



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

SECOND APPEAL NO. 92 OF 2020

Bhimrao Suryabhanji Amrute (Dead)
through his legal representatives :

- 1) Ambadas S/o Bhimrao Amrute,
Aged about 60 years, Occu. : Agriculture,
- 2) Jagdish S/o Ambadas Amrute,
Aged about 32 years, Occu. : Agriculture,
- 3) Satish S/o Ambadas Amrute,
Aged about 30 years, Occu. : Agriculture,

All R/o. At Post Hiwarkhed,
Tq. Morshi, Dist. Amravati.

.... **APPELLANTS**

// VERSUS //

- 1) Ashok S/o Bhimrao Amrute,
Aged about 56 years, Occu. : Service,
R/o. Gurukrupa Colony,
Near Rahatgaon Chowki, Amravati,
Tq. and Dist. Amravati.
At present Mahendra Colony,
Near Hanuman Mandir, Amravati.

Bhimrao Suryabhanji Amrute (Dead)
through his legal representative :

- 2) Kanta Pramodrao Deshmukh,
Aged about 51 years, Occ.- Household,
R/o. Purna Nagar, Tq. Bhatkuli,
District Amravati.

.... **RESPONDENTS**

Mrs. S. W. Deshpande, Advocate for Appellants.
Mr. G. R. Sadar, Advocate for Respondent Nos.1 and 2.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 09.09.2024.

DATE OF PRONOUNCING THE JUDGMENT : 26.09.2024.

JUDGMENT.

1. **Admit.** Heard finally with the consent of the learned Advocates for the parties.

2. This appeal is preferred against the Judgment and decree passed by the District Judge-1, Amravati in Regular Civil Appeal No.145 of 2016, dated 05.09.2019, which was preferred against the Judgment and decree passed by the 3rd Joint Civil Judge, Senior Division, Amravati in Special Civil Suit No.240 of 2011, dated 13.12.2013.

3. Brief facts of the case are as follows :

(i) The agricultural land bearing Survey No.137/2-B admeasuring 1.21 HR., and House No.1533, situated at village Hiwarkhed, Tq. Morshi, District Amravati are the subject matter of the suit.

(ii) The plaintiff contended that defendant No.1 – Bhimrao is his father, defendant No.2 is his brother and defendant No.3 is his

sister. Defendant Nos.4 and 5 are the sons of brother of plaintiff, who died earlier. The father of the plaintiff passed away during the pendency of the suit. The plaintiff further contended that agricultural land bearing Survey No.137/2B was purchased using funds received by the defendant No.1 from the State Government under the Land Acquisition Act. These funds were obtained as compensation for the acquisition of ancestral agricultural land bearing Survey No.55/7. The defendant No.1, the plaintiff's father, sold Survey No.137/2B to the defendant No.5. The plaintiff argued that this sale was illegal and not binding on him. He further contended that these properties are ancestral properties and, therefore, claimed he has 1/4th share in the suit properties.

4. Defendant No.2 appeared but failed to file a written statement. Subsequently, he filed a written statement along with an application to set aside the order of no written statement. The application was allowed on the condition that costs would be deposited in the Court. However, the costs were not deposited. As a result, the suit proceeded without the written statement of defendant No.2.

5. Defendant Nos.3 to 5 also failed to file their written statements, consequently, the suit proceeded without their written statements as well.

6. The defendants did not produce any evidence. After considering the evidence presented by the plaintiff on record, the learned trial Court decreed the suit to the extent of a 1/4th share of the plaintiff in the suit properties and held that the sale-deed dated 28.02.2011 is not binding upon the plaintiff.

7. The first appeal was preferred by plaintiff contending that he is entitled to a 1/3rd share in the suit property as per Section 8 of the Hindu Succession Act, 1956 (for short the "HS Act"), due to the death of his father during trial.

8. The first appellate Court formed the following points for consideration :

(1) Whether the appellant proves that he is entitled for one third share in the suit property due to death of Bhimrao Suryabhanji Amrute, the original defendant No.1?

