrent List;

(2) it contains any provision repugnant to the provision of an earlier law made by the Parliament or an existing law with respect to that matter;

(3) the law so made by the Legislature of the State has been reserved for the consideration of the President;and

(4) it has received 'his assent'.

. In view of aforesaid requirements, before obtaining the assent of the President, the State Government has to point out that the law made by the State legislature is in respect of one of the

matters enumerated in the Concurrent List by mentioning entry/entries of Concurrent List and that it contains provision or provisions repugnant to the law made by the Parliament or existing law. Further, the words "reserved for consideration" would definitely indicate that there should be active application of mind by the President to the repugnancy pointed out between the proposed State law and the earlier law made by the Parliament and the necessity of having such a law, in facts and circumstances of the matter, which is repugnant to a law enacted by the Parliament prevailing in a State. The word 'consideration' would manifest that after careful thinking over and due application of mind regarding the necessity of having State law which is repugnant to the law made by the Parliament, the President may grant assent. This aspect is further reaffirmed by use of word "assent" in Clause (2) which implies knowledge of the President to the repugnancy between the State law and the earlier law made by the Parliament on the same subject matter and the reasons for grant of such assent. The word "assent" would mean in the context as an expressed agreement of mind to what is proposed by the State."

9. It can be, therefore, presumed that the aforesaid position of law would have been considered by the Hon'ble President of India when assent was given to Section 29-A of the Hindu Succession Act.

10. At the same time, another Full bench decision of the Hon'ble Apex Court in the case of *M.Karunanidhi Vs. Union of India -AIR 1979 SC 898,* is worth considering, wherein, it has been observed thus, -

"Repugnancy between a law made by a State and by the Parliament may result from the following circumstances :

(1) Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

(2) Where however if law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with cl.(2) of Art. 254.

(3) Where a law passed by the State legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List an

entrenchment, if any, being purely incidental or inconsequential.

(4) Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with or repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Art 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254." (stress supplied)

11. Further, we can also take note of T.Barai Vs. Henri Ah Hoe and Anr - AIR 1983 SC 150,

wherein, it has been observed, -

"Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. To the general rule laid down in clause (1), clause (2) of Article 254 engrafts an exception. The result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a Concurrent subject would be

that the [State Act](#) will prevail in that State and override the provisions of the [Central Act](#) in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the Proviso to clause (2) of Article 254. Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together e.g., where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed. In all such cases, the law made by Parliament shall prevail over the State law under [Article 254\(1\)](#)." (stress supplied)

12. It can be seen that the law on the point of Succession is at Entry No.5 of the Concurrent List, i.e. List No.III in the Seventh Schedule. Article 254 of the Constitution gets attracted only when both Central and State legislations have been enacted on any of the matters in the said List and

there is conflict between two legislations. The basic principle is that the Central legislation will prevail as Article 254(1) of the Constitution gives supremacy to the law made by the Parliament. We have considered earlier as to how Section 29-A of the Hindu Succession Act, as amended in the Maharashtra, was repugnant to the old Hindu Law. As stated in T.Barai's case (supra), the general rule, laid down in clause 1 of Article 254; clause 2 engrafts an exception viz., if the President assents to a State Law, which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to earlier law of the Union. However, the Constitution itself makes a proviso to clause 2 and provides that, nothing in clause 2 of Article 254 shall prevent the Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. Now, it is to be seen that in the year 2005, the Union Government brought an amendment to Section 6 of the Hindu Succession Act and made the daughters as coparceners and this has been done with a view to give equal rights to

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the daughters in comparison to sons. When the Maharashtra State Amendment was restricted to unmarried daughters (excluding the daughters, who were married prior to 1994), no such distinction has been made in Section 6 of the amended provision by the Union Government and, therefore, the repugnancy existed. In view of the proviso, when Parliament exercised its power to bring a new legislation, the said enactment will prevail. In view of the law laid down in the aforesaid three pronouncements, it was not necessary for the Parliament to repeal Section 29-A of the Hindu Succession (Maharashtra Amendment) Act. Taking into consideration both the enactments, i.e. Section 29-A and Section 6, as amended in 2005, they cannot stand together and, therefore, the law made by the Parliament would prevail over the State Law in view of Article 254(1) of the Constitution of India.

