(2025) 01 BOM CK 0017

Bombay High Court (Aurangabad Bench)

Case No: Second Appeal No. 426 Of 2010

Kashinath s/o Tapiram Tayde		APPELLANT
	Vs	
Sau Parvatabai @ Vaijayabai Chintaman Bhalerao		RESPONDENT

Date of Decision: Jan. 2, 2025

Acts Referred:

- Constitution of India, 1950 - Article 254
- Hindu Succession Act, 1956 - Section 6, 6(1), 6(5), 29A

Hon'ble Judges: R.M. Joshi, J

Bench: Single Bench

Advocate: A. P. Bhandari, Rani Bharuka Bora, S. S. Bora, V. R. Jain

Final Decision: Dismissed

Judgement

R. M. Joshi, J.

1. This second appeal involves following substantial questions of law :-

(i) Whether the plaintiff who is a daughter would have the benefit of the amended provisions as amended by the Central Act of 2005 in Hindu

Succession Act ?

Â (ii) The plaintiff is born prior to 1956. The defendant No. 1 is also born prior to 1956. The father of the plaintiff and defendant No. 1 died in the year

1990. In such circumstances, whether the provisions of the Central Amendment in the year 2005, to the Hindu Succession Act, would be available to

the plaintiff ?

2. Parties are referred to as Plaintiff and Defendants.

3. Plaintiff is the real sister of Defendant No. 1 and daughter of Tapiram. Plaintiff filed suit for partition and separate possession in respect of five

properties as described in paragraph No. 1 of the plaint. She claims that these properties are ancestral properties of Plaintiff and Defendants. It is also

claimed that out of the ancestral properties, their father had purchased some of the Â properties but in the name of himself and Defendant No. 1. It is

also claimed that Plaintiff came to know about the revenue record indicating name of defendants in respect of the suit properties, she sought partition.

Since, it was refused, suit for partition and separate possession came to be filed.

4. Defendants filed written statement at Exhibit 16 denying the contentions raised by Plaintiff with regard to the properties being joint family

properties. It is claimed that during the life time of father of Plaintiff and Defendant No. 1, there was an oral partition in respect of the land and the

house. It is claimed that the subject land and house came to the share of Defendant No. 1 and as against this, fatherÂ ofÂ PlaintiffÂ andÂ

DefendantÂ No.Â 1Â performedÂ marriageÂ of daughters. It is also claimed that amount received from fatherâ€™s employment at the time of

retirement was also paid to the daughters. It is specifically claimed in paragraph no. 3 of the written statement that on the basis of partition in the year

1974, revenue record was mutated in favour of Defendant No. 1 vide Mutation Entry No. 1209. In paragraph No. 5 of the written statement, it is

claimed that inspite of knowledge about the said mutation entry, no objection is raised by the Plaintiff in that regard and as such she has no right to

take any exception thereto now. In paragraph No. 10, it is specifically pleaded by Defendant No. 1 that their father had no sufficient income to

purchase properties though he was employed. It is further specifically claimed by Defendant No. 1 that he used to do labour work and out of said

income, in the year 1962, his father purchased Gat No. 106 but since this Defendant was minor, it was purchased in his name. Thus, there is specific

pleading with regard to Gat No. 106 being self-acquired property. On these amongst other contentions, suit was opposed.

5. Learned Trial Court decreed the suit in respect of three properties more particularly described in paragraph Nos. 1B to 1C. Plaintiff has not take

exception to the said decree. As such, rejection of partition in respect of remaining two properties has attained finality.

