

(2011) 09 BOM CK 0146
In the Bombay High Court
Case No : Appeal From Order No. 265 of 2011

Sadashiv Sakharam Patil and Others	APPELLANT
Vs	
Chandrakant Gopal Desale and Others	RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Hindu Succession Act, 1956 — Section 6, 6(1), 8

Citation : (2011) 5 BomCR 726 : (2011) 113 BOMLR 3004 : (2012) 1 MhLj 197

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Sandesh Patil, in AO No. 265/2011, R.S. Apte, G. Godre, in AO No. 274/2011, Deepak Chitnis, in AO No. 180 of 2011 and Sharin Shaikh and U.M. Jhaveri, in AO No. 792/2011, for the Appellant; P. Sakseria, Mayur Khandeparkar, Ranjit Shetty, Lucky Rai Indorkar and Aniket Nair for Hariani and Company, in AO. Nos. 265, 274, 518 and 792/2011, R.S. Apte and G. Godre, for Respondent No. 14 in AO No. 265/2011, Deepak Chitnis, for Respondent Nos. 13 and 265/2011, Sharin Shaikh and U.M. Jhaveri for Respondents No. 12 in AO No. 265/2011, A.A. Kumbhakoni, for Original Defendant and Pradeep Samant and Associates for Respondent Nos. 2 to 5 in A.O. No. 265/2011, for the Respondent

Judgement

Roshan Dalvi, J.—The main challenge is to the order of injunction restraining creation of third party interest in the suit properties under the impugned order of the Second Joint Civil Judge (S.D.) Thane dated 23rd November 2010. One Sakharam had three children: two daughters, Narmadabai and Muktabai and one son, Sadashiv. The two daughters predeceased him. His son succeeded him.

2. Muktabai died in 1978. Narmadabai, the other daughter died in 1987 prior to Sakharam who died on 4th October 1995. Sadashiv, claiming to be the sole heir and successor of Sakharam, got the Revenue records altered showing a mutation entry dated 3rd December 2002 reflecting his name.

3. The son of Muktabai filed the suit claiming the share of Muktabai in the properties of her father Sakharam. He claims that the properties of Sakharam are ancestral properties or properties purchased from the proceeds of the sale of

ancestral properties. Sadashiv, who is the Defendant No. 1 in the suit, claims that the properties were purchased by Sakharam along with Sadashiv himself and are, therefore, his self acquired properties. These properties are stated to have been bequeathed by him under the registered Will dated 11th September 1989. The son of Muktabai claims that the Will is bogus and that Sakharam had no bequeathable interest, the properties being ancestral properties which he could not have disposed off by Will. The other heirs of Muktabai and Narmadabai similarly claim the properties of their deceased mothers.

4. Upon the case that they are ancestral properties, the heirs claim that Muktabai was a coparcener u/s 6 of the Hindu Succession Act 1956 as amended by the Hindu Succession (Amendment) Act 39 of 2005. It is claimed that Muktabai being a daughter of a coparcener viz: Sakharam became a coparcener by her birth in her own right as did Sadashiv.

5. Sadashiv claims that even if the properties are ancestral properties Muktabai or Narmadabai were not coparceners and cannot claim any interest therein. It is his contention that only on and from 9th September 2005 on which date the Amendment Act 39 of 2005 came into force that the daughter who was then living would become a coparcener. Muktabai as well as Narmadabai died not only prior to the Act having come into force, but even prior to their father. The succession of Sakharam opened on 4th October 1995 when he expired. On and from that date his estate had to be administered. On and from that date his coparcenaries interest in the ancestral property would devolve by survivorship. So far as his intestate succession is concerned, Sadashiv as also the children of Muktabai and Narmadabai would take their shares from 1995. Neither of the children claimed her share. In fact, Sakharam died testate leaving behind a registered Will. Seven years after his death the mutation entry came to be made. Sadashiv was shown as the owner of the suit lands. None challenged the ownership or the mutation entry within three years of the death of Sakharam and also within three years of the mutation entry having been made respectively.

6. Sadashiv entered into an assignment for development of his properties with the other Defendants on 24th December 2004 followed by a registered development agreement on 10th March 2005. The development commenced from 30th May 2005. A public notice dated 10th May 2006 was not objected by any party. The initial claim has been made only in the suit filed in 2010.

7. It may be mentioned that the aforesaid facts are all admitted and extracted from the pleadings. The seminal aspect to be considered for seeing the prima facie case of the Plaintiff, the son of Muktabai, to restrain creation of third party rights in the suit properties taking them to be the ancestral properties of Sakharam, is whether his mother was a coparcener and was entitled to coparcener rights in the suit properties even assuming that the suit properties are ancestral properties. If that aspect is seen, it would next have to be seen whether the suit properties are shown to be the ancestral properties from the record of rights and if not, whether they are shown to be purchased from the

proceeds of any other properties which were the ancestral properties of Sakham which would constitute a nucleus. If that is shown, the Plaintiff would prima facie make out a case of having a share in any of the suit properties. This is in view of the fact that the Defendants have shown that the properties have been acquired by Sakham and Sadashiv jointly from the original owners of the lands under registered documents.

