**HIGH COURT OF MADHYA PRADESH : JABALPUR**

**BEFORE HON'BLE SHRI JUSTICE SANJAY YADAV**

**First Appeal No.4/1999**

Rajkumar Singh and others

versus

Pushpendra Singh and others

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Shri Sachin Yadav, learned counsel for appellants.

Shri G.S. Baghel, learned counsel for respondents No.1 to 3.

None for the respondent No.4.

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**J U D G M E N T**
**(3.1.2017)**

Present appeal under Section 96 of the Code of Civil Procedure, 1908 at the instance of defendants No.1 to 4, is directed against the judgment and decree dated 27.11.1998 passed by Third Additional District Judge, Satna in Civil Suit No.15-A/1992.

**2**. Parties are referred to as they were before the trial Court.

**3**. The action was instituted by the plaintiffs seeking declaration that the sale deed executed by defendant No.5 in favour of defendants No.1 to 4 on 31.7.1991 in respect of agricultural land bearing Khasra No.388 and 390 admeasuring

6 Bigh 6 Biswa situated at Mouja Babupur Tahsil Nagod District Satna, be declared null and void and the plaintiffs be declared 1/3rd owner each of the suit property and for possession and permanent injunction and the mesne profits. Contending *inter alia* that land bearing Araji No.142, 237, 240, 373, 374, 388, 390, 406 and 407, Total Area 20 Bighas 11 Biswa i.e. 4.295 hectares situated at Village Babupur being an ancestral property with the name of Bhuvneshwar Singh recorded in the revenue record, after whose death, the defendant No.5 was recorded as Bhumiswami being Karta Khandan. That, the defendant No.5 was hard of hearing since his birth. That, defendants No.1 to 4 taking advantage of inherent limitation of defendant No.5, took him to Nagod and got the sale deed in question registered in their name under the garb that the defendant No.5 is selling the suit property to meet out his medical expenses. It was contended that being ancestral property, defendant No.5 had no exclusive right in selling the ancestral property as he was only a Karta Khandan and that the sale was also void because the same was without consideration. It was contended that the plaintiffs came to know about the alleged sale when on 27.10.1991, the defendants No.1 to 4 forcefully took possession of suit property. It was contended that the suit property being

ancestral, the plaintiffs No.1 and 2 who are son of defendant No.5 have 1/3rd share each in the property and the plaintiff No.3 being the wife of defendant No.5, have half share in 1/3rd share of defendant No.5 i.e. she declared owner over 1/6th share by declaring the sale deed as null and void.

**4**. Defendants No.1 to 4 (present appellants) contested the claim. While not disputing the relationship between plaintiffs No.1 and 2 being sons of defendant No.5 and the plaintiff No.3 being his (defendant No.5) wife, the defendants contradicted the claim that the suit property is an ancestral property. Denying further that the suit property is Hindu undivided family property, defendants contended that the suit property being self-acquired property by defendant No.5 and he having sold the same to meet out his personal medical expenses, the sale deed cannot be said to be illegal or void. Besides denying the claim of 1/3rd share by respective plaintiffs, the defendants further denied the right of plaintiffs for mesne profits.

**5**. Defendant No.5 also filed the written statement, wherein while not disputing his relationship with the plaintiffs, denied that the suit property is ancestral. It was contended that the land being pawai land, he had ownership right as Mourusi Kashtkar. He further contended that no consideration was paid

in lieu of the suit property and that the sale deed was got registered by playing fraud. For that the defendants acceded to the claim by the plaintiffs to declare the sale deed as null and void.

**6**. These pleadings and counter pleadings gave rise to various issues viz., whether the suit property is part of Hindu Undivided Family Property, whether the plaintiffs are entitled for 1/3rd share in the suit property, whether the sale of property vide registered sale deed dated 31.7.1991 was to meet out the interest of the family and if not whether the sale deed was valid, whether the plaintiffs are entitled for the possession and the mesne profit.