13. Earlier the Hon'ble Apex Court considering similar provision under the Tamil Nadu Amendment Act, 1989 in the case of Mangammal alias Thulasi and Anr. Vs. T.B.Raju and Ors. - (2018) 15 SCC 662, held thus, -

“Under Section 29-A of the Hindu Succession Act, 1956 (as inserted by the Hindu Succession (Tamil Nadu Amendment) Act, 1989), the legislature has used the word “the daughter of a coparcener”. Here the implication of such wordings mean both the coparcener as well as the daughter should be alive to reap the benefits of this provision at the time of commencement of the amendment of 1989. A similar issue has been dealt with by the Supreme Court in *Prakash Vs. Phulwati - (2016) 2 SCC 36*. Thus, only living daughters of living coparceners would be entitled to claim a share in the ancestral property. In the present case, the father of the appellant daughters had already died on 29.12.1979, i.e. before the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 with effect from 25.3.1989. Hence, the appellant daughters were not the coparceners in the Hindu joint family property in view of the 1989 amendment. Consequently, they were not entitled to claim partition and separate possession at the very first instance. At the most, they could claim maintenance and marriage expenses if situation warranted. However, on the death of their father and mother, the appellants would get their property

through succession in the manner as prescribed in paras 18 and 19 of the judgment herein."

. The decision in the case of Mangammal has been partly overruled. In this connection, discussion made in para Nos.81 and 82 in the decision in the case of Vineeta Sharma, would make it crystal clear that, the same point now tried to be agitated by the present appellants, by taking help of the decision in the case of Mangammal, has been overruled by the three-Judges Bench of the Hon'ble Apex court in Vineeta Sharma's case.

18. Further, it is also to be noted that in the decision of Mangammal, reliance was placed on the decision in the case of Prakash Vs. Phulwati (cited supra) and in Vineeta Sharma's case, observations made in para No.139 would be very much important, wherein it has been held, -

"In view of the aforesaid discussion and answer, we overrule the views to the contrary expressed in Prakash v. Phulavati and Mangammal v. T.B. Raju & Ors. The opinion expressed in Danamma @ Suman Surpur & Anr. V Amar is partly overruled to the extent it is contrary to this decision."

14. In view of the decision in the case of Vineeta Sharma (cited supra) even father need not be alive and the earlier law on this point in the case of Prakash and Ors. Vs. Phulwati and Ors. (2016) 2 SCC 36, stood overruled.

15. In the present case, date of death of father Sopan is now not material. It cannot be said that after death of Sopan, claim of the plaintiffs in the year 2004, would be time barred.

16. As regards proof about earlier partition is concerned, both the Courts below are consistent and they have appreciated the evidence properly. No doubt, merely because the witnesses are not giving specific date of the partition, they are disbelieved. But, it is to be noted that when there was alleged partition between the father and the son, no separate share was carved out for the mother, i.e. original plaintiff No.2. Even after Sopan expired, defendant No.1 contends that the land allotted to deceased Sopan came to his share only as his legal heir. He cannot exclude mother and the sisters from that inheritance. Only

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mutation entries also will not be sufficient. Defendant No.1 had failed to prove that certain properties are his self-acquired properties. When the Courts below are concurrent and have taken a consistent view in consonance with the record, this Court need not interfere in the same.

17. Therefore, for the aforesaid reasons and in view of the decision in the case of Kirpa Ram (deceased) through Lrs. and others Vs. Surendra Deo Gaur and others, [2021 (3) Mh.L.J. 250]., the Second Appeal deserves to be dismissed at the threshold. Accordingly, it is dismissed. Pending Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV

Later on :

. Learned Advocate appearing for the appellant, after pronouncement of the judgment, prays for continuation of the interim relief. It is to be noted that all the three Courts including this Court have not accepted the defence that has been taken by the present appellant. The suit was filed in the year 2004 and the fruits of the decree are yet to be enjoyed by the original plaintiffs. Under such circumstance, oral request stands rejected.

**(SMT. VIBHA KANKANWADI)
JUDGE**

BDV