8. The learned Judge has gone into various records of rights, proceedings under the ULC Act, certain sanctioned layout map and mutation entries and execution of various documents by and between Sakham and/or Sadashiv and the Defendants. He has also considered that there was no partition in the joint family, the succession of Sadashiv by Will which has been challenged by the Plaintiff as also the marriages of two daughters of Sakham.

9. It may be mentioned that all these aspects would be of secondary importance, if a primary right as a coparcener of the two daughters is not established.

10. The Legislative provision upon which the Plaintiff claims his share through his mother is Section 6 of the amended Hindu Succession Act which runs thus:

6. Devolution of interest in coparcener 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 coparcener property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcener 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.

11. The judgments interpreting the relevant aspects of Section 6 have been shown to me essentially by the Counsel on behalf of the original Plaintiff.

12. In the case of Suglabai Vs. Gundappa A. Maradi and Others, the first three words of the aforesaid section came to be considered and interpreted in paragraph 24. It has been observed that the words "on and from" mean "immediately and after" - the commencement of the Act. It is observed that in other words as soon as the amending Act came into force the daughter of the coparcener becomes, by birth, a coparcener in her own right in the same manner

as the son. In that case the change in law came into effect during the pendency of the Appeals. It was held that the changed law applied to pending Appeals and consequently, the said Appeal. Hence the daughter in that case was held to be the coparcener. It was observed that there was nothing in the Act which showed that only those born on and after the commencement of the Act would become coparceners. Hence it was held that even a daughter who was born prior to the amendment Act became a coparcener immediately on and after the Amendment Act.

13. This is the case where the daughters had already expired prior to the coming into force of the amendment Act and prior to any litigation, her son having filed the suit himself. There is nothing in the Section which shows that it would apply to all females retrospectively including a daughter who had expired prior to the coparcener himself, prior to any litigation and prior to the amendment Act itself. If such a daughter was also to be included the entire population would come to be included and the children and grandchildren of all deceased females would claim their share in the estate of their grandparents and great grandparents through their mother. It would have to be seen whether the legislation is capable of such an absurd interpretation.

14. The words "on" and "from" show and suggest that on a date prior to the Act coming into force the daughter (female) would not be included as a coparcener. Consequently, all daughters born to coparceners in a Hindu joint family living at the time the Act came into force would become coparcener. Daughters (females) who had expired a day prior thereto, unfortunately, could not, because they would be covered by the law prior to the amendment. If such interpretation is not given the words "on" and "from" "the commencement of the Hindu Succession (Amendment) Act, 2005" would lose their significance all together and would be rendered otiose.

15. This aspect is essentially decipherable from the proviso to Section 6(1) of the Act cited above. This provision has been specifically enacted to lay down a cut off date for the daughter of a coparcener to claim her right as a coparcener including her right of partition which is restricted by any disposition or alienation made prior to 20th December 2004. Hence when the Act came into force on 9th September 2004 partition could be claimed by a daughter, if the coparcener property was not partitioned about nine months prior thereto. This shows that the earlier dispositions and alienations could not be challenged so that whilst the daughter was not a coparcener and certain rights were created they would stand. This is to lend stability to facts and circumstances that may have prevailed in innumerable families having joint family properties prior to the creation of the new right in favor of the daughter. Counsel on behalf of the original Plaintiff sought to show that the proviso has been held to be ultra vires the constitution by the Karnataka High Court which judgment shall be considered presently.

16. It has been held in the case of Pravat Chandra Pattnaik and Others Vs. Sarat Chandra Pattnaik and Another, that the aforesaid Section was enacted for

removing the gender discrimination that prevailed leading to oppression and negation of the fundamental right of equality to women and to render social justice by giving them equal status in the Society. The Act came into force from 9th September 2005 and the statutory provisions u/s 6 of Hindu Succession Act, 1956 thereof created a new right. The provisions are not expressly made retrospective by the legislature. The Act is clear and there is no ambiguity. Therefore, words cannot be interpolated. They do not bear more than one meaning. The Act is therefore, prospective. It creates a substantive right in favor of the daughter. The daughter gets a rights of a coparcener from the date when the amended Act came into force. Consequently, the contention that only the daughters who were born after 2005 would be treated as coparceners was not accepted. It specifically clarifies that the daughter gets a right as a coparcener from the year 2005 whenever she may have been born. She can claim a partition of the property which was not partitioned earlier. However, the judgment specifies a rider. That is in view of the proviso to Section 6(1) of the Act.

