

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6088 OF 2018

1. Shivpalsingh s/o Shivcharansingh Gour
Age: 42 years, Occu.: Business,
R/o. Old Kautha Road,
Nanded.

2. Sanjaysingh s/o Shivcharansingh Gour
Age: 36 years, Occu.: Business,
R/o. Old Kautha Road,
Nanded.

... Petitioners

Versus

Ganesh s/o Arjunsingh Bisen
Age: 47 Years, Occu.: Business,
R/o. Gadipura, Nanded.

... Respondent

.....

Mr. M. M. Patil (Beedkar), Advocate for petitioners.
Mr. S. S. Gangakhedkar, Advocate for the respondent.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 10.06.2021

Pronounced on : 08.07.2021

JUDGMENT :-

. Rule. Rule made returnable forthwith. Heard finally, with consent of both the parties.

2. Present petition has been filed invoking the constitutional powers of this Court under Article 227 of the Constitution of India to challenge

the judgment and order dated 03.05.2018 passed by learned District Judge-4, Nanded in Miscellaneous Civil Appeal No.93 of 2016 whereby the appeal was allowed, which was filed by the present respondent and the order passed below Exhibit-57 for temporary injunction on 14.11.2016 by learned 2nd Joint Civil Judge Senior Division, Nanded in Special Civil Suit No.17 of 2016 was quashed and set aside.

3. Before turning to the disputed facts, certain admitted facts are considered. House property bearing NWCMC No.4-5-133 (old), CTS No.16477, admeasuring 337.20 sq. mtrs. situated at Gadipura, Tq. and Dist. Nanded as well as agricultural land bearing Gut No.1105 admeasuring 2 Hectare 77 R situated at Kalambar (Bk.), Tq. Loha, Dist. Nanded was the property owned by one Arjunsingh Ramsingh Bisen. Present plaintiffs are the grandsons of Arjunsingh (sons of the predeceased daughter of Arjun Singh). The genealogy has been given in plaint which shows that defendant Nos.1 to 3, 7, 8 and 9 are the real brothers and sisters and they are the sons and daughters of Arjunsingh. Defendant Nos.4 to 6 are the legal heirs of deceased Rekha and apart from the present plaintiffs, defendant Nos.10 and 11 are the legal heirs of deceased Usha. Arjunsingh's wife predeceased him. It also appears that Usha had expired in the year 2001. Arjunsingh expired on 09.04.2008.

4. With the abovesaid admitted facts, the plaintiffs had come with the case that after death of Arjunsingh, they being the grandsons of a predeceased daughter, have share in the suit properties. Defendant Nos.1 and 2 reside at Nanded and, therefore, the others have faith in them and, therefore, those defendants were cultivating and possessing the suit properties on behalf of all. After the demise of Arjunsingh, it was orally settled that the suit property would be distributed equally, however, it did not take place. Usha has 1/8th share in the suit properties and after her death, her share would devolve on the plaintiffs and their sisters. Therefore, they have filed the suit for partition and separate possession. Defendant Nos.1 and 2 filed separate written statements, however, their contention is same. They contend that they are denying that the suit properties are the ancestral properties. As per the record, defendant No.1 was in possession of the property and it is so reflected in the mutation. They have contended that the plaintiffs have no share in the suit properties.

5. At Exhibit-57, the plaintiffs filed application for grant of temporary injunction against defendant Nos.1 and 2 restraining them from creating third party interest in the suit property till the disposal of the suit. It has been resisted by the defendants and after hearing both sides, the learned Trial Judge had granted injunction against defendant

No.2 only. Defendant No.2, his servants, agents and any other person claiming through him, are temporarily restrained from creating third party interest in the suit property till the disposal of the suit.

6. Original defendant No.2 filed Miscellaneous Civil Appeal No.93 of 2016 before the learned District Court, Nanded. The Appeal was heard by learned District Judge-4 and it has been allowed. The impugned order below Exhibit-57 has been set aside and that application for temporary injunction was rejected. Hence, the original plaintiffs are before this Court.

