AFR
HIGH COURT OF MADHYA PRADESH, JABALPUR

First Appeal No.678/2000

Mukund

Versus

Smt.Sulakshana Bokare

Present : Hon. Shri Justice S.K. Gangele, J.
Hon. Shri Justice Anurag Shrivastava, J.

Shri Rajas Pohankar, learned counsel for the appellant.

Shri R.K. Sanghi, learned counsel for the respondent No.1.

Shri Prakash Gupta, Panel Lawyer for the respondent No.6/State.

Whether approved for reporting: Yes/No.

J U D G E M E N T
(15.05.2017)

Per Anurag Shrivastava, J.

This is first appeal under Section 96 of Code of Civil Procedure preferred by appellant/defendant No.1 against the judgment and decree dated 10.07.2000, passed by 11th Additional District Judge, Jabalpur in Civil Suit No.500-A/1994, whereby the Court declared the respondent No.1/plaintiff as owner of 1/3-1/3 shares in suit property shown in schedule 1 and 3 respectively and also owner of 1/6 share in suit property shown in schedule 2 of the plaint. The trial Court also passed a decree for partition and possession of respective shares of respondent No.1/plaintiff in suit property and also a decree for

recovery of 1/3 part of rent since 12.08.1992 from appellant/defendant No.1 as mesne profit.

2. This is not disputed that the common ancestor of the parties Late Shri Sadashiv Rao Pohankar was the owner of suit property situated in Jabalpur and Village Purwa as shown in schedule 1, 2 and 3 annex to plaint. Smt. Yamuna Bai was his wife. They had one son Late Madhukar Rao and a daughter Smt. Sudha w/o Shri Krishna Kshirsagar. Smt. Ratna Prabha is second of wife of Madhukar Rao. There are two sons Yashwant and Mukund Rao and one daughter Sulakshana born from first wife of Madhkar Rao, who is no more. It is also not disputed that Sadashiv Rao had expired on 17.05.1959, his wife Yamuna Bai had expired on 25.11.1987, later on Madhukar Rao had expired on 16.07.1990 and his son Yashwant had also expired on 07.05.1982 prior to death of Madhukar Rao. Smt. Ratna Prabha widow of Late Shri Madhukar Rao had expired during pendency of appeal. The genealogy of parties are shown as under:-

Sadashiv Rao Pohankar
(Died 17.05.1959)

= Yamuna Bai
(Wife) (Died 25-11-87)

Madhukar Rao (Died 16/7/90)	Sudha (Def.No.4)
Ratna Prabha	W/o Shrikrishna Kshirsagar
(II-Wife)(D-.3)	(D-5)

Yeshwant	Sulakshna	Mukund Rao (D-1)
(D-07.05.1982)	(Plaintiff)	= Charu Sheela (D-2)
		(Wife)

3. The plaintiff's suit in brief is that in life time of Smt. Yamuna Bai an oral partition of the joint family property had taken place in the year 1971 and in that partition Late Shri Madhukar Rao had received the property as shown in plaint schedule 1, Smt.Yamuna Bai was given the land shown in schedule 2 and Late Yashwant had been given the land shown in schedule 3 annexed to the plaint apart from some more land which has been acquired by the State Government for construction of medical college. In this partition, the plaintiff, Mukund Pohankar and Smt. Sudha had also received separate land. Later on Yashwant had been died on 07.05.1982, he was unmarried and issue less. Therefore, his property devolved on his father Madhukar Rao, thus Madhukar Rao became owner of disputed property shown in schedule 1 and 3. Yamuna Bai died on 25.11.1987 and on her death, her property devolved in equal shares to Madhukar Rao and Smt. Sudha. Madhukar Rao had expired on 16.07.1990 and on his death, his property devolved on the plaintiff, his son Mukund Rao and wife Smt.Ratna Prabha in equal shares. Thus, the plaintiff has 1/3 share in the property shown in schedule 1 and 3 annexed to the plaint and also 1/6 share in the property shown in schedule 2 of the plaint.

