



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

CIVIL APPLICATION (CAS) NO. 339 OF 2024

IN

SECOND APPEAL NO. 107 OF 2024

NARMADABAI RAMESHWAR HURKAT

Vrs.

ASHOK SHIVLAL HURKAT

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Dr. Renuka Sirpurkar, Advocate for applicant/appellant.
Shri A. R. Deshpande, Advocate for respondent-sole.

CORAM: SANJAY A. DESHMUKH, J.

DATE : 25/07/2024.

1. Perused the application.
2. Heard learned Advocates for both sides.
3. This Court has formed substantial question of law today. Considering the peculiar set of facts and the arguments of both sides, it would be proper to stay the execution proceedings arose out of Judgment and Decree of learned Trial Court.
4. There shall be stay to the execution of the impugned Judgment and Decree as prayed, in terms of prayer clause (i).
5. The application is disposed of.

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6. Heard learned advocates for both sides.

7. Learned advocate for the appellant/original defendant submitted that the plaintiff came with the case that he has legal right to claim possession of the suit property situated at village Ansing, Tah. and Dist. Washim bearing Block No.474 as it is ancestral property of his father Shivilal which is in the possession of the defendant.

8. The defendant came with the case that father of the plaintiff Shivilal executed an unregistered Relinquishment Deed dated 22/08/1977 in her favour and since then, she is in possession of the suit property. Her name is recorded to the record of rights of the suit property.

9. Learned advocate for the appellant submitted that the plaintiff's father died in the year 1994. Thereafter, admittedly, the plaintiff and his brothers and sisters have not tried to record their names to the record of rights of the suit property. However, their names are recorded to the other properties as successors. It is case of the plaintiff that he was unaware about the existence of his father's

property i.e. suit property and execution of the alleged Relinquishment Deed in favour of the defendant.

10. Learned advocate for the appellant submitted that substantial question of law as to whether plaintiff has title to the suit property needs to be formed. It is lastly prayed to form the said substantial question of law and admit the appeal.

11. Learned advocate for the respondent/plaintiff submitted that there are concurrent findings of both the Courts that plaintiff has proved his right in the suit property as it is ancestral property of his father. He is co-owner of it. He submitted that defence of adverse possession of the defendant over the suit property is not proved. By the unregistered relinquishment deed, no any legal right is created to the defendant in the suit property. He submitted that no such substantial question of law arises to determine and decide in this appeal. It is lastly prayed to dismiss the appeal at the admission stage in limine. He is relying upon the following authorities.

- i] **2013 SCC OnLine Gau 534**
Puspendra Hazarika and others Vrs. Gajen Hazarika, in which it is held that one of the co-owner can maintain suit against trespasser.

ii] **2003(1) ALL MR 565**

Bhimrao Dnyanoba Patil and others Vrs. State of Maharashtra and others, in which it is held that unless adverse animus to possess suit property is pleaded and proved, mere possession of long period even over a statutory period would not be sufficient to mature the title to the suit property.

12. Nobody will dispute the ratio laid down in the above authorities. However, each case has to be decided on the basis of factual matrix in the context of particular case on its merit.

13. It is well settled that on the basis of unregistered relinquishment deed, if it had been acted upon, and substantive rights can be created. Further such document cannot perfect title to the possessor of it in the suit property. But possessory title can pass on the basis of principles of equity. The alternative defence of adverse possession is not proved by the defendant. The adverse possession of defendant is not proved. It is well settled that plaintiff has to stand on his own legs and prove his case. Further false or wrong defence is no ground to accept the plaintiff's case. When the plaintiff came with the case that it is his ancestral property, he has

to establish that at the time of execution of alleged unregistered Relinquishment Deed there was existence of Hindu coparcenary joint family having coparcenary properties and therefore, he, his brothers and sisters are having by birth right in the suit property jointly. An initial burden of proof lies upon the plaintiff that he was having title to the suit property when the suit was filed in view of the admitted fact that Shivilal executed an unregistered Relinquishment Deed in favour of the defendant.