7. Heard learned Advocate Mr. M. M. Patil (Beedkar) for petitioners and learned Advocate Mr. S. S. Gangakhedkar for the respondent.

8. It has been vehemently submitted on behalf of petitioners that the learned District Judge failed to consider that deceased Usha, through whom the plaintiffs are claiming, have independent share in the suit properties. Even as per Section 8 of the Hindu Succession (Amendment) Act, 2005, son and daughters of predeceased daughter are also included in Schedule-I. Under such circumstance, even if we don't consider the amendment to Section 6 of the Hindu Succession (Amendment) Act, 2005, yet, independently when the plaintiffs have share in the suit property and it was shown by the plaintiffs that the defendants have intention to sell out property, when they have produced paper

proclamation and advertisement to sell out the property, there was every threat to the rights of the plaintiffs over the suit properties; it ought to have been held that the plaintiffs have shown *prima facie* case and they would be put to irreparable loss, if the injunction as prayed is not granted. The plaintiffs have filed the suit for partition and if the defendants are allowed to dispose of the property, then it would be difficult for the plaintiffs to get the decree that would be passed in their favour executed. Further, though the learned District Judge had relied on the decision in *Mangamal @ Thulasi and Another Vs. T. B. Raju and others, (2018 DGLS (SC) 355)* in which reliance was placed on the decision in *Prakash and others Vs. Phulavati and others, (AIR 2016 SC 769)*, now in view of the decision in *Vineeta Sharma Vs. Rakesh Sharma and others, [(2020) 9 SCC 1]*, the decision in both these cases has been overruled to the extent it is contrary. Now, it is held that all the daughters have right equal to the sons irrespective of whether they are alive or not and whether the father is alive or not. He, therefore, prayed for setting aside the order passed by the learned District Judge and restoration of the order passed below Exhibit-57 by the learned Trial Judge.

9. Per contra, learned Advocate Mr. S. S. Gangakhedkar appearing for the respondent vehemently submitted that in view of *Vineeta*

Sharma's case (Supra), he may not press for the property i.e. agricultural land, though the fact remains that in the present case Usha had expired prior to come into force the Act of 2005, but as regards the house property is concerned, in view of Section 23 of the Hindu Succession Act, we will have to consider that till defendant Nos.1 and 2 decides to partition the suit property, especially the house property, the plaintiffs cannot have any right in that property. So long as defendant Nos.1 and 2 agrees to continue with their joint status, plaintiffs can not force them to give share in the residential area. There are restrictions imposed in Section 22 of the Hindu Succession Act for a daughter to claim possession of the house property. The daughter will have the right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow. That right cannot be extended to the plaintiffs. When plaintiffs have no *prima facie* case/right in respect of dwelling house, they cannot ask for the injunction in respect of that property. He relied on the decision by this Court in ***Lata @ Bhagyashree Arunkumar Sangole Vs. Madhukar Rajaram Ganjare and Ors., (2008 (6) Bom.C.R. 445)***, wherein it has been held by this Court that “appellant was married prior to commencement of Maharashtra Amendment Act. Hence, cannot claim benefit of Section 29-A. Omission of Section 23 under Amendment Act

does not open floodgate to ineligible female heirs for seeking partition of dwelling house. Their rights are still in abeyance until male heir is in occupation of dwelling house.” Therefore, he prayed not to grant any relief in respect of the dwelling house.

10. As regards the legal position is concerned, the things are more crystal clear now, however, for that purpose facts are important and at the cost of repetition, they may be reiterated to the extent they are applicable here. Usha expired in the year 2001 i.e. prior to come into force of the Hindu Succession (Amendment) Act, 2005, however, Arjunsingh i.e. the father expired in the year 2008 i.e. after the commencement of the Act. He has left two properties one is house property and another is agricultural land. As regards agricultural land is concerned, it can be seen that though the learned District Judge-4 had relied at that time on the decision in *Prakash and Others Vs. Phulavati and others (Supra)*, *Mangamal @ Thulasi and others (Supra)*, but in view of the recent pronouncement by the three Judge Bench of the Supreme Court in *Vineeta Sharma (Supra)*, the reference was answered thus :-

“137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

137.2. The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

137.5. In view of the rigor of provisions of Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (*sic* effected) by a decree of a court, it may be accepted. A plea of partition based on

oral evidence alone cannot be accepted and to be rejected outrightly.