4. It is further pleaded by the plaintiff that the defendant No.1 Mukund Pohankar in colusion with defendant No.5 has got prepared a forged and false Will said to have been executed by Shri Madhukar Rao and on the basis of this Will he is claiming the ownership in respect of house and land shown in schedule 1 and 3. Similarly, defendant No.4 and 5 are claiming the ownership over the property shown in schedule 2 of plaint on the basis of forged Will set to have executed by Yamuna Bai in favour of defendant No.4. On the basis of these Wills, the defendants have got their names mutated in Municipal and Revenue Records and they are claiming ownership on the disputed land. As per plaintiff Late Madhukar Rao and Smt. Yamuna Bai had never executed any Will. On the alleged date

of Will, Madhukar was seriously ill and not in a mental and physical stage to execute the Will. The Wills are forged and fabricated. At present, there are four tenants in the disputed house from whom. Defendant No.1 is collecting the rent. Since in revenue records, the names of defendant No.1 have been mutated illegally without notice to plaintiff. The plaintiff has filed present suit for declaration of title on 1/3 and 1/6 share in the disputed property and also for injunction to restrain the defendants to create third party interest on the disputed property and recovery of amount of rent in tune of share of plaintiff.

5. In written statement, the defendants No.1 and 2 had admitted that the disputed properties are their ancestral properties. They have denied the averrments that in 1971 a partition of properties took place in life time of Yamuna Bai and the properties are partition according to pleading made in para 7 of plaint. It is averred by the defendants that at the time of marriage, the plaintiff had been given 25 acres of land in lieu of her share in joint family property, therefore, she has no right left over the disputed property. Late Shri Madhukar Rao had executed a Will in favour of defendant No.1 Mukund Rao and bequeathed his share in the property to Mukund Rao. Therefore, after the death of father, defendant No.1 has become absolute owner of the property. The defendants have pleaded “no knowledge” regarding alleged Will executed by Smt. Yamuna Bai in favour of defendant No.4. It is averred that plaintiff is not in possession of the property, therefore, simply a suit for declaration without seeking relief of partition and possession is not maintainable.

6. The defendants No.4 and 5 Smt. Sudha and her husband Shri Krishan Kshirsagar had also denied the factum of partition as pleaded by plaintiff in the year 1971. They have admitted the averrments regarding alleged Will said to have been executed

by Smt. Yamuna Bai in favour of defendant No.4 and it is pleaded that Yamuna Bai has not executed any Will in favour of defendant No.4. It is averred further that the defendant No.4 is daughter of Late Yamuna Bai and Sadashiv Rao Pohankar, therefore, she would get her share in the disputed property by inheritance. Plaintiff is not entitled any share in the property of Late Smt. Yamuna Bai. Plaintiff has no right over the disputed property, therefore, her suit is liable to be dismissed.

7. On the basis of pleadings of the respective parties, the trial Court had framed 11 issues and vide order dated 19.11.2015 passed by this Court two additional preliminary issues shown as under have been framed and sent to trial Court to record its findings:-

> 1. Whether the suit as presented is barred by law?
>
> 2. Whether the suit for simplicity relief of declaration without anything more is maintainable in law or it was essential to pray for relief of partition and possession in addition to the relief of declaration?

8. Learned trial Court decreed the suit with a finding that the entire suit property was the joint Hindu family property. The plaintiff has failed to prove that the disputed properties were partitioned in the life time of Smt. Yamuna Bai in the year 1971 and the properties shown in schedule 1 was allocated to Late Madhukar Rao, properties mentioned in schedule 2 was given to Late Smt. Yamuna Bai and properties mentioned in schedule 3 came in share of Yashwant Rao. Trial Court has also recorded the findings that after the death of Yashwant Rao on 07.05.1990, his share in the property shall devolve on Madhukar Rao. Late Smt. Yamuna Bai's share after her death shall devolve upon her son Madhukar Rao and daughter Smt. Sudha equally. The disputed Wills alleged to have been

