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

SECOND APPEAL No.52 OF 2012

1. Smt. Leelabai wd/o Dagduba Hingne,
aged 66 yars, Occ. Agriculturist,
R/o. Deulghat, Tq. And Distt. Buldana.

2. Sau. Shobhabai Madhukar Suradkar,
aged 39 years, Occ. Household,
R/o. Sasanabad, Tq. Bhokardan,
Distt. Jalna.

3. Ku. Pushpa Dagduba Hinge,
aged 34 years, Occ. Nil,
R/o. Deulghat, Tq. And Distt. Buldana.

4. Sau. Asha Anil Sonune,
aged 25 years, Occ. Household,
r/o. Surangali, Tq. Bhokardan, Distt. Jalna. …. APPELLANTS

...**VERSUS**...

Sau. Bhikabai Shriram Pakhare,
aged 59 years, Occ. Agriculturist,
Dhamangaon, Tq. And Distt. Buldana. …. RESPONDENT

=-

Shri A.S. Mardikar, Advocate for the Appellants.
Shri R.G. Kavimandan, Advocate for the Respondent.

=-

CORAM : S.B. SHUKRE, J.
Reserved on : 19th NOVEMBER, 2013.
Pronounced on : 28th MARCH, 2014.

JUDGMENT :

By this appeal, the appellants have challenged the judgment and decree passed on 16/11/2011 in Regular Civil Appeal No.36/2011 by

Principal District Judge, Buldana, whereby the judgment and decree passed by the 3rd Joint Civil Judge Junior Division, Buldana in Regular Civil Suit No.171/2007 on 31/01/2011 was quashed, set aside and modified.

2. The respondent, the original plaintiff, is the sister of one Dagduba Hingne. The respondent claimed that Kashinath was the original owner of the suit properties bearing Gat No.293 situated at Village Deulghat Taluka and District Buldana and house property bearing No.1456 of Village Deulghat of District Buldana, he having received the same by way of inheritance. Said Kashinath and his wife Dwarkabai were parents of respondent and Dagduba. Kashinath and Dwarkabai died on 12/09/1999and 14/01/1995, respectively. After their death, respondent and Dagduba being the only children surviving their parents, the suit properties devolved upon them. Dagduba also died on 20/04/2002 leaving behind his wife, appellant no.1 and his daughters, appellants no.2 to 4. The respondent claimed that she had one half share in the suit properties which was denied to her and, therefore, she filed a suit for partition and separate possession of the suit properties.

3. The appellants, the original defendants, resisted the suit contending

that respondent did not have one half share in the suit properties as claimed by her. While they admitted the relationship and also the nature of the suit properties being ancestral, they disputed the extent of share as claimed by the respondent in the agricultural land, one of the suit properties and also claimed that respondent had no share in the house property, the second of the suit properties. They submitted that since respondent got married prior to 1994, there would be notional partition in or about 1994 according to which Kashinath, Dwarkabai and Dagduba would receive one third share each, and daughter being married would not get anything, as after her marriage she would not be a coparcener in the joint family properties. They further submitted that Dwarkabai predeceased Kashinath on 14/01/1995 and, therefore, after her death, her share would devolve upon the respondent-plaintiff, Kashinath and Dagduba. They further submitted that after death of Kashinath on 12/09/1999, again share of Kashinath would be divided equally between Dagduba and Bhikabai. They submitted that after the death of Dagduba on 20/04/2002, the appellants were in exclusive possession of the suit properties. Thus, they submitted that the share of the respondent would be confined to two ninth share in the suit properties.

4. The Trial Court framed four issues and after considering the

evidence of the parties and arguments canvased before it, decreed the suit partly granting three fourth share to the appellants and one fourth share to the respondent in the agricultural land and refusing any share to the respondent in the house property. Being aggrieved, both appellants and respondent preferred appeal and cross-objection before the District Court, Buldana.