138. We understand that on this question, suits/appeals are pending before different High Courts and subordinate courts. The matters have already been delayed due to legal imbroglio caused by conflicting decisions. The daughters cannot be deprived of their right of equality conferred upon them by Section 6. Hence, we request that the pending matters be decided, as far as possible, within six months.

139. 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. Let the matters be placed before appropriate Bench for decision on merits.”

11. Therefore, definitely *prima facie* case exists in favour of plaintiffs in respect of agricultural land (effect of Section 23 of Hindu Succession Act is required to be considered and therefore, only one property is taken note of here). When there was an attempt on the part of defendant Nos.1 and 2 to sell out the property, then definitely plaintiffs would suffer irreparable loss as the purpose of their suit itself would frustrate.

12. This Court is in agreement with the submission on behalf of the petitioners that apart from the present abovesaid position in ***Vineeta***

Sharma's case (Supra), independently also after 2008 i.e. death of Arjunsingh, plaintiffs in the capacity as sons of predeceased daughter would get share. Therefore, that independent right is also required to be considered while considering the *prima facie* case as that independent right under Section 8 of Hindu Succession Act coupled with Schedule-I.

13. Now, turning towards Section 23 of the Hindu Succession Act and the pronouncement relied by the learned Advocate for the respondent, this Court has to take the note of subsequent pronouncements by this Court as well as Hon'ble Apex Court. The Division Bench of this Court in ***Kaushalyabai Biharilal Pateriya and others Vs. Hiralal Bhagwandas Gupta and others, (2007 (4) Bom. C.R. 219 :: 2007 (2) ALL.M.R.679)*** has observed thus :-

“17. In the present case, what we find is that Section 23 of the Hindu Succession Act, 1956 prohibited a female heir from claiming partition until the male heirs choose to divide their respective shares. By Amending Act No.39 of 2005, effective from 05-09-2005, this provision of Section 23 has been deleted. Thus, the embargo contained in Section 23 stood removed for the first time by Amending Act No.39 of 2005. In the statement of objects and reasons, the reason for omission of Section 23 is stated in the following words:

..... It is also proposed to omit the said section so as to remove the disability on female heirs contained in that Section.

18. The Apex Court in the case of (Gummalapura Taggina Matada Kotturuswami V. Setra Veeravva ad others)⁴, reported in A.I.R. 1959 S.C. 577, held that it is well settled that an Appellate Court is entitled to take into consideration any change in law. Similarly in the case of United Bank of India, Calcutta V. Abhijit Tea Co. Ltd. and others, reported in 2000(7) S.C.C. 357, the Apex Court in para 20 held as under :

“ Now, it is well settled that it is the duty of a Court, whether it is trying original proceedings or hearing an appeal, to take notice of the change in law affecting pending actions and to give effect to the same. (See G.P. Singh : Interpretation of Statutes, 7th Edn., p.406). If, while a suit is pending, a law like the 1993 Act that the Civil Court shall not decide the suit, is passed, the civil Court is bound to take judicial notice of the statute and hold that the suit even after its remand cannot be disposed of by it.

We, therefore, hold that deletion of Section 23 from the Hindu Succession Act, 1956 though has taken place during the pendency of the present appeal, its effect will have to be taken into consideration while deciding the present appeal and consequently we hold that as a result of such omission the plaintiffs are entitled to share in the dwelling house(s) also and consequently the shares of the plaintiffs in the dwelling house(s) would be to the extent of 1/30th each. We, therefore, do not agree with the learned Counsel for the respondents that the provisions of Amending Act No.39 of 2005 would only apply prospectively, as such not to the present appeal.”