executed by Madhukar Rao in favour of defendant No.1 Mukund Rao is not found proved. Similarly, the Will said to have executed by Late Smt. Yamuna Bai in favour of defendant No.4 is also not found proved. The trial Court finally arrived at conclusion that after the death of Madhukar Rao, his share in disputed property shall be inherited by, plaintiff Smt.Sulakshna, defendant No.1 Mukund Rao and defendant No.3 Smt. Ratna Rao (wife) in equal 1/3-1/3 shares. Thus, the trial Court declared 1/3 share of plaintiff in the properties mentioned in schedule 1 and 3 and 1/6 share in properties mentioned in schedule 2 annexed with the plaint. The trial Court had further granted decree of partition and possession in respect of shares of plaintiff in suit properties, which are not acquired by the Government in Land Acquisition proceedings. The trial Court had also granted decree of recovery of arrears of 1/3 part of the rent from 12.08.1993 as mesne profit against the defendant No.1.

9. On additional issues, learned trial Court vide order dated 08.02.2016 recorded the findings that the suit of plaintiff is not barred by law and the suit for simplicitor relief of declaration of share in the property is maintainable without seeking relief of partition and possession.

10. In appeal, it is contended by the leaned counsel for the appellant that the plaintiff has filed the suit for mere declaration of her right in the property. She did not claim relief of partition and separate possession. She has admitted in para 18 of her cross-examination that she is not in possession of disputed property. She had filed amendment applications bearing I.A. Nos.2150/2004 and 2151/2004 in present appeal and admitted that due to inadvertence and wrong advice she has not claimed relief of partition and separate possession. Therefore, the suit for mere declaration is not maintainable under Section 34 of Specific Relief Act, 1963, the view taken by the trial Court is

contrary to law laid down by Hon'ble Supreme Court in ***Vinay Krisha Vs. Keshav Chandra (1993) Supp (3) SCC-129, Meharchand Das Vs. Lal Babu Siddique (2007) 14 SCC 253*** and ***Venkataraja Vs. Vidyane (2014) 14 SCC 502.***

11. It is further argued by the learned counsel for the appellant that the name of appellant was mutated over the property in the year 1991 rejecting the objection of plaintiff, the appellant is exclusively realizing the rent from the property. This shows the ouster of plaintiff, therefore she is required to claim possession. Learned trial Court has wrongly held that no case of ouster is made out. This finding is contrary to law laid down by Apex Court in ***Darshan Singh Vs. Gujjar Singh (2002) 2 SCC 62.***

12. It is submitted by learned counsel for the appellant that plaintiff is not a coparcener and was only entitled to claim share in property which her father as coparcener would have got at the time of his death in the year 1990. Therefore, the trial Court has wrongly calculated 1/3 share of plaintiff in disputed property. It is also argued that the plaintiff has not claimed relief of partition and possession, therefore, trial Court has committed illegality in granting the decree of partition and possession. The trial Court had wrongly held the Will Ex.D-1 dated 15.05.1989 executed by Madhukar Rao in favour of his son defendant No.1 Mukund as “not proved,” when it is duely proved by Shri Krishan Shankar Kshirsagar (DW-4) the attesting witness. The suit lands have been declared surplus and vested in State of M.P. under Urban Land (Ceiling and Regulation) Act, 1976, therefore, the trial Court erred in granting a decree for apportionment of compensation in absence of such relief.

13. Learned counsel for respondent No.1/plaintiff supported the judgment and decree passed by the trial Court.

14. Considering the rival submissions made by learned counsel for the parties, and on perusal of record, the first question arises for consideration is whether the suit simplicitor for relief of declaration of share of plaintiff in the suit property without seeking relief of partition and possession is maintainable or not ?

15. It is not disputed that the suit property originally belongs to common ancestor and grand father of the plaintiff Sadashiv Rao. This is no one's case that the suit property is his self acquired property. The defendants have denied the factum of partition in the year 1971, in the life time of Smt.Yamuna Bai as averred by plaintiff in para 7 of the plaint. The trial Court had framed an issue on this point and the parties have laid evidence in their support. Therefore, simply on the ground that defendant no.1 and 2 have not specifically denied" above pleadings relating to partition, this cannot be treated as admission.

