IN THE COURT OF THE SENIOR CIVIL JUDGE, CHITTAPUR

AT: CHITTAPUR

ORIGINAL SUIT No.24/2014

Present: Sri M.D. Talawar, B.A.LL.B.,(Spl.)., Senior Civil Judge, Chittapur.

Dated: 29TH day of July 2017

1. Nagamma W/o Jagadev Dastapur, age 40 years,occp. Household &Agril. R/o Kerolli Tq.Chincholi Dist. Kalaburagi.

... Plaintiff.

(By Sri G.S.Hiremath Advocate)

-Versus-

1. Ghalappa S/o Bhimanna Karimgol R/o Kodadur Tq. Chittapur now at C/o Jagadev Pujari, Kanaka Nagar, Humnabad Road, Sulepeth Tq. Chinholi and 7 others.

..defendants.

(D1-By Sri MT Arunkar Adv., D2 &D3 –By Sri I.B.Allolli Adv. and D4 –By Smt.Bharati M PatilAdv.)

I.A.No.I

1. Ghalappa S/o Bhimanna Karimgol R/o Kodadur Tq. Chittapur now at C/o Jagadev Pujari, Kanaka Nagar, Humnabad Road, Sulepeth Tq. Chinholi

2. Shobha W/o Sharnappa Karimgol, age 36 years,occp. Household & Agril.

3. Suryakanth S/o Sharnappa Karimgol, age18 years, occp.Student.

4. Mallamma W/o Sharnappa Karimgol, age 32 years, occp., Household & Agril.

5. Basamma D/o Sharnappa Karimgol, age 12 years, occp.Student.

6. Basappa S/o Sharnappa Karimgol, age 10 years, occp. Student.

7. Mallappa S/o Sharnappa Karimgol, age4 years, occp. Student. Deft. 5 to 7 are minors u/g of their natural mother deft.No.4 and all R/o Kodadur Tq. Chittapur Dist. Kalaburagi.

....Applicant/defendants

-Versus-

1. Nagamma W/o Jagadev Dastapur, age 40 years,occp. Household & Agril. R/o Kerolli Tq.Chincholi Dist. Kalaburagi..

...Opponent/plaintiff.

ORDER ON I.A.No.I

1. The advocate for the defendants filed I.A.No.I under Order VII Rule-11 (a) and (d) of C.P.C. for rejection of plaint on the ground that, there is no cause of action and suit is barred by law.

2. In support of I.A.No.I an affidavit of defendant no.2 is filed. The brief averments as made out in the affidavit are as under.

3. The plaintiff filed the suit for partition and separate possession against defendants. The defendant no.2 contended that there is no cause of action as made out by the plaintiff. The suit of the plaintiff is not maintainable in view of the Judgment rendered by Hon'ble Apex Court with reference to Sec. 6 of Hindu Succession (Amendment) Act 2005 therefore, the plaint ought to be rejected. Further contended that, the father of the plaintiff is still alive and hence, she does not derive any right to open partition or enforce for partition and separate possession

of the property of her father during his lifetime. Further contended that in the instance case the father of plaintiff at defendant no.1 and therefore, there is no cause of action and the plaint is also hit by provision of Order VII Rule 11(a) of CPC. Therefore, requested to reject the plaint under Order VII Rule-11 (a) and (d) of C.P.C.