But if the same was effected earlier i.e., prior to 20th December, 2004 the same should not be reopened.

17. Hence the prospectively of the Act is clear. There can be no retrospective operation for the reason that it is not expressly made retrospective by the legislature and it is specified not to effect transactions prior to the specified date in the proviso.

18. It would, therefore, have to be seen when in this case the daughters of Sakharam would become coparceners. Both the daughters had died prior to Sakharam and definitely prior to the Act coming into force. Consequently, on and from 9th September 2005 they were not living to be coparceners in their own right in the same manner as Sadashiv had. Had they been living on 9th September 2005 they would have had the same right in their father's property as his son. It is, therefore, that it is rightly contended on behalf of the Defendants in the suit that Sakharam's succession opened on 4th October 1995 on that date his daughters Muktabai and/or Narmadabai were not coparceners. His coparcener property would devolve by survivorship to his only son Sadashiv. The devolution of interest in the coparcener property as specified in the sub- title/ heading of Section 6 would take place only to the son. The words in the sub-title "devolution of interest" also therefore, show that for an interest to devolve upon a person that person must be alive. No devolution of interest in coparcener property can take place upon a deceased coparcener. On the date of the death of Sakharam his daughters were not even coparceners; they were not even alive. No devolution of interest upon them could take place.

19. In the case of Sheela Devi and Others Vs. Lal Chand and Another, the Court considered the estate of one Babu Ram who died in the year 1989. He was one of the 5 sons of Tulsi Ram and one of the members of the coparcener property. He left behind two sons and three daughters. Babu Ram had inherited 1/5th share of the property of his father and 1/20th share through another brother

who had died intestate without issues. The succession between the two brothers and their descendants was in issue. The applicability of the Section 6 of the Hindu Succession Act of 1956 was under consideration. Though that is a different matter, observation in paragraph 21 of the judgment relates to the new Act of 2005. It was *inter alia* observed that the succession was opened in 1989 and hence the provisions of the amendment Act 2005 would have no application. Thereupon Section 6(1) of the old Act of 1956 which related to succession on the death of a coparcener in the event the heirs were only male descendants came to be considered.

We are not concerned with the interpretation of the old Section 6 which was the issue in the case of Sheela Devi (*supra*). We are concerned with only the aspect of the applicability of the amendment Act on the date the succession opened. Since it was held that the new Act would not apply when succession opened prior to the date on which it came into force - in that case in 1989 - the Court considered Section 6 of the earlier Act.

20. My attention has been drawn by Counsel on behalf of the original Plaintiff to the judgment in the case of G. Sekar Vs. Geetha and Others, to show that this aspect has been negated in the later judgment of the Supreme Court. Paragraph 49 of the judgment extracts the case of Sheela Devi and the entire paragraph 21 thereof. It is observed that in the case of Sheela Devi the amendment Act had no application as the succession has opened prior to 1989 and hence that contention came to be negative to consider and interpret the vesting of the right of the coparcener under the old Act. It is, therefore, entirely erroneous to contend upon reading the word "negative" that the contention that upon the succession opening in 1989 the amendment would have no application was negative without reading the entire paragraph 49 as a whole. It may be clarified that in the case of Sheela Devi upon the applicability of Section 6 of the old Act, the contention with regard to the applicability of the new Act was negative and the old Section was considered. Consequently, the fact that succession did open in 1989 when Babu Ram died which did not make the new Act applicable was accepted. We would do well to read the two judgments together.

21. In the case of Champabai W/o. Darshrath singh Pardeshi and Ors. v. Shamabai @ Shamkuwarbai Gajraj singh Pardeshi and Anr. 2010 (3) ALL MR 262 this Court considered the dwelling house and the agricultural properties of the deceased, one Dashrath singh. He died in 1998 having married twice and leaving behind two married daughters born to his first wife and two sons born to his second wife. In this case the retrospectively of the Act was to be considered. It was observed that succession had opened in 1998 when Darshrathsingh died. There was no amendment to the Hindu Succession Act at the relevant time. The division of shares was immediate without the rights being deferred to the married daughters who were married prior to the Maharashtra Amendment to the Hindu Succession Act. The Maharashtra Amendment with regard to the grant of coparcener rights to daughter made an exception for married daughters. That

amendment, of course, would no longer be applicable in view of the Central Amendment Act. The contention with regard to the dwelling house that the deceased would not take the share was accepted. The shares devolved upon the two sons in 1998 by application of Section 6 r.w. Section 8 of the old Hindu Succession Act of 1956.