16. The burden of proof of partition lies upon the plaintiff. Plaintiff Smt. Sulakshana (PW-1) deposed about oral partition of the disputed property in the year 1971. In para 10 of cross-examination, she could not describe the details of the properties comprised in the partition and its distribution or allocations. She is not able to state the Khasra numbers and particular of the properties partitioned and the shares allocated to co-owners. Therefore, on the basis of vague statement of the plaintiff without any corroboration by oral or documentary evidence, it cannot be proved that there was a partition of the family property in the year 1971. The findings of trial Court in this regard is correct and acceptable.

17. The second question is that whether Madhukar Rao had bequeathed his share in the property to his son Mukund Rao by executing a Will Ex.D-1? Mukund Rao (DW-1) produced the Will Ex.D-1 in evidence and deposed that the Will deed was

executed by his father in presence of Late Priyadarshan Dharmadhikari and Shri Krishan Shankar Kshirsagar (DW-4). But the execution of the Will is denied by attesting witness DW-4, he deposed that although there is his sign on Will Ex.D-1, but this is document is neither written before him nor it was signed by expectant Madhukar Rao and other attesting witness P. Dharmadhikari before him. It is further deposed by DW-4 that the Will Ex.D-1 is forged document and his signatures were obtained in blank papers by misrepresentation. Therefore, alleged Will Ex.D-1 becomes suspicious and not proved by attesting witness. Thus, the trial Court had rightly found this Will Ex.D-1 as not proved.

18. As far as the fact regarding execution of Will by Smt. Yamuna Bai in favour of defendant No.4 Smt. Sudha, is concerned, this is denied by Smt. Sudha herself in her written statement and pleaded that no such Will had been executed in her favour.

19. Thus, from the evidence adduced by the parties, it is evident that there was no partition of the property took place in the year 1971 and Late Madhukar Rao and Late Smt. Yamuna Bai had not bequeathed their shares in the property by executing Will. The defendants have not pleaded that there was any partition of joint family property between the parties or their ancestors. Mukund Pohankara (DW-1) in para 2 of his statement deposed that as per his knowledge, his father had transferred the ancestral property to all the members of family. He did not say that his father had partitioned the property or executed any instrument for transfer of the property on the names of family members. He admitted that the property of his brother Yashwant was mutated after his death on the name of wife of witness Mukund in revenue records. Shri Krishan Shankar Kshirsagar (DW-4) in para 9 of cross-examination deposed that he has no knowledge about the partition of the

property. Thus, from the evidence adduced by the parties, it is not proved that the disputed properties have ever been partitioned. Simply recording of the name of different members of the family separately in revenue records over some part of the properties cannot be construed as partition of the properties. It is also important to notice that the defendant Mukund in his evidence merely stated that his father had given 28 acres of land to plaintiff as her share in the in the family property at the time of marriage. He did not disclose the description of the land and the place where it is situated. There is no evidence to prove that this land was given in lieu of share of plaintiff in family property. Therefore, this fact is not proved that plaintiff has been given 28 acres of land as her share in joint family property. Defendant Mukund (DW-1) has admitted in para 12 of his statement that during life time , his father and mother lived with him and they were never lived apart. The plaintiff was living in Nagpur after marriage. Similarly, defendant No.4 Smt. Sudha is living in Delhi. Therefore, merely living of plaintiff and defendant No.4 in their matrimonial home cannot be inferred that they are living separately after partition. Therefore, the trial Court has rightly arrived at the findings that there is no partition of the property in metes and bounds and also the disputed property is still a joint family property.