4. On the other hand, the advocate for the plaintiff filed objection to I.A.No.I. The brief averments of the affidavit as made out in the objection are as under:

5. The advocate for the plaintiff contended that, it is settled position of law that, once a case is posted for Judgment, no any application is to be entertained, hence application is not at all maintainable. Further contended that the defendant no.2 and 3 have not at all cross examined plaintiff and all of a sudden now when the case is posted for judgment, the defendant no.2 and 3 have come up with the present application, hence not at all maintainable either on facts or law. Further contended that the very object of amendment of Hindu Succession Act, 1956 is to remove the discrimination between sons and daughters and to give equal rights to the daughters in Hindu Mitakshara coparcener property as sons. From this, it is crystal clear that as per Hon'ble Apex Court Judgment, daughters will be treated as coparceners only after 9.9.2005 irrespective of that fact they were born earlier. Further contended that suit properties were purchased through registered sale deed by mother of the plaintiff, now mother of the plaintiff expired leaving behind the plaintiff and defendants as her

legal heirs, hence intention of the defendant no.2 and 3 during the lifetime of father is that daughters cannot claim suit for partition. Further contended that in view of the Hon'ble Apex Court Judgment the suit of the plaintiff is maintainable from all angles of law and also on facts. Further contended that there is no partition effected in between the plaintiff and defendants, but the defendant no.2 and 3 behind the back of the plaintiff and defendant no.1 have got their names entered illegally in the suit lands, which is against the law. The defendant no.1 who is the father of the plaintiff filed written statement admitting all the facts and contents of the plaint. Under such circumstances, the statement of defendant no.2 and 3 are quite imaginary and also not tenable either on facts or law, because the karta of the family is very well known about family and joint family property. Hence application filed by the defendant no.2 is not at all maintainable in the eye of law. Therefore, pray to reject the I.A.No.I

6. Both sides Advocates called out for arguments on I.A.No.I, who remained absent on 28.7.2017, therefore both side arguments on I.A.No.I is taken as heard and perused the documents on record. Now, the following Points arises for my consideration.

POINTS

1. Whether the applicants /defendant no.2 & 3 prove that, there is no cause of action to file the suit and suit is barred by law ?

2. What Order?

7. My findings on the above Points are as under:

Point No.1: Affirmative.

Point No.2: As per final order, for the following;

R E A S O N S

8. **Point No.1**:- I have perused the I.A.No.I under Order VII rule 11 (a) and (d) of CPC and an affidavit in support of it, objections to I.A.No.I and other documents on record. In the affidavit in support of I.A.No.I, it is averred that, The plaintiff filed the suit for partition and separate possession against defendants. The defendant no.2 contended that there is no cause of action as made out by the plaintiff. The suit of the plaintiff is not maintainable in view of the Judgment rendered by Hon'ble Apex Court with reference to Sec. 6 of Hindu Succession (Amendment) Act 2005 therefore, the plaint ought to be rejected. Further contended that, the father of the plaintiff is still alive and hence, she does not derive any right to open partition or enforce for partition and separate possession of the property of her father during his lifetime. Further contended that in the instance case the father of plaintiff at defendant no.1 and therefore, there is no cause of action and the plaint is also hit by provision of Order VII Rule 11(a) of CPC. Therefore, requested to reject the plaint under Order VII Rule-11 (a) and (d) of C.P.C.

9. On the other hand, the advocate for the plaintiff filed objection to I.A.No.I. The brief averments of the affidavit as made out in the objection are as under:

10. The advocate for the plaintiff contended that, it is settled position of law that, once a case is posted for Judgment, no any application is to be entertained, hence application is not at all maintainable. Further contended that the defendant no.2 and 3 have not at all cross examined plaintiff and all of a sudden now when the case is posted for judgment, the defendant no.2 and 3 have come up with the present application, hence not at all maintainable either on facts or law. Further contended that the very object of amendment of Hindu Succession Act, 1956 is to remove the discrimination between sons and daughters and to give equal rights to the daughters in Hindu Mitakshara coparcener property as sons. From this, it is crystal clear that as per Hon'ble Apex Court Judgment, daughters will be treated as coparceners only after 9.9.2005 irrespective of that fact they were born earlier. Further contended that suit properties were purchased through registered sale deed by mother of the plaintiff, now mother of the plaintiff expired leaving behind the plaintiff and defendants as her legal heirs, hence intention of the defendant no.2 and 3 during the lifetime of father is that daughters cannot claim suit for partition. Further contended that in view of the Hon'ble Apex Court Judgment the suit of the plaintiff is maintainable from all angles of law and also on facts. Further contended that there is no partition effected in between the plaintiff and defendants, but the defendant no.2 and 3 behind the back of the plaintiff and defendant no.1 have got their names entered illegally in the suit lands, which is against the law. The