6. Learned counsel for Appellant/Defendant No. 1 submits that though the Honâ€™ble Supreme Court in case ofV ineeta Sharma vs. Rakesh

Sharma and others, (2020)9 Supreme Court Cases 1 has held that right of a daughter in the co-parcernary property is by birth however, there is no

complete embargo for taking stand of oral partition. It is his submission that in Paragraph No. 137(5) of the said judgment, the Honâ€™ble Supreme

Court has held that 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 by the decree of Court, it may be accepted. According to him, in the instant case, theory of oral partition is

supported by mutation entry. It is his further submission that the Honâ€™bleÂ SupremeÂ CourtÂ inÂ thisÂ judgmentÂ hasÂ notÂ takenÂ into

consideration the issue as to the right of a daughter who is born prior to 1956. So also, the effect of Maharashtra Amendment Â in Section 29A of

Hindu Succession Act has not been considered, when admittedly, Plaintiff married prior to 1994. To buttress his submissions, he placed reliance on

judgment of Division Bench of Karnataka High Court in case ofP ushpalatha N. Vs. V.V.Padma, 2010(3) AIR KANT HCR 225, wherein in

Paragraph No. 56 of the said judgment it is held that there was no intention either under the unamended act or the act after amendment to confer any

such right on a daughter of a co-parcener who was born prior to 17.6.1956. It is his submission that since these two aspects were not decided by the

Honâ€™ble Supreme Court, it is open for the Appellant herein to make submissions in that regard and these issues deserve consideration.

7. It is his submission that there is specific pleading in the written statement with regard to the oral partition which, according to him, gets support from

7/12 extracts at Exhibits 34 to 36. It is his submission that the present case is clearly covered by observations of Honâ€™ble Supreme Court in case

of Vineeta Sharma (supra) in Paragraph No. 137.5. It is his further submission that these aspects are not taken into consideration by the Courts below

and as such these substantial questions of law are involved herein.Â He has also placed reliance on judgment of Honâ€™ble Supreme Court in

Paragraph Nos. 16 and 17 in case of Danamma Alias Suman Surpur and another vs. Amar and others, (2018) 3 Supreme Court Cases 343 in order to

submit that in the said judgment also the daughters were not considered as co-parcener and this judgment has been upheld by Honâ€™ble Supreme

Court in case of Vineeta Sharma (supra).

8. Learned counsel for Plaintiff/contesting Respondent supported the impugned judgment.

9. AtÂ theÂ outsetÂ itÂ needsÂ mentionÂ that,Â partiesÂ areÂ at ad-idem to the position that Plaintiff and Defendant No. 1 were born prior

to 1956 and their father Tapiram died in 1990. Thus, relationship between Plaintiff and Defendant No. 1 as real brother and sister is admitted. It is the

case of Plaintiff that the suit properties are ancestral joint family properties and there is no partition effected with regard to the same. As against this,

it is the case of Defendant No. 1 in paragraph Nos. 3 and 5 of the written statement that there was partition in the year 1974 and pursuant to the same

his name was entered into revenue record vide mutation entry No. 1209. However, in paragraph No. 10 there is specific averment made by this

Defendant claiming that Gat No. 106 is his self-acquired property and only for the reason that he was minor at the relevant time, it was purchased by

his father in his own name.Â Thus, it is clear that insofar as Gat No. 106 is concerned, it is not a case of Defendant No. 1 that it is a joint family

property and pursuant to partition, the same been transferred into his name.Â In the light of this specific case of Defendant No. 1, merely on the basis

of mutation entries and recording of name of Defendant No. 1 in two properties and name of Defendant No. 2 and father of Plaintiff and Defendant

No. 1 in one property will not be sufficient to accept the proof of factum of partition.

10. It is pertinent to note that neither in the pleadings nor in the evidence, this Defendant specifically states or even atleast approximately/around when

in 1974, oral partition has taken place. Neither Defendant No. 1 in his evidence nor his step sister who was examined by him makes any whisper

about the same. Since there is presumption of jointness of Hindu undivided family, once Defendant No. 1 comes with a specific plea of partition, initial

burden would be on him to prove that there was partition oral or otherwise. The evidence as it appears from record is not sufficient to hold that there

was partition of the suit property and that the Defendant No. 1 has failed to prove factum of previous partition. This Court, while entertaining second

appeal, cannot and is not inclined to interfere into the findings of facts recorded by both the Courts below.

11. Now, the question remains as to whether in view of Section 29A of Maharashtra Amendment to Hindu Succession Act, the Plaintiff has no right

to seek partition, as sought to be canvassed on behalf of Appellant. It would be relevant to reproduce said provision for the sake of convenience.