20. Since plaintiff Smt.Sulakshana is daughter of Madhukar Pohankar. The disputed property is her ancestral property therefore, she is a co-owner having right and interest in the property. Her brother Mukund Rao, step mother Late Smt.Ratna and sister of her father, Smt. Sudha were also co-owners of the property. It is admitted by plaintiff Smt. Sulakshana (PW-1) in para 18 of cross-examination that she is not in possession of the claimed property. It is settled law that the possession of co-owner over the land will be deemed to be the possession of all the co-owners over the land even if some of the co-owners are not in actual possession of the land. To establish plea of ouster

in case of co-owner, three elements are necessary. Firstly, there should be declaration of hostile animus. Secondly, there must be uninterrupted and long possession of the party setting up the plea of ouster and thirdly, the right of ownership should be exercised openly by the party setting up the plea of ouster.

21. Hon'ble Supreme Court in P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314, where in para 4 it was observed that : --

> ".....But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other coheir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See Corea v. Appuhamy, 1912 AC 230 (C). It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be interfered when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is

> sufficient to notice that the Privy Council in N. Varada Pillai v. Jeevarathnammal, AIR 1919 PC 44 at p. 47(D) quotes, apparently with approval, a passage from Culley v. Doed Taylerson, (1840)3 P&D 539: 52 RR566(E) which indicates that such a situation may well lead to an inference of outster "if other circumstances concur". (See also Govindrao v. Rajabai, AIR 1931 PC 48 (F)). It may be further mentioned that it is well settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

22. Hon'ble Apex Court in ***Annasaheb Babusaheb Patil Vs. Balwant Babusaheb Patil AIR 1995 SC 895, observed that :-***

> ***"***in the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenery property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other members he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other.

23. In the present case, the defendant Mukund Rao accepts that he lived with his parents in ancestral house. His parents lived with him in their life time jointly. The present suit is filed in the year 1993. Prior to this, the plaintiff was living in Nagpur. It appears that only after the death of his father in 1990, the defendant has refused to give share of crop to his sister i.e. plaintiff. As he is now denying the right and share of the plaintiff, therefore, the plaintiff has brought the present suit. Simply, mutation of name of defendant in revenue record is not sufficient to presume the ouster of plaintiff. When the defendant Mukund Rao had denied the right of plaintiff is not stated by him in his statement. Hon'ble Apex Court in **Annasaheb Babusahed Patil (Supra)** observed that one who holds possession on behalf of another, does not by merely denial of that others title make his possession adverse so as to give himself the benefit of statute of limitation, therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all. Therefore, in present case, the ouster of plaintiff is not proved.

24. The case laws relied upon by the learned counsel for the appellant/defendant No.1, ***Shambhu Prasad Singh Vs. Mst. Phool Kumar and others 1971 (2) SCC 28, Kandu and Five others Vs. Kochi and others 1971 (3) SCC 784, P.Lakshmi Reddy Vs. L.Lakshmi Reddi 1957 SCR 195 AIR 1957 SC 314, Darshan Singh and others Vs. Gujjar Singh and others (2202) 2 SCC 62*** are distinguishable on facts. In present case, the mutation in revenue records had been carried out at the instance of Late Madhukar Rao. It is not shown that the name of defendant Mukund Rao was entered in the revenue record after rejection of claim/objection of plaintiff/respondent.

Thus, from the evidence available on record, it is established that the plaintiff is in constructive possession of the disputed property. The ouster of plaintiff is not proved.

25. Learned counsel for the appellant has argued that as per proviso to Section 34 of Specific Relief Act, 1963 no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Plaintiff has admitted that she is not in possession of suit property and in appeal also she has moved amendment application to incorporate the relief of partition and possession in the suit. Therefore she has to claim the relief of possession and partition also. Resultently the suit for mere declaration is not maintainable under Section 34 of Specific Relief Act, 1963. The view taken by the trial Court is contrary to law laid down by Hon'ble Supreme Court in ***Vinay Krisha Vs. Keshav Chandra (1993) Supp (3) SCC-129, Meharchand Das Vs. Lal Babu Siddique (2007) 14 SCC 253*** and ***Venkataraja Vs. Vidyane (2014) 14 SCC 502.***