defendant no.1 who is the father of the plaintiff filed written statement admitting all the facts and contents of the plaint. Under such circumstances, the statement of defendant no.2 and 3 are quite imaginary and also not tenable either on facts or law, because the karta of the family is very well known about family and joint family property. Hence application filed by the defendant no.2 is not at all maintainable in the eye of law.

11. During the course of argument the learned Advocate for plaintiff placed his reliance upon the following decisions:-

(1) ILR 1996 KAR 553 (Sujatha /Vs/ Indian Bank) wherein the Lordship held as under:-

" Civil Proceudre Code,1908 (Central Act No.5 of 1908) –Order 9 Rule 7 – Case posted for Judgment, no application to recall or advance hearing for any other purpose.

(2) (2016)SCCR 12 (Prakash and others /Vs/ Phulavatiand others) wherein the Lordship held as under:-

" B. Hindu Succession Act, 1956 –Section 6 (As amended by Act No.39 of 2005) –Female Hindu Succession –Rights under amendment are applicable to living daughters of living coparceners as on 9th September 2005 irrespective of when such daughters are born – All that is required is that daughter should be alive and her father should also be alive ont he date of amendment."

(3) HCR 2016 Kant. 355 (Munithayamma (Smt.) and others /Vs/ Nanjappa and others wherein the Lordship held as under:-

" Hindu SuccedssionAct,1956 –Section 6 (As amended in2005) – Partition –Right of female coparcener –Amended Act has no retrospective operation and has application only when both coparcener and his daughter were alive as on date of commencement of amended Act i.e., on 9.9.2005, irrespective of date of birth of daughter and coparcener who died thereafter – Defendant was sole surviving coparcener as on date alienation was made –Findings recorded by Courts below against plaintiffs

in respect of 'B' schedule property is not erroneous –Appeal dismissed."

(4) HCR 2016 Kant. 906 (Vasanti /Vs/ Gangapati Appuni Navakhandkar and others) wherein the Lordship held as under:-

" Hindu Succession Act, 1956 – Section 6 – Partition –Rights of daughter –Rights under amendment are applicable as on 9.9.2005, instead of reckoning right of such daughters fromdate of Hindu Succession Act,1956 prior to amendment –Partition taken place before 20.09.2004 will remain unaffected –As on 9.9.2005, if father was alive and daughter was also alive, then the Act is applicable and she is entitled for equal share with her brothers – But if father died prior to 2005 and specifically partition taken place in family, daughters are not entitled for equal share with that of their brothers."

(5) HCR 2017 Kant.143 (Shivaji and others /Vs/ Kasturbai and another) wherein the Lordship held as under:-

" Hindu Succession Act, 1956 –Section 6 – Partition – Ancestral joint family properties – If a coparcener that is father and daughter are both alive as on date of enforcement of amendment Act i.e. 9.9.2005, in such circumstance only daughter could be considered as a coparcener and given a share equal to that of son and not otherwise."

(6) 2017 (1) Kar.L.R.450 (Balavant Rao /Vs/Smt. Geeta andothers) wherein the Lordship held as under:-

" Hindu Succession Act, 1956 –Section 6 – Daughters rights – Keeping in mind, the amendment made toS.6 in the year 2005, if the deceased coparceners has left behind a daughter and if the deceased coparcener i.e., the father and the daughter were both alive on 9.9.2005, in that case, the daughter would be entitled toa share equal to that of a son i.e., her brother and not otherwise."