(2) Whether the appellant proves that the impugned judgment and decree dated 13.12.2013, passed by the learned 3rd Joint Civil Judge (Senior Division),

Amravati, in Special Civil Suit No.240/2011 (Ashok Vs. Bhimrao and others) suffers from any illegality, irregularity, perversity which calls interference of this Court?

9. The learned first appellate Court, by partly allowing the appeal held that the plaintiff is entitled to a 1/3rd share in the suit properties.

10. The second appeal is preferred by the defendants on the grounds that the suit property bearing No.137/2B is not coparcenary property, and the plaintiff has no right to claim partition of it.

11. Following substantial questions of law are formed :

(1) *Did first appellate Court commit error in determining the share of the parties by completely over looking the fact that Bhimrao's 1/3rd share was purchased by Jagdish and Satish?*

(2) *Can a son file a suit for partition during the lifetime of his father with respect to ancestral property?*

12. The learned Advocate Mrs. S.W. Deshpande representing the defendants, submitted that plaintiff has not pleaded in the plaint that the suit properties are coparcenary properties. She relied on the precedential law established in *Uttam Vs. Saubhag Singh & Ors.*, reported in (2016) 4 SCC 68, para 18 reads as under :

“18. Some other judgments were cited before us for the proposition that joint family property continues as such even with a sole surviving coparcener, and if a son is born to such coparcener thereafter, the joint family property continues as such, there being no hiatus merely by virtue of the fact there is a sole surviving coparcener. Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe (1988) 2 SCC 126, Sheela Devi v. Lal Chand, (2006) 8 SCC 581, and Rohit Chauhan v. Surinder Singh (2013) 9 SCC 419, were cited for this purpose. None of these judgments would take the appellant any further in view of the fact that in none of them is there any consideration of the effect of Sections 4, 8 and 19 of the Hindu Succession Act. The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:-

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the

interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 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.

13. The learned Advocate for the plaintiff submitted that the sale-deed of the defendant is illegal. They has not adduced any evidence, whereas the plaintiff has proved his right to the suit properties. It is therefore, prayed to dismiss the appeal.

14. The learned Advocate for the plaintiff relied on the following precedential law of ***Arshnoor Singh Vs. Harpal Kaur & Ors.***,

reported in *(2020) 14 SCC 436*, para No.7.1 and 7.9 reads as follows :

“7.1. Mulla in his commentary on Hindu Law (22nd Edition) has stated the position with respect to succession under Mitakshara law as follows:

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“A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to the separate or self-acquired property of the deceased with rights of survivorship.”

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“All property inherited by a male Hindu from his father, father’s father or father’s father’s father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son’s sons, and son’s son’s sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property.”

7.9. In the present case, the entire property of Lal Singh was inherited by his son Inder Singh as coparcenary property prior to 1956. This coparcenary property was partitioned between the three sons of Inder Singh by the court vide a decree of partition dated 04.11.1964. The shares allotted in partition to the coparceners, continued to remain coparcenary property in their hands qua their male descendants. As a consequence, the property

allotted to Dharam Singh in partition continued to remain coparcenary property qua the Appellant.

15. Perused the impugned judgment and relevant documents.

16. Generally, in a suit for partition by Hindus, three terminologies regarding nature of property are pleaded in their pleadings viz. (i) coparcenary property; (ii) joint family property, (iii) ancestral property. Later two terminologies have created chaos. They are neither defined nor explained in the Hindu Law. Hindu Partition Law is not codified, it is regulated by uncoded Hindu law and by precedential law. However, as per Section 4 of the H.S. Act, the express provisions of this Act shall prevail over any provision in conflicting uncoded Hindu Law.

17. Except in certain exceptions, parties to the partition litigation claiming rights under the term of 'ancestral property' or 'joint Hindu family property' must plead that there exists Hindu coparcenary family having coparcenary property i.e. property of which no partition took place for earlier three generation and he/she has by birth right in it. It is cardinal principle of civil trials procedure that, "first plead, then prove". According to Order XIV of the Code of Civil Procedure, 1908, the parties are expected to plead the material proposition of law and facts to establish a legal proposition

particularly to decide their the legal rights and liabilities. If pleadings regarding to existence of Hindu coparcenary family and its coparcenary property of which a partition has not taken place are absent, and there is no evidence of its existence neither the son nor the daughter can claim partition by virtue of birth right assuming that it is coparcenary property.

