

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

SECOND APPEAL NO. 396 OF 2018

1. Sau. Pushpa Rangdeo Patre
Aged about 67 years,
Occupation : Housewife,
R/o. Purushottam Borikar,
Near Datta Guru Xerox & STD,
Golibar Chowk, Nagpur.

.... **APPELLANT.**
(Org. Plaintiff)

// VERSUS //

1. Smt. Hirabai Purushottam Borikar
Aged about 79 yrs. Occ-Nil,
R/o Ashvinikumar P. Borikar,
102, Blue, Opel-II (first Floor)
Nandivali road, Dombivali (E)
Mumbai-421 201
At present R/o House no.04
C/o Manish Computer & Xerox
Centre, Golibar Chowk, Nagpur
2. Sau. Ranjan Suresh Bakre,
Aged about 60 years, Occ- Housewife,
R/o Dhanlaxmi Co-op. Hsg. Society,
Near Kamath Building, Shastrinagar,
Dombivali (W), Mumbai.
3. Shri Pradeep Purushottam Borikar,
Aged about 67 years, Occ. Service
R/o Deshpande Layout, Near Water Tank,
Waishnavi Devi Chowk, Wardhaman Nagar,
Nagpur 440 008.

4. Ashvinikumar P. Borikar,
Aged about 67 yrs. Occ-Service
R/o 102, Blue Opel-II (first Floor),
Nandivali road, Dombivali,
(E), Mumbai – 421 201.
5. Sau. Kanta Ganpati Umredkar
Aged about 52 yrs. Occ.-Housewife
R/o Dr. Mohadikar, Binaki Layout,
Hanuman Society, Plot no.7, Last Bus Stop,
Vaishali nagar, Nagpur
6. Sau. Vaijanti Prakash Bajirao
aged 49 years, Occ-Housewife,
R/o Deoghar Mohalla, Bajirao Galli,
Budhwari, Nagpur.
And also at
Block no.6 Kamdhenu Apartments,
Hariom Nagar, Mulund (West) Mumbai.
7. Avinash Purushottam Borikar,
Aged about 47 yrs Occ. Service
R/o Kalpana Singh, Mangal Nagar,
New Colony, New Katni (MP)
8. Ku. Asha Purushottam Borikar,
age 53 yrs. Occ. Household,
R/o Shri Niketan Co-op. HSG. Society,
Soham Hospital, 3rd Floor,
Mohanand Nagar, Majarli Road,
Badalapur (W) Mumbai.
(Deleted as per Exh.31)

.... **RESPONDENTS.**
(Org. Defendants)

Shri S.P.Kshirsagar, Advocate for Appellant.
None for the Respondents.

CORAM : ANIL S. KILOR, J.
DATE OF RESERVING THE JUDGMENT : 24/11/2021
DATE OF PRONOUNCING THE JUDGMENT : 29/04/2022

JUDGMENT :

1. In this appeal a challenge is raised to the judgment and decree dated 28th February 2018 passed by the District Judge-10, in Civil Appeal No. 28 of 2013 dismissing the appeal filed by the plaintiff for modification of judgment and decree of the trial Court and thereby upholding the judgment and decree dated 23rd October 2012 passed by the Extra-Joint Civil Judge Junior Division, Nagpur in Regular Civil Suit No.155 of 2007, decreeing the suit for partition, separate possession and permanent injunction.

2. The brief facts of the present case are as follows: (The parties are referred to as per their status before the trial Court.)

The plaintiff/ appellant filed a suit for partition, separate possession and permanent injunction. It is the case of the plaintiff that the plaintiff and defendant Nos.2 to 8 are real

brothers, sisters and the defendant No.1 is mother of plaintiff. A house bearing No. 4 constructed on Nazul Sheet No.133, City Survey No.176/1, Area 500 sq.ft., situated in Ward No.48 at Nagpur is the suit property, which was originally owned by the father of the plaintiff and defendant Nos. 2 to 8, Purushottam Borikar. He died on 17/03/2003 and after his death being legal heirs the plaintiff and the defendants became owners of the suit property. It is further pleaded that the suit property is in possession of the plaintiff and it is not yet partitioned. The plaintiff therefore, filed a suit for partition.

3. The defendant Nos.1,2, 3 and 5 and defendant Nos. 4, 6 7 and 8 filed their written statements vide Exh.20 and 27 respectively. The defendants have admitted their relationship with the plaintiff, however, denied that the suit property was self acquired property of their father. It is submitted that the suit property is an ancestral property and as the plaintiff got married

before 22/06/1994, she is not coparcener and cannot claim any share in the suit property.

4. The learned trial court, after scrutinizing the oral as well as documentary evidence, decreed the suit and thereby it is declared that the plaintiff is having 1/40th share in the suit property, vide judgment and decree dated 23/10/2012 passed in Regular Civil Suit No. 155 of 2007.

5. The plaintiff, feeling aggrieved on denial of grant of equal share i.e. 1/9th share in the suit property, for modification of the aforesaid judgment and decree, she carried an appeal namely Civil Appeal No. 28 of 2013 before the District Judge-10 at Nagpur, which came to be dismissed vide judgment and decree dated 28/02/2018, which is under challenge in this appeal.

6. This Court, while issuing notice on 6th August 2018 framed the substantial question of law viz. :

“In the light of decision in 2017(1) Mh.L.J. 294 (Uttam ..vs.. Saubhag Singh and others) whether the plaintiff is entitled for share in the suit property in the light of provisions of Section 8 of the Hindu Succession Act, 1956?”