26. Section 34 of Specific Relief Act, 1963 read as under:-

> "Discretion of court as to declaration of status or right:- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need out in such suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
>
> **Explanation.-** A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

27. The proviso to Section 34 of Specific Relief Act, makes it necessary to claim consequential relief in a suit for declaration

where the plaintiff is able to seek such relief and omits to claim it. It is settled law that when plaintiff is not in exclusive possession of the property, the suit simplicitor for declaration of title to the property is not maintainable. The same principle is enunciated by Hon'ble Apex Court in case laws relied upon by learned counsel for the appellant ***Vinay Krisha Vs. Keshav Chandra (1993) Supp (3) SCC-129, Meharchand Das Vs. Lal Babu Siddique (2007) 14 SCC 253*** and ***Venkataraja Vs. Vidyane (2014) 14 SCC 502.***

28. Hon'ble Apex Court in case law **Meharchad Das (Supra)** in para 12 observed that:-

> "if the plaintiff had been in possession, then a suit for mere declaration would be maintainable; the logical corollary whereof would be that if the plaintiff is not in possession, a suit for mere declaration would not be maintainable."

29. In present case, the plaintiff has constructive possession over the disputed property. Therefore, it cannot be said that she is not in possession of the property. This Court in Pheraniya and other Vs. Mauji Lal and others 2012(2) MPLJ 205 observed as under:

> "The discretionary relief that can be granted under Section 34 of the Act is based upon principles contained in legal maxim 'ex debito justiciae'. However, there is a rider in the nature of proviso appended to section 34 of the Act and that provides that no Court shall make a declaration contemplated by section 34 where the plaintiff omits to seek further relief than a mere declaration. The bar to the grant of relief contained in the proviso to section 34 would not apply to the facts of the present case because the respondents No.2 and 3 who were the plaintiffs before the trial Court admittedly had one fourth undivided share each in the suit property on the date of filing of the suit. It is within the realm of the plaintiffs to formulate appropriate reliefs

> for them which may be necessary in a given factual matrix and they were not required to have necessarily prayed for relief of possession when the were satisfied by the declaration to be given by the Court in their favour that they were the owner of one fourth undivided share each in the suit property. Both the Courts below were absolutely right in their conclusion that the respondents No.2 and 3 were not required to claim separate relief of possession while seeking a declaration regarding their right in the suit property. They were in deemed possession of their share on the date of the suit. It was the choice of respondents No.2 and 3 being the plaintiffs in the suit to have simply made a prayer for declaration with consequential relief of mandatory injunction in the form of direction to the revenue authorities to delete the names of the appellants from khasra entries and to substitute their names to the extent of their shares in the suit property."

30. We are fortified by above view. As in the present suit the plaintiff is found in constructive possession of disputed joint family property in which she has got share, therefore a suit simplicitor for declaration of her share in the property is maintainable.

31. Now, we will consider about the share of plaintiff in suit property. The suit property is coparcenery property of Late Shri Sadashiv Rao, who is the grand father of plaintiff. Shri Sadashiv Rao had expired on 17.05.1959, therefore, the succession will open after death of Shri Sadashiv Rao. The present suit has been filed by plaintiff in the year 1993.Since the plaintiff is daughter of Madhukar Rao. Therefore whether she may be treated as coparcener or not this has to be seen. Section 6 of Hindu Succession Act, 1956 is amended by Hindu Succession (Amendment) Act, 39 of 2005 and date of Commencement of the Amendment Act is 09.09.2005. Hon'ble Apex Court in case

law **Prakash and others Vs. Phulvati and others (2016) 2 SCC 36,** in para 17 and 18 observed that the text of the amendment itself clearly provides that the right conferred on a "daughter of a coparcener" is "on and from the commencement of the Hindu Succession (Amendment) Act, 2005". Section 6(3) talks of death of coparcener, after the amendment for its applicability. Therefore, amendment cannot be given retrospective effect. Hon'ble Apex Court in para 23 further observed that:

> "accordingly, it must be held that the rights under the amendment are applicable to living daughters of living coparceners as on 09.09.2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20.12.2004 as per the law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation to Section 6(5) as amended."