5. Learned Principal District Judge, Buldana, recorded a finding that respondent was entitled to one half share while the appellants together were entitled to one half share in the suit properties and dismissed the suit and allowed the cross-objection of the respondent. He also directed modification of the judgment and decree passed by the Trial Court so as to incorporate a declaration that respondent was entitled to partition and separate possession in respect of her one half share in the suit properties, while defendants jointly were entitled to one half share in the suit properties. The judgment and decree to this effect were delivered on 16/11/2011. Same are under challenge in the present Second Appeal. This appeal has been admitted by this Court on 13/07/2012 on a substantial question of law in following terms :

> "Whether the Hindu Succession (Amendment) Act, 2005 (No.39 of 2005), which came into force with effect from 05.09.2005, entitles a married

> daughter, not being the member of coparcenary, to seek reopening of devolution of interest already devolved before coming into force of the Amended Act? Put it differently, whether plaintiff-Bhikabai, claiming through Kashinath-her father, who died intestate in 1999 and the property having been devolved upon Dagduba, the sole coparcener (brother of Bhikabai), who died in 2002 leaving behind four daughters; can claim her share in the coparcenary property when no coparcenary was in existence and the interest of sole surviving coparcener was already devolved upon his daughters prior to 05.09.2005?"

6. I have heard Shri Anil Mardikar, learned Counsel for appellants and Shri R.G. Kavimandan, learned Counsel for respondent. With their assistance, I have carefully gone through the judgments and decrees passed by both the Courts below and also the paper book of the appeal.

7. In this case, there is no dispute about the fact that respondent got married prior to 1994. There is also no dispute about the deaths of mother and father of respondent and Dagduba on 14/01/1995, 12/09/1999 and 20/04/2002, respectively.

8. Learned Counsel for the appellants submits that till the death of Dwarkabai, properties were not partitioned and so in such a case theory of notional partition would be applicable according to which deceased

Kashinath, Dwarkabai and Dagduba would get one third share each in the suit properties, whereas respondent having been married prior to 1994 would get nothing as she could not be treated as coparcener while effecting partition of the suit properties.

9. Learned Counsel for the appellants further submits that after death of Dwarkabai her one third share would be equally divided between Kashinath, Dwarkabai and respondent and after death of Kashinath, again theory of notional partition would be applicable and Kashinath's share would be equally divided in between Dagduba and respondent. In this way, he further submits, the respondent would at the most get two ninth share in the suit properties and not anything beyond that.

10. Learned Counsel further submits that due to marriage of respondent prior to 1994, the coparcenary was reduced to only three members i.e. Kashinath, Dwarkabai and Dagduba and after deaths of Kashinath and Dwarkabai, the coparcenary came to an end. He further submits that if coparcenary itself was not in existence, there was no question of respondent becoming a coparcener in her own right by virtue of new Section 6 of the Hindu Succession Act, 1956 (for short, "Succession Act") introduced into the Act, by Hindu Succession (Amendment) Act,

2005, (for short, "the 2005 Amendment Act") which came into force on 9/09/2005. He further submits, relying upon ***Sadashiv Sakharam Patil and Ors. V/s. Chandrakant Gopal Desale & Ors.*** reported in ***2012 (1) Mh.L.J. 197***, that the 2005 Amendment Act is prospective and it creates a substantive right in favour of daughter from the date when the amendment Act came into force. Therefore, according to him, the learned District Judge has committed a serious error of law in giving benefit of Section 6 of the Succession Act introduced by the Amendment Act, 2005, to the respondent.

11. Learned Counsel for the respondent has submitted that there is no quarrel about the proposition that substantive right created in favour of the daughter making her a member of the coparcenary in her own right came into being with effect from 9/09/2005 and it was not available to daughters before that date. He further submits that it would not mean that the right cannot be asserted by the daughters in respect of the joint family properties which have not been alienated or partitioned or disposed of in accordance with the conditions laid down in Section 6 of the Succession Act, 1956.

12. Learned Counsel for respondent further submits that if there has been no disposition or alienation including partition or testamentary disposition having taken place before 20/12/2004, the daughter of a coparcener will have equal rights in the coparcenary properties along with the other coparceners and in the instant case, there has been no such disposition or alienation or partition as contemplated under proviso to sub-section 1 and also under explanation to sub-section 5 of Section 6 of the Succession Act. Therefore, even though respondent was not the member of the coparcenary before 2005, by virtue of a substantive right newly conferred upon her by law, the respondent can reopen the notional partitions and claim her equal share in the suit properties, so submits learned Counsel for the respondent. For these submissions, he places his reliance upon the case of ***Ganduri Koteshwaramma & Anr. V/s. Chakiri Yanadi & anr.*** reported in ***2011 (9) SCCC 788***.