18. There is distinction between coparcenary and Hindu joint family. The coparcenary is narrower group than Hindu joint family consisting of only males who acquire by birth right or interest in the coparcenary property only by daughter. The property remains undivided. The concept of a joint Hindu family constituting a coparcenary refers to a common male ancestor with his lineal descendants in the male line, within four degree counting from and inclusive of such an ancestor or three degree exclusive of ancestor. To constitute a coparcenary, there must be male members of a Hindu joint family i.e. great grand father, his sons, grandsons and great grand sons. The share of coparceners can only be ascertained if partition takes place between them. However, until coparcenery is in existence their share cannot be determined in definite terms. Their shares fluctuates, means increases with the death and decreases by the birth of any of the coparcener.

19. A similar view is taken by the Hon'ble Supreme Court in the precedential law of *Uttam Vs. Saubhag Singh and others*, reported in (2016) 4 SCC 68 and *Commissioner of Wealth Tax, Kanpur and others Vs. Chander Sen and others*, reported in (1986) 3 SCC 567, wherein it is held that if such coparcenary property is divided in a partition, it becomes the absolute property of individual and does not remain coparcenary property for his son and now daughter etc. to claim by birth right.

20. In the this case, the plaintiff had not pleaded the existence of Hindu coparcenary family of three generation and coparcenary property to claim partition of it. Merely because the father purchased the suit property bearing No.137/2B using funds got from property acquired by the Government, it is not sufficient to infer and conclude that that there was an existence of Hindu coparcenary family and it's coparcenary property. There is no such presumption regarding existence of coparcenary family and its property. It has to be pleaded and proved. Therefore, the sale-deed executed by the father of the plaintiff in favour of his grandsons, defendant No.2 and 3 is not illegal. It was his own property and not a coparcenary property. To this extent, this appeal deserves to be allowed and the judgment and decree passed by the learned trial

Court as well as first appellate Court, partly deserve to be set aside. However, the plaintiff had 1/3rd share in the house property as per Section 8 of the H. S. Act, as his father had not disposed of it. Therefore, precedential law of **Arshnoor singh** cited supra on behalf of respondent/plaintiff is not helpful to him, hence it is not relied upon.

21. For the reasons discussed above, the substantial question of law No.1 is answered in the 'affirmative' that sale-deed executed by the father of the plaintiff is not illegal as there is no pleading or evidence of the existence of the Hindu coparcenary family and its coparcenary property. The substantial question of law No.2 is therefore, answered in the negative. Because a son/daughter cannot file suit for partition during the life time of father unless there is existence of Hindu coparcenary family and its coparcenary property. They can claim succession right under Section 8 of the H.S. Act after the death of their father provided if at the time of death, the suit property remains undisposed i.e. if he dies intestate.

22. The appeal, deserves to be partly allowed. The impugned Judgments and decrees of both Courts deserves to be partly set aside in respect of property Survey No.137/2B. The Judgment and decree

of the trial Court deserves to be modified accordingly. Hence the following order :

- (i) The appeal is **partly allowed**.
- (ii) The judgment and decree passed by the District Judge-1, Amravati in Regular Civil Appeal No.145 of 2016, dated 05.09.2019 is partly set aside. The Judgment and decree passed by the 3rd Joint Civil Judge, Senior Division, Amravati in Special Civil Suit No.240 of 2011, dated 13.12.2013, with respect to the sale-deed of agricultural land bearing Block No.137/2B, that it is not binding upon the plaintiff/respondent No.1 is set aside. The said decree is modified as under :

(a) It is declared that plaintiff, defendant Nos.2 and 3 are entitled for 1/3rd share each in the house property No.1533, situated at Hiwarkhed, Tahsil Morshi, District Amravati. The judgments and decrees of the trial Court are partly confirmed accordingly.

23. The appeal is **disposed of**. No costs.

24. In view of disposal of second appeal, the pending application(s), if any, shall stand disposed of.

(SANJAY A. DESHMUKH, J.)