12. I have gone through the decisions as relied upon by the Advocate for plaintiff as mentioned supra. There is no dispute about the preposition of law as declared in the said decisions. Even then I am having great honour and respect to the said decisions. In the decisions reported in ILR 1996 Karnataka 553, wherein in a case of Sujatha /Vs/ Indian

Bank, their Lordship of our Hon'ble High Court of Karnataka held that, once case posted for Judgment, no application to recall or advance hearing for any other purpose shall not be maintainable. Now the present I.A. No.I is filed under Order VII Rule 11 (a) and (d) of CPC. I have also gone through the provision of Order VII Rule 11 (a) and (d) of CPC. In view of Order VII Rule 11 (a) and (d) of CPC it is crystal clear that plaint can be rejected at any time. Therefore the said decision is not applicable to the present case on hand. Before going to give my finding on point No.1 it is just and proper to refer the following decisions.

(1) 2015 (4) KCCR-3265 (SC) wherein the case of Prakash and Others –Vs- Phulavathi and Others wherein, their Lordships of Hon'ble Supreme Court held as under:

(A) HINDU SUCCESSION (AMENDMENT) ACT, 2005 ('the Amendment Act')-Whether has retrospective effect?

> The court held that, an amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition or opening of succession as per un-amended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the Amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.
>
> The Act of 2005 is not having any retrospectively. The Decision of Karnataka High Court in Phulavati & Others –Vs- Prakash and Others as reported in 2011 (2) KCCR 1248: AIR 2011 Kar.78 is overruled. The Full Bench decision of Bombay High Court as rendered in

Badrinarayan Shankar Bhandari –Vs- Omprakash Shankar Bhandari as reported in AIR 2014 Bom. 151 is confirmed.

(B) INTERPRETATION-Principle-Socio welfare legislation-just because of it could it be or retrospective nature?

The Court held that, even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the Amendment applicable on and from its commencement and only if death of the co-parcener in question is after the Amendment. Thus, no other interpretation is possible in view of express language Shyam Sunder –Vs- Ram Kumar (2001) 8 SCC 24".

(C) HINDU SUCCESSION (AMENDMENT) ACT, 2005- Whether amendment will not apply unless the daughter is born after the 2005 Amendment?

The court held that, we are unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. All that is required is that daughter should be alive and her father should also be alive on the date of the amendment.

(D) PARTITION-Notional-whether is covered under Section 6 (3)?-No.

The court held that, even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the Amendment applicable on and from its commencement and only if death of the coparcener in question is after the Amendment. Thus, no other interpretation is possible in view of express language Shyam Sunder –Vs- Ram kumar (2001) 8 SCC-24".

13. Before going to give my findings on Point No.1, it is just and proper to refer Section-6 of Hindu Succession (Amendment) Act, 2005, which reads as under:

"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 purpose 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 of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court."

14. Further, I have also gone through the decision reported in AIR 2016 SC-3292 wherein in the case of R.K. Roja –Vs- U.S. Rayudu wherein their Lordships of Hon'ble Supreme Court held that, "Civil Procedure Code (5 of 1908), O.7, R.11-Rejection of plaint-Application for-court cannot proceed with trial without disposing of application under O.7, R.11". Therefore, looking to the law as laid down by the Hon'ble Apex Court in the said decision, once application is filed under Order VII Rule-11 of C.P.C. it should be disposed-off at first instance.