13. In order to see as to whether or not Section 6 of the Succession Act has only prospective effect and does not affect the partitions made notionally before 20/12/2004, the date given in the proviso to sub-section 1 of Section 6, it would be necessary to consider the provisions contained in this Section. Section 6 reads thus:

6. Devolution of interest in coparcenary property-(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-
(a) by birth become a coparcener in her own right in the same manner as the son;
(b) have the same rights in the coparcenary property as she would have had if she had been a son;
(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,
and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:
Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.
(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.
(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-
(a) the daughter is allotted the same share as is allotted to a son;
(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.- For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.-For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu

> Succession (Amendment) Act, 2005.
> (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.
> Explanation - For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.'

The section, newly added by the 2005 Amendment Act, which came into force with effect from 9/09/2005, is a step taken as a part of affirmative action programme to render social justice to women, which is clear from its statement of objects and reasons. It is aimed at removing of bias and discriminatory practices against Hindu women in their status in a Hindu joint family property governed by the Mitakshara Law. It accords equality to the daughter of a coparcener in holding property rights in the same manner and to the same extent as the male member of a coparcenary of such a Hindu joint family. It confers a substantive right upon the daughter by laying down that on and from the commencement of the Amendment Act, 2005, the daughter of a coparcener shall be the coparcener by birth in her own right in the same manner as the son and shall have the same rights in the coparcenary property as she would have had, if she had been a son. Likewise, she is also subjected to the same liabilities in respect of the coparcenary property as that of a son.

14. The substantive right, no doubt, has been conferred upon the daughter of a coparcener governed by the Mitakshara Law on and from 9/09/2005, but the right so given, one must understand, is in its very nature a birth right and so cannot be taken away or given restrictive meaning except in the circumstances and to the extent mentioned in the section itself. Therefore, once given, it would relate back to and take effect from the incidence of birth of a daughter in a Hindu joint family and, therefore, from the date of the birth, the daughter would be treated, by fiction of law, as a member of a coparcenary in the same manner as the son and would be entitled to all those rights therein as if she were a son and would also be liable to share the liabilities in respect of the coparcenary property in the same measure as a son. The language of the section is so clear that it leaves no room to doubt that it gives effect to the substantive right of the daughter from the date of her birth. Therefore, such right can be asserted by the daughter in respect of all the coparcenary properties, except those which have been disposed of or alienated in the manner and subject to conditions as stated in Section 6(1), read with sub-section (5) and she can re-open the earlier partitions also, not made in accordance with those conditions.

15. No doubt, Section 6, sub-section (1) begins with the expression "On and from the commencement of the Hindu Succession (Amendment) Act, 2005", but the expression only declares the date on which the substantive right is conferred and shall continue to be conferred and nothing more. Having regard to the language of the entire section, this expression cannot be used to examine the question of effect and impact of the right on the coparcenary property, interest in which has already been devolved upon the surviving coparcener. The effect and impact of the right would be determined by the nature of the right created and restrictions specifically placed upon its assertion by the legislature. As already said, the right is in its nature a birth right, something akin to fundamental right, which is available intrinsically by virtue of mere birth as a daughter in the Hindu Joint family governed by Mitakshara Law and hence can be exercised from birth onwards in accordance with law. The only restrictions on this right are stated in the proviso to sub-section (1). It lays down that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20/12/2004. It suggests two things, (i) the section will affect or invalidate any disposition or alienation including partition or testamentary disposition made on or after 20/12/2004 and, (ii) the section will also affect or

invalidate all those dispositions or alienations made before 20/12/2004, if they are not made in accordance with Section 6, particularly, those partitions which are not effected by a registered partition deed or by a decree of a Court, as clarified by explanation to sub-section 5. It may be stated here that Section 6 came into force w.e.f. 9/09/2005 and language of the proviso indicates that legislature intended to invalidate all dispositions or alienations made between 20/12/2004 and the date of commencement of the Amendment Act, 2005 and intended to save only those made before 20/12/2004 in accordance with conditions laid down in the section itself. This only shows that legislature intended Section 6 right to have a retrospective effect in a manner controlled by it.