7. I have heard learned counsel for the appellant. None for the respondent.

8. Shri Kshirsagar, learned counsel for the appellant has submitted that in the recent judgment of the Hon'ble Supreme Court of India, in the case of *Vineeta Sharma ..vs.. Rakesh Sharma*¹ and others, the judgment in the case of *Prakash and others vs. Phulavati and others*² on which the learned first appellate Court has relied upon, has been overruled. Accordingly, he submits that the learned first Appellate Court committed error in not considering the appellant as coparcener.

9. He further submits that in the light of judgment of the Hon'ble Supreme Court of India in the case of *Uttam ..vs.. Saubhag*

¹ (2020) 9 SCC 1

² 2016(1) Mh.L.J. 1

*Singh*³ the appellant/plaintiff is entitled for share in the suit property in the light of provisions of Section 8 of the Hindu Succession Act, 1956 (hereinafter referred to as “the Act of 1956”).

10. To consider the submissions made by the learned counsel for the appellant, I have perused the record and thereupon following facts emerged as admitted facts:

- A) The plaintiffs and defendants, except defendant No.1, are the brothers and sisters. The defendant No.1 is the mother of plaintiff.
- B) The suit property was originally owned by father of plaintiff namely Purushottam Borikar who died on 17/03/2003.
- C) Plaintiff got married in the year 1974.
- D) The suit for partition, separate possession and permanent injunction was filed on 23/01/2007.

11. It is pertinent to note here that both the Courts below have held that the suit property is an ancestral property. It has further come in the cross-examination of the P.W.1-Pushpa (Plaintiff) that there was partition between her father and his brothers.

12. Thus, in view of the admission given by the plaintiff that there was a partition between her father and brothers, it makes further clear that the partition took place prior to 2003 i.e. prior to the death of father in 2003 and prior to Hindu Succession (Amendment) Act, 2005 i.e. 09/09/2005 and also prior to 20/12/2004, the date on which the Bill was presented in Rajya Sabha.

13. The Hon'ble Supreme Court of India in the case of *Vineeta Sharma* (supra) has held thus:

“53. Section 6 deals with devolution of interest in coparcenary property of a joint Hindu family governed by the Mitakshara law. The originally enacted provision of section 6 excluded the rule of succession concerning Mitakshara coparcenary property. It provided that the interest of a coparcener male Hindu who died after the

commencement of the 1956 Act shall be governed by survivorship upon the surviving members of the coparcenary. The exception was provided that if the deceased had left surviving a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative, the interest of such coparcener shall devolve by testamentary or intestate succession, as the case may be, in order to ascertain the share of deceased coparcener, the partition has to be deemed before his death. Explanation 2 disentitled the separated person to make any claim in case of intestate succession.

54. Though the widow or daughter could claim a share, being a Class I heir in the property left by the deceased coparcener, and a widow was entitled, having a right to claim a share in the event of partition daughter was not treated as a coparcener. The goal of gender justice as constitutionally envisaged is achieved though belatedly, and the discrimination made is taken care of by substituting the provisions of section 6 by the 2005 Amendment Act.

55. to 59. ...

60. The amended provisions of section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right. Section 6(1)(a) makes daughter by birth a coparcener "in her own right" and "in the same manner as the son." Section 6(1)(a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. Section 6(1)(b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. Though the rights can be claimed, w.e.f. 9.9.2005, the provisions are of retroactive application; they confer

benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20.12.2004, the date on which the Bill was presented in the Rajya Sabha, shall not be invalidated.”

14. In the teeth of above referred law laid down in the case of *Vineeta Sharma* (supra) I revert back to the facts of the present case.

15. In the present case, as it is noted that the suit property is an ancestral property and it was partitioned prior to death of father of the plaintiff in 2003 between him and brothers of the plaintiff, the legislature has by providing savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20/12/2004, the date on which the Bill was presented in Rajya Sabha, shall not be invalidated. Thus, the partition between father and brothers of the plaintiff is held to be valid.

16. In the circumstances, though the plaintiff can be considered as a coparcerner, in view of the judgment in the case of *Vineeta Sharma* (supra), as per the above referred proviso to Section 6 of the Hindu Succession Act, the partition took place between father and brothers of the plaintiff cannot be invalidated.

17. The judgment of the Supreme Court of India in the case of *Prakash & Others* (supra) relied upon by the learned first appellate Court has been overruled by the Hon'ble Supreme Court of India in the case of *Vineeta Sharma* (supra). Thus, now the right is given to the daughter under Section 6(1)(a), by birth. The declaration of right based on past event was made on 09/09/2005 and as provided in Section 6(1)(b), daughters by their birth have the same rights in the coparcenary and they are subject to the same liabilities as provided in Section 6(1)(c) and therefore, it is not necessary that father coparcener should be living as on 09/09/2005.

18. However, in this case, though the plaintiff can claim right in the suit property as a daughter, she can claim it with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition, which had taken place before 20/12/2004. In that view of the matter, the plaintiff is not entitled for 1/9 share as claimed by her, in the light of the fact that the suit property was partitioned between father and brothers of the plaintiff prior to 20/12/2004.

19. The Hon'ble Supreme Court of India in the case of *Uttam ..vs.. Saubhag Singh* (supra) has held that on the application of Section 8 of the Act, either by reason of the death of the male Hindu living self acquired property or by the application of Section 6 proviso such property would devolve only by intestacy and not survivorship. The Hon'ble Apex Court further held that on a conjoint reading of Section 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with Section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have

succeeded to it as they hold the property as tenants in common and not as joint tenants. This being a case both the Courts below have rightly held that after the death of father the plaintiff is entitled for share in the father's share and accordingly she has been granted 1/40 share in the house.

20. Hence, no interference is required in the impugned judgment passed by the learned first appellate Court. Accordingly, I have answered the substantial question of law and passed the following order:

The second appeal is **dismissed**. No order as to costs.

Pending Civil Application(s), if any, shall stand **disposed of**.

(ANIL S. KILOR, J)

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