14. Further, in *G. Sekar Vs. Geetha and others*, [(2009) 6 SCC 99] Hon'ble Apex Court has dealt with the effect of deletion of Section 23 of the Hindu Succession Act, 1956 and it has been observed thus :-

“21. The said property belonging to Govinda Singh, therefore, having devolved upon all his heirs in equal share on his death, it would not be correct to contend that the right, title and interest in the property itself was subjected to the restrictive right contained in Section 23 of the Act. The title by reason of Section 8 of the Act devolved absolutely upon the daughters as well as the sons of Govinda Singh. They had, thus, a right to maintain a suit for partition. Section 23 of the Act, however, carves out an exception in regard to obtaining a decree for possession inter alia in a case where dwelling house was possessed by a male heir. Apart therefrom, the right of a female heir in a property of her father, who has died intestate is equal to her brother. Section 23 of the Act merely restricts the right to a certain extent. It, however, recognizes the right of residence in respect of the class of females who come within the purview of proviso thereof. Such a right of residence does not depend upon the date on which the suit has been instituted but can also be subsequently enforced by a female, if she comes within the purview of proviso appended to Section 23 of the Act.”

Thereafter, in paragraph Nos.22, 23 and 24 of the abovesaid decision, Hon'ble Apex Court has considered 174th report of the Law Commission and statement of objects and reasons of the 2005 act and

thereafter, in paragraph Nos.25, 26 and 27 following observations have been made :-

“25. It is, therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act.

26. Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that Section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property is concerned has been sought to be removed, we fail to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of Section 8 of the Act read with the Schedule appended thereto.

27. Restrictions imposed on a right must be construed strictly. In the context of the restrictive right as contained in Section 23 of the Act, it must be held that such restriction was to be put in operation only at the time of partition of the property by metes and bounds, as grant of a preliminary decree would be dependent on the right of a co-sharer in the joint property. Concededly a preliminary decree could be passed declaring each co-sharer to be entitled to 1/5th share therein in terms of the provisions contained in Section 8 of the Act. 1/5th share in each co-

sharer upon death of the predecessor-in-interest of the parties is absolute. They cannot be divested of the said right as the restriction in enjoyment of right by seeking partition by metes and bounds is removed by reason of Section 3 of the 2005 Act.”

Further, note has to be taken in respect of the observation in paragraph No.32 of the abovesaid decision, which runs thus :-

“32. It is trite that although omission of a provision operates as an amendment to the statute but then Section 6 of the General Clauses Act, whereupon reliance has been placed by Mr. Viswanathan, could have been applied provided it takes away somebody's vested right. Restrictive right contained in Section 23 of the Act, in view of our aforementioned discussions, cannot be held to remain continuing despite the 2005 Act.”

15. Therefore, taking into consideration the abovesaid observations and legal position at this stage, which is *prima facie*, definitely, plaintiffs have shown that they can claim partition in respect of the said property. This is apart from their own independent right under Section 8 of the Hindu Succession Act and, therefore, it is for the Courts of law to preserve their rights till the suit filed by them is decided. When the plaintiffs have shown threat to their right in the form that the properties are put to sell, then the Courts are definitely called upon to protect the

rights of the citizens and, therefore, the learned Trial Judge had rightly protected the rights of the plaintiffs. The order passed by the learned District Judge-4, Nanded in Miscellaneous Civil Appeal No.93 of 2016 on 03.05.2018 deserves to be set aside by invoking the constitutional powers of this Court under Article 227 of the Constitution of India to protect the rights of the petitioners. Hence, the following order is passed :-

ORDER

- (I) Writ petition stands allowed.
- (II) The judgment and order passed in Miscellaneous Civil Appeal No.93 of 2016 by learned District Judge-4, Nanded on 03.05.2018 is hereby set aside.
- (III) It is clarified that the order passed by learned 2nd Joint Civil Judge Senior Division, Nanded on 14.11.2016 below Exhibit-57 stands restored.
- (IV) Parties to bear their own costs.
- (V) Rule is made absolute in the above terms.

[SMT. VIBHA KANKANWADI, J.]

scm