22. The judgment in the case of Champabai relates to the earlier State amendment. The Central amendment is not in terms thereof entirely. Hence the bifurcation of retrospectively amongst the property which is a dwelling house and the agricultural properties cannot be read into it after the Central Amendment Act of 2005 was enacted. Consequently, the reliance upon the earlier case of Lata @ Bhagyashree Vs. Madhukar Ganjare (died) (through his L.Rs. Shakuntalabai Ganjare and Others) and Subhash Gudewar, of the same learned Judge applying retrospectively to the agricultural properties and not dwelling house cannot be considered as applicable law after the amendment Act of 2005.

23. In fact the observation in paragraph 8 of the judgment in the case of Miss. R. Kantha, d/o Doddarmaiah Reddy v. Union of India and Anr. AIR 2010 Kar 27 to which also my attention has been drawn by Counsel on behalf of the original Plaintiff would be material. It runs thus:

It follows, therefore, that the provisions of the Act can be enforced when the right to succession opens and not before. The Petitioner's father is said to be alive and hence her right to succession as a co-parcener has not opened.

24. In that case the Plaintiff/Petitioner applied for partition of the coparcener property whilst her father was alive u/s 6 of the new Act of 2005 upon the premise that she, as a coparcener, was entitled to all the rights of coparcener including partition. Her father was alive at that time. It was held that Section 6 of the new Act of 2005 was the law relating to intestate succession which regulates the succession of properties of all Hindus by its heading itself which speaks of "devolution" of interest. It was held that "Devolve" means to pass from a person dying to a person living. Hence, the right of a daughter to be treated like a son should be construed only with regard to the share that "devolves" on her when her right to succession opens having regard to the scope and ambit of the Act itself.

Hence the judgment in the case of Ms. R. Kanta shows the restrictive operation of Section 6 as applying to devolution of interest upon the death of coparcener only.

25. This judgment has however been relied upon by Counsel on behalf of the original Plaintiff to show that the proviso to Section 6(1) has been declared ultra vires. That has been declared by a single Judge of the Karnataka High Court. The same proviso and its logic have been considered by a single Judge of this Court in the case of Champabai (supra) in paragraph 11 thereof. The proviso sets the cut-off date beyond which claims cannot be made. It, therefore, sets out a specific classification based upon an intelligible criteria so as not to undo all that

has been done in the distant past. We cannot read into that proviso anything which would render it discriminatory or arbitrary. The reasoning of the proviso as mentioned herein above, therefore, must stand.

26. It may be mentioned that this was main aspect which was required to be considered to see the prima facie case of the Plaintiff. Unless the Plaintiff had shown a legal right in the estate of Sakharam he cannot proceed with the suit and derail various transfers affected earlier. The filing of the suit decades after Sakharam died, mutation entries came to be made and also five years after the amendment itself came into force would even otherwise be barred by the law of limitation.

27. It is no good for a Court to consider the prima facie case upon seeing irrelevant aspects or aspects of secondary importance. The observations of the learned Judge in the impugned order that all this will be seen in trial is avoiding the issue of consideration of the prima facie case. The seminal case of the Plaintiff setting out his legal rights must be first seen. If that is not shown, no prima facie case can be said to have been made out.

28. In this case Sadashiv is the only son of Sakharam has been bequeathed the entire property of Sakharam. It would otherwise be a natural Will. It is also a registered Will. Sadashiv has acted upon the Will and shown himself as owner of the suit properties at least since 3rd December 2002 when the mutation entry came to be made to alter the record of rights. He has dealt with that property by assignment since 2004 and under the registered development agreement since March 2005. The initial developers have, in turn, transferred their properties. Hence transfers have come to be effected from Defendant Nos. 14 to 15 to 16 etc.

29. The Defendants further claim that Sadashiv initially obtained the power of attorney from the original owners. The development agreement itself was entered into along with the power of attorney. The initial power of attorney was dated 26th March 1965. A later registered power of attorney has been executed on 16th January 1991. The registered development agreement has been executed on 24th December 2004 by Sakharam and Sadashiv. The developers have been put in possession of the suit properties under possession letters executed in December 2004. With regard to the other property bequeathed under the Will also similarly possession receipt has been executed. The developers, therefore, claim that the suit properties under the development did not even belong to Sakharam at the time of his death.

30. Upon such contention the Counsel on behalf of the original Plaintiff claims that the properties claimed to be purchased by Sakharam and Sadashiv were out of the proceeds of other ancestral properties which formed the nucleus. No document in that regard has been produced. None is seen to have been shown in the trial Court. The impugned order makes no reference to such nucleus.

31. Consequently, on facts as well as law the Plaintiff is not seen to have made

out any prima facie case for grant of any interim reliefs. No party can stall all development at such a late stage without showing an iota of legal right.

32. Consequently the impugned order deserves to be and is set aside. This order is stayed for 3 weeks.