29. A. Equal rights to daughter in coparcenary property. Notwithstanding anything contained in section 6 of this Act, â€

(i) in a Joint Hindu Family governed by the Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a

son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship ; and shall be

subject to the same liabiliiies and disabilities in respect thereto as the son;

(ii) at a partition in a Joint Hindu Family referred to in clause (/), the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to

a son:Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of partition

shall be allotted to the surviving child of such p/e-dec eased son or of such pre-deceased daughter :Provided further that the share allotable to the pre-deccased child

of a pre-dcccased son or of a pre-deceased daughter, if such child had 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 of the pre-dec :ased daughter, as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) 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

will or other testamentary disposition ;

(iv) nothing in this Chapter shall apply to a daughter married before, the date of the commencement of the Hindu Succession (Maharashtra Amendment) Act, 1994;

(v) nothing in clause (ii) shall apply to a partition which has been effected before tho date of the commencement of the Hindu Succession (Maharashtra Amendment)

Act, 1994.

12. Perusal of the said provision indicates that a right was created in favour of a female Hindu and she was treated as a co-parcener with a rider that

she is not married prior to coming into force of the Amendment Act of 1994 and that partition is not already effected. In this backdrop, provision of

amended Section 6 becomes relevant which reads as under :-

6. Devolution of interest in coparcenary property.—

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 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 the same manner as the son;

(b) have the same rights in the coparcenery property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenery 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 (39 of 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

coparcenery 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) x x x

Â (c) x x x

(4) x x x

(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 â€œpartitionâ€ 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.

13. This provision clearly indicates that in a joint Hindu family governed by Mitakshara law a daughter of a co-parcener shall by birth become a co-

parcener in her own right in the same manner as the son and it does not depend upon marital status of the daughter.

14. In order to decide the effect of the Central amendment to section 6 of the Act, when Section 29A of Maharashtra Amendment Act, is not

repealed and to appreciate submissions made by learned counsel for Appellant in that regard, it would be necessary to consider Article 254 of the

Constitution. It reads thus :-

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or

to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by

Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the

Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the

provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has

been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending,

varying or repealing the law so made by the Legislature of the State.

15. This Article would apply in case of inconsistency between laws made by Parliament and Legislature of State. A plain reading of both provisions of

amended Section 6 of the Act and Section 29A of Maharashtra Amendment, 1994 indicates that they are inconsistent to the extent, that, the daughter

married prior to 1994 (before commencement of Amended Act) was excluded from consideration as a co-parcener whereas Central Amendment to

Section 6 does not make it qualified/conditional. As per this provision, irrespective of factum of marriage of the daughter, she would be considered as

coparcener.

16. As per Clause (1) of above Article, in respect of matters from concurrent list, the law made by Parliament, whether passed before or after law

made by Legislature of State or as case may be existing law, shall prevail and the law made by Legislature of State, to the extent of repugnancy be

void. Clause (2), however, provides that, where the State Legislature has made a law repugnant to the provisions or earlier law made by Parliament

and it has received assent of the President, the same shall prevail in the State.

17. In the instant case, Maharashtra Amendment 1994 i.e. State Legislature is enacted prior in time and since the Central amendment to Section 6 of

the Act being at later point of time, Clause (1) would come in play and to the extent of repugnancy, and the Central amendment would prevail. Thus,

this Court has no hesitation to hold that the provisions of amendment to Section 6 of the Act would prevail over State amendment and that the

marriage of the daughter prior to 1994, would not become embargo in recognising her status as a coparcener.

18. The submission of learned counsel for the Appellant about non-consideration/decision on the point of applicability of Section 29A of Maharashra

Amendment, 1994, by Honâ€™ble Supreme Court in judgment of Vineeta Shrama (supra), is not also acceptable for the reason that not only

Maharashtra Amendment Act, 1994 but also similar provisions made by other states, are duly considered therein. In paragraph No. 57 of the

judgment, a reference can be found about the cognizance being taken by Honâ€™ble Supreme Court of the said State amendments. Discussion by

referring to Mangammal vs. T. B. Rajuâ€™s case, (2018) 15 SCC 662, amply makes it clear that the conclusions finally recorded in judgment of

Vineeta Sharma (supra) are on due consideration of all relevant provisions and the judgments passed earlier. This judgment (Vineeta Sharma),

therefore, rests all the issues as of now concerning to amendment of 2005 to Section 6 of the Act.