32. Thus, the parties are governed by provisions of old Section 6 of Hindu Succession Act. Prior to its amendment Section 6 reads as under:-

> "**6. Devolution of interest in coparcenary property**.-When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act : Provided that, if the deceased had left him surviving

a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.-For the purposes of this 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.

Explanation 2.-Nothing contained in the proviso to this section shall be construed as enabling a person who had separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

33. According to Section 6 of Act when a coparcener dies living behind any female relative specified in class 1 of the schedule to the act or male relative specified in that class claiming to such female relative, his undivided interest in the Mitakshara coparcenery property would not devolve upon the surviving coparcener, by survivor-ship but upon his heirs by instate succession. Explanation 1 to Sec. 6 of the Act provides a mechanism under which undivided interest of a deceased-coparcener can be ascertained **(See Anardevi Vs. Parmeshwari Devi AIR 2006 SC 3332)**.

34. Hon'ble Apex Court in case law **Uttam Vs. Saubhag Singh and other AIR 2016 SC 1169** after considering various case laws summarized the principles governing the devolution of interest and succession in Mitakshara coparcenery property prior to the amendment of 2005 reads as under:-

> (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.

35. In the present case, applying aforesaid principles to the facts of this case, it is clear that after the death of Late Shri Sadashiv Rao, joint family property be devolved by succession under Explanation 1 to Sec.6 r/w Sec.8 of Hindu Succession Act. We have to ascertain the share of deceased Sadashiv Rao in notional partition i.e the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. Thus, Sadashiv Rao, his wife Yamuna Devi and son Madhukar Rao shall have equal 1/3-1/3 shares in the property. The 1/3 share of Sadashiv Rao shall again be divided between Yamuna Devi, Madhukar Rao and daughter Smt. Sudha and each will get 1/9-1/9 share. Thus, after death of Sadashiv Rao, Yamuna Devi and Madhukar Rao shall have 4/9-4/9 shares and Smt. Sudha shall have 1/9 share. After the death of Yamuna Devi on 25.11.1987, as per Section 15 of Hindu Succession Act, her share shall devolve upon her son Madhukar Rao and daughter Smt.Sudha, equally. Thus, both will get 2/9-2/9 shares. Therefore, the total share of Madhukar Rao becomes 4/9+2/9=2/3 and share of Smt. Sudha becomes 2/9+1/9=1/3.

36. Late Madhukar Rao has wife Smt.Ratna Prabha, two sons Mukund Rao, Yashwant Rao and one daughter plaintiff Smt. Sulakshana. Yashwant Rao died on 07.05.1982.

Madhukar Rao holds the property in his share by the application of Sec.6 proviso, such property would devolve only by intestacy and not survivor-ship. Hon'ble Apex Court in case law **Uttam Vs. Saubhag Singh (Supra)**, categorically enunciated the following principles:-

> (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.

37. Thus, after notional partition and allocation of shares to Madhukar Rao, his mother and sister the status of coparcenery gets abolished and Madhukar Rao holds the property as tenants in common. Therefore, after the death of Madhukar Rao his property shall devolve and be partitioned according to the provision of Sec.8 of Hindu Succession Act. Since Smt.Sulakshana, Mukund Rao and Smt. Ratna Prabha are all class 1 heirs as per schedule 1, therefore, they will get equal share i.e. 2/9-2/9 each. Now Smt. Ratna Prabha has expired living behind only heir Smt.Sulakshana and Mukund Rao, therefore, her share shall be equally divided between them. Thus, the share of Smt.Sulakshana shall be 2/9+1/9=1/3 and similarly, the share of Mukund Rao shall be 1/3. Thus, it is proved that plaintiff Smt. Sulakshana, defendant No.1 Mukund Rao and defendant No.4 Smt. Sudha are having equal 1/3-1/3 shares in the suit property. The trial Court has committed error in calculating the share of the parties in suit property.