16. In the case of ***Ganduri*** (supra), the Hon'ble Supreme Court has held that the right accrued to a daughter in the property of a joint Hindu family governed by Mitakshara Law by virtue of the 2005 Amendment Act, is absolute except for the circumstances provided in the proviso appended to sub-section (1) of Section 6. The proviso lays down that rights given to daughter of the coparcener shall not affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which had taken place before the 20th day of December, 2004. The Hon'ble Apex Court has further held that for the

purposes of Section 6, partition means any partition, as explained in the explanation to sub-section (5), made by Deed of Partition registered under the Registration Act, 1908 or effected by a decree of Court.

17. Interpreting thus, the Hon'ble Supreme Court gave the benefit of the substantive right so created to the appellants in the said case, who were also the daughters of a coparcener of a Hindu joint family property governed by the Mitakshara Law. While giving such benefit to the appellants, the Hon'ble Apex Court considered the fact that the judgment and preliminary decree in that case were passed on 19/03/1999 and the preliminary decree was amended on 27/09/2003. It was further considered that before the final decree could be passed, the Amendment Act of 2005 introducing new Section 6 came into force on the basis of which an application came to be made by the appellants/daughters for modifying the preliminary decree so as to give them one fourth share each in the coparcenary property which was equal to shares of their two brothers and father. It was further noted that this application was allowed by the Trial Court but in appeal, the Trial Court's order allowing the application was set aside against which appeal was preferred before the Hon'ble Supreme Court. It was in this appeal that the Hon'ble Apex Court decided the issue in favour of the daughters by declaring that the

daughters would have equal share along with the sons in the coparcenary property, if conditions prescribed in newly added Section 6 were fulfilled.

18. The decision of the Hon'ble Apex Court in the said case of ***Ganduri,*** therefore, makes it clear to us the following things:

(i) The equal share given to the daughter of a coparcener governed by Hindu Mitakshara Law along with brothers is by way of a substantive right;

(ii) Though the substantive right is created on and from 9/09/2005, it relates back to the incidence of birth;

(iii) The substantive right would not be available only if the coparcenary property is disposed of or alienated including by any partition or testamentary disposition of property before 20/12/2004 and;

(iv) If there is disposition of a coparcenary property by any partition, such partition must be by execution of a Deed of Partition duly registered under the Registration Act, 1908 or effected by a decree of the Court.

19. Having regard to the nature of provisions contained in Section 6 as discussed earlier and interpretation placed upon it by the Hon'ble Supreme Court in the aforestated case of Ganduri, I find that there is no substance in the argument of learned Counsel for the appellants that

Section 6 is prospective in nature and it does not relate back to the incidence of birth of the daughter.

20. In the instant case, even though the daughter i.e. respondent was married before 1994 and the parents died well before coming into force of the new Section 6, the respondent would acquire equal rights in the coparcenary property only by virtue of her birth in the Hindu joint family, undisputedly governed by Mitakshara Law, in the same manner as the son and would have the same rights in the coparcenary property as she would have had, if she had been a son. That means the right of the respondent as a coparcener, equal in status and effect as that of a son, would have to be understood as having arisen on the date on which she took birth and, therefore, she would be entitled to claim her equal share in the coparcenary property from that date, unless the property has lost its character as a coparcenary property by disposition or alienation made before 20/12/1994, as contemplated in proviso to sub-section (1) of Section 6(1) read with sub-section (5). In the instant case, there has been no disposition or alienation including any partition or testamentary disposition as contemplated under Section 6(1) read with sub-section (5) before 20/12/2004 having taken place and, therefore, the respondent would have equal share in the coparcenary property and would be entitled

to even re-open the notional partitions, which are not covered under the explanation to sub-section (5) of Section 6.