**7**. The trial Court decreed the suit holding that the suit property being part of Hindu Undivided Family Property and the plaintiffs No.1, 2 and 5 being the coparceners have 1/3rd share each in the suit property. It further held that being Hindu Undivided Family Property, the Karta of the family can alienate in the larger interest of the family; however, since the defendant No.5 did not lead any evidence and the defendants No.1 to 4 also could not establish that the sale of property by impugned registered sale deed dated 31.7.1991 was to meet out the family requirement, the trial Court found fault with the sale; accordingly, held the impugned sale deed invalid and

that no right therefrom accrue in favour of defendants No.1 to 4. The trial Court, however, non-suited the plaintiffs for mesne profits.

**8**. The defendants No.1 to 4 (present appellants) have questioned the findings regarding the suit property being Hindu Undivided Family Property and that the suit property was not sold to meet out the family requirement.

**9**. The plaintiffs and defendants No.1 to 4 had led their evidence. The defendant No.5 though filed written statement, but did not enter into the witness box.

**10**. It is borne out from the evidence of plaintiffs' witnesses viz., Samarjeet Singh (PW1), Gulab Singh (PW2), Pushpendra Singh (PW3) and Sukhendra Singh (PW4) that the suit land alongwith land bearing Khasra No.142, 237, 240, 373, 374, 406 and 407 situated at Village Babupur, Tahsil Nagod was recorded in the name of Bhuvneshwar Singh, plaintiff No.1 and 2's grandfather and father of defendant No.5. There was no partition of the said property which continued to be recorded in the name of Bhuvneshwar Singh, who died intestate; whereafter name of defendants No.5 was recorded in the revenue record, which the plaintiffs claimed was recorded in capacity as Karta of family. Defendant No.1, in his statement, had also stated that the plaintiffs and defendant

No.5 are joint family. There is no material evidence on record that the possession of the plaintiffs' over the suit property was ousted.

**11**. Trite it is, as held in **Kailash Rai v. Jai Jai Ram AIR 1973 SC 893** that :

> "9. … In law the possession of one co-sharer is possession both on his behalf as well as on behalf of all other co-sharers, unless ousted is pleaded and established."

**12**. This proposition, however, would come true only when it is established that the property is shared by co-parceners.

**13**. Coparcenary property, as is observed by their Lordships in **Rohit Chauhan vs Surinder Singh (2013) 9 SCC 419,** means : -

> "... In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an

> ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener."

**14**. On the strength of the decision in **Rohit Chauhan** (supra), it is contended on behalf of the plaintiffs that it being nobody's case that the plaintiffs No.1 and 2 were not born when Bhuvneshwar Singh died intestate, the entire property in the name of Bhuvneshwar Singh including the suit property inherited by defendant No.5 was a coparcener property and the plaintiffs No.1 and 2 had equal share in it along with the defendant No.5.

**15**. The precise question which invites consideration is **: whether in the wake of Section 8 of the Hindu Succession Act, 1956, the defendant No.5 would inherit the property left by Bhuvneshwar Singh, who died intestate, in individual capacity or as the Karta of his own undivided family ?**

**16**. Section 8 of the Hindu Succession Act, 1956 lays down the General Rules of Succession in the cases of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I, then upon the heirs mentioned in Class I of the Schedule, which reads as follow :

> Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre- deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre- deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son, son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre- deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son."

**17**. Dwelling on the issue similar to that as presently arises for consideration, their Lordships in **Commissioner of Wealth-tax, Kanpur vs. Chander Sen AIR 1986 SC 1753** observed :

> 20. In view of the preamble to the Act i.e. that to modify where necessary and to codify the law,

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

21. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu law 15th Edn. dealing with section 6 of the Hindu Succession Act at page 924-26 as well as Mayne's on Hindu Law, 12th

Edition pages 918-919.

22. The express words of section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but included son of a predeceased son cannot be ignored.

**18**. In **Bhanwar Singh vs Puran (2008) 3 SCC 87**, following the decision in **Chander Sen** (supra), their Lordships were pleased to observe :

12. The Act brought about a sea change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non-obstente provision in terms whereof any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided.

13. Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolve according to the provisions of the Chapter as specified in clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed in Class-I heirs but a grandson, so long as father is

alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants.

14. Indisputably, Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act, therefore, the properties of Bhima devolved upon Sant Ram and his three sisters. Each had 1/4th share in the property. Apart from the legal position, factually the same was also reflected in the record of rights. A partition had taken place amongst the heirs 15. Although the learned First Appellate Court proceeded to consider the effect of Section 6 of the Act, in our opinion, the same was not applicable in the facts and circumstances of the case. In any event, it had rightly been held that even in such a case, having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as tenants in common and not as joint tenants. In a case of this nature, the joint coparcenary did not continue.

**19**. Recently, their Lordships in **Uttam vs Saubhag Singh (2016) 4 SCC 68**, wherein while dwelling on the following facts that 'One *J,* having interest in an ancestral Mitakshara joint family property along with other coparceners, died in 1973 leaving behind his widow *M* and sons. The appellant-

plaintiff was the grandson of *J* who was born in 1977 i.e. after his grandfather"s death. He filed a suit for partition of the joint family property in 1998 in which the first four defendants were his father (D-3) and his father's three brothers (D-1, D-2 and D-4). He claimed a 1/8th share in the suit property on the footing that the suit property was ancestral property, and that, being a coparcener, he had a right by birth in the said property in accordance with the Mitakshara law. The trial court in 2000 decreed the suit holding that the property was ancestral and that on the evidence, there was no earlier partition of the said property, as pleaded by the defendants in their written statements. The first Appellate Court, while confirming the trial court"s finding regarding the property being ancestral and there being no earlier partition, held that after death of the plaintiff"s grandfather *J,* his widow being alive, *J*"s share would have to be distributed in accordance with Section 8 HSA as if *J* died intestate and as such the joint family property had to be divided in accordance with rules of intestacy and not survivorship. Accordingly, no joint family property

remained to be divided when the suit for partition was filed by the plaintiff, and that since the plaintiff had no right while his father was alive, the father alone being a Class I heir (and consequently the plaintiff not being a Class I heir), the plaintiff had no right to sue for partition, and therefore the suit was dismissed and consequently, the first appeal was allowed. The High Court dismissed the second appeal of the plaintiff following the same line of reasoning'; were pleased to hold :-

> "18. Some other judgments were cited before us for the proposition that joint family property continues as such even with a sole surviving coparcener, and if a son is born to such coparcener thereafter, the joint family property continues as such, there being no hiatus merely by virtue of the fact there is a sole surviving coparcener. Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe (1988) 2 SCC 126, Sheela Devi v. Lal Chand, (2006) 8 SCC 581, and Rohit Chauhan v. Surinder Singh (2013) 9 SCC 419, were cited for this purpose. None of these judgments would take the appellant any further in view of the fact that in none of them is there any consideration of the effect of Sections 4, 8 and 19 of the Hindu Succession Act. The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:-

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as

> they hold the property as tenants in common and not as joint tenants."

**20**. Applying the principle of law laid down in **Chander Sen** (supra), **Bhanwar Singh** (supra) and **Uttam** (supra), it is held that in the facts of the case at hand that Bhuvneshwar Singh dying intestate, the property held by him was inherited by defendant No.5 not as a Karta of Hindu Undivided family but, as an individual, it was within his right to have sold the property without any prior consent of other family members as would create any dent to the sale deed executed on 31.7.1991, nor the plaintiffs will have any right in them to seek partition thereof by treating it to be an ancestral/ coparceners property.

**21**. In view whereof, the suit filed by the plaintiffs fail; consequently, impugned judgment and decree is hereby set aside.

**22**. Accordingly, the appeal is **allowed** to the extent above. Parties to bear their own costs.

*Let decree be drawn accordingly.*

**(SANJAY YADAV)**
**JUDGE**

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