38. The last question arises for consideration is whether the decree for partition and possession of suit property can be granted in favour of plaintiff? From the pleadings and averments made in the plaint, it is clear that the plaintiffs have not claimed above relief in the suit.

39. Learned counsel for the respondent contended that the plaintiff has substantially claimed the relief for declaration of her share in the joint family property alongwith mesne profit. Not claiming the relief for partition and possession is only a technical irregularity and case of plaintiff cannot be thrown out on a mere technicality of pleadings. The court is competent to grant alternative relief which is not expressly prayed for as held by this Court in **Gorilal Baldev Das Vs. Ramjilal Bhuralal AIR 1961 MP 346**. It is further argued that in case law **Smt. Neelawwa Vs. Smt. Shivawwa AIR 1989 Karnatak 45**, the plaintiff brought a suit for declaration of title and injunction claiming half share in the suit land. Hon'ble High Court has granted him relief of partition and separate possession even in absence of specific prayer for such relief.

40. *Per contra* learned counsel for the appellant that in absence of pleadings and an opportunity to defendant to deny such claim the trial Court could not have granted the relief of partition. The plaintiff has not claimed the relief of partition and possession, he has not paid any court fees on this relief. The defendants have not opportunity to rebut the claim of partition and lead the evidence. Therefore, the trial Court has committed illegality in granting the decree for partition and possession.

41. It is not disputed that the plaintiff has not claimed the relief for partition and possession of suit property. No court fees has been paid on said relief. No pleadings regarding partition have been made. **Hon'ble Apex court in Bachhaj Nahar Vs. Nilima Mandal and another (2008) 17 SCC 491.** It is observed

that it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder o causes of action or parties, etc, which require pleading an proof. Civil Court cannot grant any relief ignoring the prayer.

42. Hon'ble Apex Court in para 12 and 13 of above case law further observed that the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during tiral. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief.

43. In the present suit, it is not clearly mentioned that all the joint family properties have been incorporated in the suit. It is also admitted by plaintiff PW-1 in para 12 that leaving 16000-16000 sq.fts. of land, a remaining lands have been acquired by the government. Defendant Mukund Rao (DW-1) also admitted that 25 acres of the land had been acquired in ceiling proceedings. The trial Court has also recorded the finding that some of the disputed properties have been acquired by the government in ceiling proceedings. The copies of the proceedings Ex.D-2, D-3, D-4 and D-5 have been produced in evidence before the trial Court. Therefore, it is not clear how much lands have been acquired by government from suit property? The decree for partition of the properties, which have

been acquired by the government, is not proper. Government is to be noticed in this regard. Therefore, in above facts and circumstances of the case, without proper pleadings and claim of relief, the learned trial Court has committed illegality in granting the decree of partition and possession in favour of plaintiff.

44. As far as respondent No.1/plaintiff's applications for amendment I.A. No.2150/2004 and I.A. No.2151/2004 are concerned, the plaintiff is seeking the amendment to incorporate the relief of partition and possession in the suit. This amendment is sought after a lapse of 11 years. The plaintiff has not filed any cross appeal or cross objection against the impugned order judgment and decree of trial Court. Therefore, at this stage, the proposed amendments cannot be allowed. Therefore, I.As. No. 2150/2004 and I.A. No.2151/2004 stands **dismissed**.

45. Hence, in view of aforesaid discussions, the appeal is partly **allowed** and decreed as under:-

i) The decree of trial Court, in respect of partition and possession of suit property, is hereby set aside.
ii) It is declared that the plaintiff/respondent No.1 has 1/3 share in suit property described in schedule 1, 2 and 3 annexed with the plaint.
iii) Plaintiff is entitled to receive 1/3 rent collected by appellant Mukund Rao from the tenants as decreed by the trial Court.
iv) Accordingly, the judgment and decree passed by the trial Court is modified.
v) Parties have to bear their own costs.

(S.K. Gangele)
Judge

(Anurag Shrivastava)
Judge

Rashid*