15. Further, I have also gone through the decision reported in 2015 (4) KCCR 3265 (SC) wherein in the said judgement at Para No.17 the Hon'ble Apex Court held that, the text of amendment itself clearly provides that, the right conferred on a 'daughter of a coparcner' is 'on and from the commencement of Hindu Succession (Amendment) Act, 2005. Section-6 (3) talks of death after the amendment for its applicability. In view of plaint language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. Looking to the law as laid down by the Hon'ble Apex Court in view of Section-6 (3) of Hindu Succession (Amendment) Act, 2005 only after the death of coparcener the said amendment is

applicable. Further, in the said decision at Para No.26 (1) their Lordships of Hon'ble Apex Court held that, In Gurupad Khandappa Magadum –Vs- Hirabai Khandappa Magadum, (1978) 3 SCC 383, Paras 6, 11 and 13, Shyama Devi –Vs- Manju Shukla, (1994) 6 SCC 342, para 7 and Anar Devi –Vs- Parmeshwari Devi (2006) 8 SCC 656, Paras 10, 11 cases this court interpreted the Explanation 1 to Section 6 (prior to 2005 Amendment) of the Hindu Succession Act. It was held that, the deeming provision referring to partition of the property immediately before the death of the coparcener was to be given due and full effect in view of settled principle of interpretation of a provision incorporating a deeming fiction. In Shyama Devi and Anar Devi cases, same view was followed".

16. Further, I have also gone through the decision reported in AIR 2014 BOMBAY-151 (FULL BENCH) wherein in the case of Badrinarayan Shankar Bhandari –Vs- Omprakash Shankar Bhandari (FB) wherein their Lordships of Hon'ble Bombay High Court (FB) at Para No.76 held that, "as indicated by us earlier, the case of coparcener who died before 9th September 2005 would be governed by pre-amended Section 6 (1) of Act. It is only in case of death of a coparcener on or after 9th September, 2005 that the amended Section 6 (3) of the Act would apply. The said decision of the Full Bench of Hon'ble Bombay High Court is confirmed in 2015 (4) KCCR Page No.3265 (SC).

17. Further, I have also gone through the averments of the plaint at page No.4 and 5, plaintiff who averred that, " the suit properties are the

ancestral properties of the plaintiff and defendants. The suit landed property at item no.1 and 2 are ancestral properties of defendant no.1 and he has inherited the same from his ancestors. Further there is an oral partition between the defendant no.1 and his brother byname Dhulappa since long back. However, land Sy.No.116, is jointly standing in the name of defendant no.1 and LRs of his brother late Dhulappa. The suit property Sy.No.159/1-2 measuring 8 acres andSy.No.152 measuring 1 acres 35 guntas is the property purchased under a registered sale deed in the name of late Kashamma W/o Ghalappa who is the mother of the plaintiff and she died intestate. The other portion of the land Sy.No.152 measuring to the extent of 5 acres 30guntas is nominally standing in the name of defendant no.1. The open plot and house properties at item No. 5 is standing in the name of defendant no.1, which also is the ancestral property of the plaintiff and defendants. Hence all the properties mentioned above are the joint family properties and the plaintiffs and defendants are in joint possession and enjoyment of the same as coparceners."

18. Looking to the averments as made out at para 4 and 5 of the plaint, plaintiff claimed that the suit schedule properties are the ancestral properties of herself and defendants and they are joint family properties and they are in joint possession and enjoyment of the same as coparceners. Therefore considering the facts and circumstance of the case I am of the view that, inview of Sec. 6 (3) of Hindu Succession (Amendment) Act 2005, the plaintiff is not entitled any

share in the suit schedule properties till the death of her father i.e. defendant No.1. Therefore, there is no cause of action to the suit. Therefore, the plaint is liable to be rejected under Order VII Rule-11 (a) and (d) of C.P.C. Therefore, Point No.1 is answered in Affirmative.

19. **Point No.2**:- In view of my findings to Point No.1, I pass the following;

O R D E R

The I.A.No.I as filed under Order VII Rule-11 (a) and (d) of C.P.C. is hereby allowed.

Further, it is ordered that, the plaint is hereby rejected Under Order VII Rule-11 (a) and (d) of C.P.C.

No order as to cost.

(Dictated to the Stenographer in the open court, transcribed by him, corrected by me, then pronounced in the open court this 29th day of July 2017)

(M.D. Talawar)
Senior Civil Judge, Chittapur.

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