21. Learned Counsel for the appellants has sought to place his reliance upon the case of ***Sadashiv Sakharam Patil*** (supra), wherein the learned Single Judge of this Court has observed that new Section 6 of the Succession Act creating substantive right in favour of the daughter, is prospective in nature. Upon carefully going through the entire judgment, in my humble opinion, this is not the ratio of the said case. The learned Single Judge considering the peculiar facts of that case has made the said observation and, therefore, it is necessary to refer to those facts. One Sakharam had three children; two daughters, Narmadabai and Muktabai and one son, Sadashiv. The two daughters predeceased Sakharam and his son succeeded him. Sadashiv claimed to be the sole heir and successor of Sakharam, which was disputed by son of Muktabai who filed a suit claiming the share of Muktabai in the coparcenary property. Against this backdrop, that the learned Single Judge held that since the daughters of the coparcener had died prior to the coparcener and definitely prior to the Amendment Act, 2005 coming into force, the daughters could not be said to be living on and from 9/09/2005 to be the coparceners in their own right. The learned Single Judge further observed in paragraph 16 that

had they been living on 9/09/2005, they would have had the same right in their father's property as his son.

22. It is pertinent to mention here that the learned Single Judge has also observed that the daughter can claim, by virtue of newly added Section 6, partition of the property which was not partitioned earlier. However, the learned Single Judge, in the aforestated facts and circumstances of the case, held that son of Muktabai cannot be said to have made any prima facie case of having a share in any of the suit properties. It is also important to note here that these observations have been made at an interlocutory stage of the suit when the order of injunction restraining creation of third party interest in the suit property passed on 23/11/2010 by 2nd Joint Civil Judge Senior Division, Thane challenged in Appeal From Order before the High Court was under consideration of the learned Single Judge.

23. It can, therefore, be seen that it has not been held in the said case of ***Sadashiv Sakharam Patil and Ors.*** (supra) that a living daughter cannot claim partition in respect of a coparcenary property not partitioned earlier by fulfilling the conditions laid down in Section 6(1) read with sub-section (5) of the Succession Act. Besides, the Hon'ble Supreme Court, as

discussed earlier, has already cleared the doubts about the law in this regard.

24. Another argument of learned Counsel for the appellants is that when the substantive right under Section 6 of the Succession Act was created in the year, 2005, there was no coparcenary in existence in relation to the joint family of which the respondent claimed to be a member together with deceased Dagduba. Therefore, according to him, question of respondent claiming any share in the coparcenary property equally with Dagduba would not arise.

25 I have already held that right conferred under new Section 6 relates back to the event of birth and if at that time the coparcenary is in existence, in the instant case, it was in existence, all the rights of a male coparcener would flow towards the daughter-coparcener and enrich the daughter-coparcener in accordance with the Section. In the instant case, there would also be no question of devolution of the property upon Dagduba, the sole coparcener, as per the earlier law, as respondent has not claimed her share in the property through Kashinath and has claimed it in her own right. New Section 6, it cannot be forgotten, makes her a coparcener in her own right. The property was admittedly ancestral and,

it is nobody's case that there was disposition of the property through testamentary succession. Therefore, I find no merit in the argument so canvassed in this behalf by the learned Counsel for the appellants.

26. Learned Counsel for the appellants has further submitted that the cross-objection which has been allowed by the First Appellate Court could not have been considered as it was belatedly filed without being accompanied by any application seeking delay condonation. A perusal of the judgment of the First Appellate Court discloses that this objection has been considered by the learned District Judge by following the law laid down in the case of ***Mahadev Govind Gharge V/s. Special Land Acquisition Officer*** reported in ***2011 (5) Mh.L.J. 532***. The discretion has been exercised in favour of the respondent by the learned District Judge even when there was no separate application filed for condoning the delay. Exercise of discretion in the absence of any specific application would, at the most, be an irregularity not affecting the merits of the case. It has also not been shown by the appellants as to why the delay should not have been condoned and resultantly one has to say that by exercise of the discretion in favour of the respondent, no prejudice has been caused to the appellants and that there has been no miscarriage of justice.

27. In the result, I find that there is no merit in this appeal and it deserves to be dismissed with costs. Substantial question of law is answered accordingly. The appeal stands dismissed with costs.

S.B. SHUKRE, J.

NH/-