19. Learned counsel for Appellant submits that since Plaintiff is born prior to 17.06.1956, she would not be entitled to become coparcener. Reliance

placed by him on judgment of Division Bench of Karnataka High Court in case of Pushpalatha (supra) to support this submission is wholly misplaced.

First of all, the said judgment has been passed prior to the judgment of Honâ€™ble Supreme Court in case of Vineeta Sharma (supra). Now, law on

the point of the applicability of the provisions of Section 6 is crystalized. It is necessary to note the conclusions drawn therein which read thus :-

â€œ137. Resultantly, we answer the reference as under :-

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 the

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 the 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 coparcernary. 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 1956 Act 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 rigour of provisions of the 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 view to the contrary expressed in Prakash v. Phulvanti and Mangammal v. T. B. Raju. The

opinion expressed in Danamma 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.

20. Thus, the law now settled by Honâ€™ble Supreme Court leaves no scope to hold that amended provision of Section 6 of the Act, would not apply

to the daughters born prior to 17.06.1956, since

application of amended provision is held to be retrospective. Recognition of status of coparcener is by birth.Â Pertinently, there is practically a

substitution of Section 6 of the Act and that the Legislature in its wisdom, thought it appropriate not to amend partly but to substitute the said provision

altogether.Â In view of this, with utmost respect, this Court does not agree with the said observations made in judgment of Pushpalatha (supra).

Moreover, neither there is any express bar created for enforcement of right of a coparcener to a female who is born prior to 1956 nor even by

implication, it can be held so. Moreover, having regard to the aim/object of the amendment, no such interpretation can be entertained.

21. Even otherwise, a bare look at the said provision shows that from date of commencement of amended Act, 2005, the daughter shall be considered

as a coparcener by birth in her own rights in the same manner as a son. Thus, this provision leaves no room whatsoever to exclude the daughters who

are born prior to 17.06.1956. To hold so would amount to re-writing of the Statute, which is not permissible in law.

22. Thus, there cannot be any dispute made with regard to the position of law that by virtue of amended Section 6 of the Hindu Succession Act, a

daughter irrespective of her date of birth has become co-parcener in her own right in the same manner as the son. Similarly, unless Defendants are in

a position to bring case in the exception as contemplated by Paragraph Nos. 137.2 and 137.5 of the judgment as recorded above, there is no embargo

to decree a suit for partition, initiated by daughter.

23. Admittedly, case of Defendant is not covered by Clause 137.2 of the judgment of Vineeta Sharma, since no case is sought to be made out to that

effect. Learned counsel for Appellant has placed reliance on judgment of Honâ€™ble Supreme Court in case of Digambar Adhar Pathal vs. Devram

Girdhar Patil and another, 1995 Supp(2) Supreme Court Cases 428 to submit that claim of Defendant of oral partition is supported by revenue record

and the same is sufficient to prove the factum of previous partition of suit properties. Such submission could have been accepted provided that it was

not the case of Defendant himself that the subject property standing in his name is his self-acquired property and not ancestral property.

24. Here in this case, as recorded hereinabove, there is specific case of Defendant No. 1 that property Gat No. 106 is his self-acquired property. As

such, the theory sought to be canvassed now before this Court about there being documentary evidence in the form of 7/12 extracts indicating that

there was partition, cannot be accepted.

25. In view of the above discussion and having regard to the law settled by the Honâ€™ble Supreme Court in case of Vineeta Sharma (supra), the

substantial questions of law as recorded hereinabove are answered in negative.

26. In the result, Appeal stands dismissed. Parties to bear their own cost.

27. At this stage, learned counsel for Appellant seeks continuation of interim order for a period of six weeks.

28. Learned counsel for Respondents opposed continuation thereof.

29 . Interim relief is in force since 2010. Hence, there is no reason not to continue the same for a period of six weeks. Hence, interim relief is

continued for six weeks from today.