14. As per Section 19 of the Hindu Succession Act, 1956, for short, "HSA Act" when the partition is effected, the property which is received in the partition becomes his absolute property. He becomes owner of it, as if it is his self-acquired property. He can transfer his right as an absolute owner of it as per Section 19 of the HSA Act. The conjoint reading of Section 4, Sections 6 (2) and (3), Section 8, Section 19, Section 30 of the Hindu Succession Act, 1956 show that coparcenary was the mischief against the Hindu females. By birth, the right to claim partition like male coparceners in the coparcenary property was not available to the Hindu females. The

succession was regulated and mischief of coparcenary was partly suppressed by the HSA Act. To claim coparcenary right, pleading of requisites of coparcenary is necessary that for three generations, there was no partition of coparcenary property and they are in joint possession of it. Law is settled in this regard by the following case laws.

i] **AIR 1986 SC 1753**

Commissioner of Wealth Tax, Kanpur, etc. etc. Vrs. Chander Sen etc.

"20. In view of the preamble to the Act, i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the Andhra Pradesh High Court the Act makes it clear by Section 4. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF property in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc."

- ii] **AIR 1970 Bom 251**
 Govindram Mithamal Sindhi Vrs. Chetumal Villardas Sindhi

"27. As a result of the discussion above, I would hold that the two married sisters of the plaintiff who were married long back before the institution of the suit had vested shares in the interest of their deceased father Mithamal in the joint Hindu family of which the plaintiff claims to be the karta. That Interest ceased to have the character of joint family property and as such the plaintiff could not represent that interest as a karta of the joint Hindu family. Since the interest of the two married daughters is not represented, the frame of the suit is defective and the suit is liable to be dismissed. In the circumstances, I would uphold the decree of dismissal of the suit passed by the two Courts below, though for reasons mentioned above. I would, therefore, dismiss this appeal."

- iii] **(2016) 4 SCC 68**
 Uttam Vrs. Saubhag Singh and others

"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, Sheela Devi v. Lal Chand and Rohit Chauhan v. Surinder Singh 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."

15. Considering the aforesaid settled legal position, an initial burden lies upon the plaintiff to plead

and prove that his father Shivilal was not having exclusive and absolute right in the suit property to relinquish it and there was existence of coparcenary of three generations residing together without partition of coparcenary property and cultivating it jointly. If there is existence of Hindu coparcenary family and having coparcenary property, then certainly, plaintiff has coparcenary right in the suit property. But pleadings in this regard are vague that it is ancestral property and therefore, the issue of title arose before both the Courts. Both the Courts have held that plaintiff is having joint title to the suit property and hence, as co-owner, he is entitled for possession of suit property.

16. Admittedly, father of the plaintiff Late Shivilal died in the year 1994. No any attempt was made by the plaintiff to record his name to the record of rights of suit property. The cause of action alleged to have been occurred when bill of electricity of water well situated in the suit property was received by the plaintiff. Then he came to know that there is existence of the suit property of his father. Therefore, suit was filed. However, it is not clarified

as to whether earlier electricity bills were not received by the plaintiff or defendant and who paid it. Adoption Deed of Late Shivilal is also not produced on record, if it was written and registered. It is matter of evidence as to who paid earlier electricity bills of motor pump installed on the water well situated in the suit property ? Therefore, to ascertain as to whether there was partition between Late Suwalal and Late Kisanlal who were sons of Late Shivkaranlal, some old documents are required to be considered like mutation entries, 7/12 extract or other relevant documents to show the subsequent conduct of the parties and its effect and to see as to whether the alleged unregistered relinquishment deed has been acted upon or not.

17. In the background discussed above, both parties are directed to produce above mentioned documents on record on next date.

18. Considering all above aspects, the following substantial question of law is formed.

“Are the Trial Court and First Appellate Court incorrect and illegal in holding that the plaintiff had proved his title to the suit property on the basis of his alleged right ?

19. Admit.
20. Shri A. R. Deshpande, learned advocate waives service of notice for respondent.
21. Call Record and Proceedings.
22. Stand over to 20/08/2024.

[SANJAY A. DESHMUKH, J.]

Choulwar